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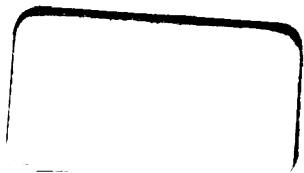
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Jurisdiction of Justice in
Civil cases 84

Indisposition of the cases in which

+ 86

Jurisdiction of the Justice in cases
the common Pleas has been on an
appeal

+ 86

Jurisdiction of Justice in cases
concerning the

and in Penalties
and in debt on the
Justice

affidavit

Section 104
Cross default & before
104 99

Penalty recoverable as debts of
the unit 338

201, 104, 104, 104, 104

RECOMMENDATIONS OF BINNS'S JUSTICE OF THE PEACE.

Philadelphia, January 28, 1840.

DEAR SIR:

The sheets of "Binns's Justice," which you did me the honor to submit to my inspection, have been carefully examined; and though sensible that nothing detracts so much from the value of a recommendation as an apparent disposition to overpraise, I feel confident that the book will fully bear me out in saying, it is a well-digested compend of all that is necessary to qualify a young magistrate for a useful and honorable discharge of his functions.

It offers to him the fruits of long experience and accurate research; and it opens to him a repository of legal principles, with minute directions for their use, from which he may readily draw whatever is necessary to conduct him safely in the new and untrodden path of his duty.

The Docket Entries, for instance, given as specimens of method in recording the general parts and transactions of a suit—matters in which, more frequently than in any other, magistrates are at fault—though compendious, are sufficiently full; and a reasonable attention to the marginal specimens of taxation, will guard the unwary from those inadvertent charges of fees, which serve too often to put the magistrate in the power of the suitor, and to involve him in a contest about farthings, which may cost him dollars; to say nothing of the loss of character, which, right or wrong, follows an infliction of the penalty annexed to extortion.

These, however, are comparatively trifling instances of the value of the book: as a manual, it will be more signally useful in furnishing a safe and ready guide in the most complicated forms of proceedings, such as summary convictions, and many others.

The matter is, for the most part, original, and supplies whatever has been omitted in other treatises. It will afford assistance, not only to the judicial magistrate, but to every county and township officer; and it will reward the citizen for a careful perusal of it, with much exact knowledge of his civil and political rights, as well as of his correlative duties. Not doubting that the inculcation of moral principle which pervades the whole, will influence the character, and elevate the standing, of the magistracy, I am, dear sir,

Your obedient servant,

JOHN B. GIBSON,
Chief Justice of Pennsylvania.

I fully concur in the above.

MCLTON C. ROGERS,
One of the Justices of the Supreme Court of Pennsylvania.

I have seen a portion of Mr. Binns's proposed publication, relative to justices of the peace, and think it will furnish an excellent manual on the subject, more especially to the magistracy. It seems to me to be well adapted to the present wants of the community.

THOMAS SERGEANT,
One of the Justices of the Supreme Court of Pennsylvania.

Philadelphia, January 31, 1840.

JUDON HUSTON [of the Supreme Court of Pennsylvania] presents his compliments to John Binns, Esq., and informs him that since the sheets of his book were left for perusal, he has been too unwell to peruse much of it. He has been in court every day, but at home has been lying on a bed most of his time. He can, therefore, only say, that from the very limited inspection of the work, he has formed a very favorable opinion of it, and believes it will be what, from his knowledge of the author, and from the general character of the author, he, and the community, expected, viz.: a full and accurate treatise on the office and duties of a justice of the peace.

February 1, 1840.

RECOMMENDATIONS OF THE SECOND EDITION.

February 3, 1845.

DEAR SIR:

The forthcoming "*Magistrate's Daily Companion*" is a decisive improvement on "*Binns's Justice*." Its abstracts of reported cases, arranged under proper heads, offer, not only to the magistrate, but the citizen of any profession, a cheap and easy means of obtaining a competent knowledge of the laws under which he lives. In affairs of magnitude he will, of course, consult a professional adviser, but the ordinary transactions of business momentarily require a familiar knowledge of common-place principles, which he may more readily obtain from the digested summary now offered to him, than from the scattered pages of a law-library, were it even at hand. For instance, the farmer, the laborer, the mechanic, or the shop-keeper, who attends to your instructions, will no longer be in danger of losing the price of his work or his goods, from ignorance of the few and simple elements of book-entries to charge a customer. These abstracts are not only accurately made, but adapted to popular apprehension; and I feel confident the work will supply, for the present, all that was wanted.

Very truly, your obedient servant,

JOHN B. GIBSON,
Chief Justice of Pennsylvania.

TO MR. ALDERMAN BINNS.

Philadelphia, February 4th, 1845.

DEAR SIR:

I have carefully examined, with much satisfaction, a portion of your "*Magistrate's Daily Companion, and Business-Man's Legal Guide*." Your arrangement is capital, and you have taken great pains to insure its legal accuracy. It should be in the hands of every magistrate, as well as young lawyer and man of business.

I wish it general circulation, because I am confident it will be of great utility. You deserve the thanks of the community for this work. I have no doubt it will live when you are dead. Every relation in life will find your book useful.

With respect, your obedient servant,

THOS. BURNSIDE,
One of the Justices of the Supreme Court of Pennsylvania.

Alderman JOHN BINNS.

RECOMMENDATION OF THE THIRD EDITION.

From the Judges of the Supreme Court of Pennsylvania.

MESSRS. KAY & BROTHER:

Gentlemen: Binns's Justice is not only the best, but the only very good book that we have on the subject. The present edition, containing, as it does, a large addition of valuable and well-digested matter, makes it all that the magistrate can desire.

JOHN B. GIBSON,
Chief Justice of the Supreme Court.
MOLTON C. ROGERS,
T. BURNSIDE,
R. COULTER,
THOS. S. BELL,
Justices of the Supreme Court.

BINNS'S JUSTICE,
OR
Magistrate's Daily Companion.

A TREATISE
ON THE
OFFICE AND DUTIES
OF
ALDERMEN AND JUSTICES OF THE PEACE,
IN THE
COMMONWEALTH OF PENNSYLVANIA,

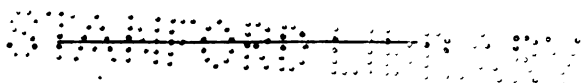
INCLUDING ALL THE REQUIRED
FORMS OF PROCESS AND DOCKET-ENTRIES,
AND EMBODYING NOT ONLY WHATEVER MAY BE DEEMED VALUABLE TO JUSTICES OF THE PEACE, BUT TO
LANDLORDS, TENANTS AND GENERAL AGENTS; AND MAKING THIS VOLUME WHAT IT PURPORTS TO BE,

A SAFE LEGAL GUIDE FOR BUSINESS MEN.

BY JOHN BINNS,
LATE ALDERMAN OF WALNUT WARD, IN THE CITY OF PHILADELPHIA.

EIGHTH EDITION,
REVISED, CORRECTED AND GREATLY ENLARGED

BY
FREDERICK C. BRIGHTLY, ESQ.,
AUTHOR OF THE "UNITED STATES DIGEST," "FEDERAL DIGEST," "FURDON'S DIGEST," ETC.



PHILADELPHIA:
KAY & BROTHER, 17 & 19 SOUTH SIXTH STREET,
LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS.

1870.

Entered, according to the Act of Congress, in the year 1870, by
KAY & BROTHER,
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COLLINS, PRINTER.

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PREFACE TO THE SEVENTH EDITION

BINNS'S JUSTICE, or MAGISTRATE'S DAILY COMPANION, has for many years been favorably known to the Legal Profession, and to the Magistracy of Pennsylvania; so much so as to have been pronounced by the unanimous certificate of the Judges of the Supreme Court, as "not only the best, but the only very good book that we have on the subject." The enactment, however, of the Revised Penal Code, and the great changes that have been made in our Statute Law, since the publication of the Sixth Edition of this work in 1855, had rendered it, not only, no longer, what it professed to be, "*a safe legal guide to business men*," but a guide which, if followed, might oftener lead astray, than conduct the inquirer upon the direct path of legal duty.

This rendered necessary an entire revision of the work, which has been almost wholly re-written by the Editor of the Sixth Edition, who has not only remodelled the book and adapted it to the present state of the law, but has added many new Titles, not before contained in it. The FORMS and DOCKET ENTRIES, as also the *Bills of Costs*, have been revised and made to correspond with the requirements of the recent statutes; and it may now

again be confidently relied on as a safe Guide to the Magistrate and Business Man.

In this book, and its companion, "DUNLAP'S FORMS," (the reputation of which is so well established as to need no eulogy) the Justice of the Peace will find all the information necessary to a correct discharge of the important duties confided to him by the Laws of Pennsylvania.

The Ninth Edition of Purdon's Digest, published in 1862, has been referred to, whenever it became necessary to cite an Act of Assembly; and the Decisions of the Supreme Court have been incorporated to the 3d volume of Wright's State Reports inclusive.

F. C. B.

PHILADELPHIA, 15 August 1862.

NOTE.—The Eighth Edition, which has been thoroughly revised, includes the decisions of the Supreme Court to 11th P. F. Smith inclusive. It contains many new titles, and much additional matter.

PHILADELPHIA, 15 October 1870.

PREFACE TO BINNS'S JUSTICE.

LONG and deeply impressed with the influence which magistrates must necessarily exercise over the public mind, it has appeared to the writer, that the man who should most effectually turn that influence to the insurance of the public peace, and of honesty and fair dealing, between man and man, would render an essential and important service.

Justices of the peace who understand their rights, and discreetly perform their duties, obtain the respect of their fellow-citizens.

In the volume now presented to the public, it is hoped, and believed, that the law is plainly laid down; that honest and honorable feelings are cherished; and that everything calculated to encourage a spirit of contention or litigation is frowned upon.

The wish of the writer is to place the magistracy in high and enviable seats; there, to exhibit examples of stern integrity; respected by all; feared only by evil-doers.

It is not presumed that much is accomplished in this volume; yet, it is confidently hoped that whatever may be its influence, it will be found on the side of the Constitution and the Laws; sturdily contending, for "Virtue, Liberty, and Independence."

The writer is conscious of the want of many, and not inconsiderable, qualifications to prepare a work of the character he has ventured to undertake and to complete. He has labored long and faithfully, and with good intentions: he trusts that the industry and experience thus devoted, has, in some measure, compensated for the want of early professional habits and acquirements.

He has been cheered on his way by encouragement from many; whose encouragement did him honor, while it inspired him with hope and confidence. He is especially under obligations to the

gentlemen of the bar. They have not only freely bestowed their advice, and corrected his errors, but some of them, with a friendliness and regard, which he will never forget, have given their time, and their talents, and their knowledge, to contribute to the more perfect completion of this work.

Care shall be taken from time to time, to note whatever improvements or additions shall be proposed, or which may suggest themselves; to the end, that by unwearied attention, and constant watchfulness, the work may be made to deserve public approbation. To assist in accomplishing this object, advice, information and correction, are respectfully invited.

An anxiety to make this volume useful to men of business, generally, and a desire to avoid references from one part of the work to another; have, it is feared, occasionally caused the publication of matter which, however its usefulness may be acknowledged, may sometimes be thought out of place.

This anxiety and desire have also caused the publication of directions so minute and particular, that they may be regarded as of a character too humble and familiar to find a place in this volume. The same feelings have induced the writer, in several places, to reiterate principles and directions, which he regards as especially valuable.

It has been felt that many will come to the reading of this volume with but little knowledge of law, and none of the practical duties of a justice of the peace. Thoroughly to imbue their minds with first principles, with the great truths upon which all the duties of the magistracy turn, the writer has made many repetitions, and but few references.

Such as the volume is, he commits it to the public, with a reasonable confidence that it will be useful; that it will have some influence in the administration of the law; and that whatever that influence may be, it will be on the side of justice.

JOHN BINNS.

PHILADELPHIA, 1 February 1840.

TABLE OF CONTENTS.

	PAGE
Constitution of the United States	15
Constitution of Pennsylvania	37
Vocabulary of Law Terms	53
Technical Law Terms explained	70
Law Phrases, &c., translated	73
Abatement	75
Abduction	78
Abortion	78
Accessory	79
Actions at Law	83
Actions against Justices of the Peace	518
Acts of Assembly	123
Adulteration	130
Adultery	132
Advice	134
Affray	136
Agents	137
Amendment	139
Appeals	140
Apprentices	146
Arrest for Debt	158
Arson	159
Assault and Battery	162
Assignments	164
Assumpsit	167
Attachment, Domestic	169
Attachment against Absent and Fraudulent Debtors	173
Attachment in Execution	179
Attachment for Contempt	190
Attorneys	191
Auctions	193
Bail	194
Bail and Commitment in Criminal Cases	196
Bailment	200
Bankruptcy	202
Banks	214
Barrator	217

	PAGE
Beneficial Societies	218
Bible, Family	219
Bigamy	219
Bills of Exchange	220
Bonds	224
Books required by a Magistrate	226
Bread and Flour	227
Bribery	228
Building Associations	229
Burglary	235
Burial Grounds	236
Cattle	237
Certiorari	237
Common Carriers	242
Common Law	247
Common Scold	247
Compounding Offences	248
Concealed Weapons	249
Conspiracy	250
Constables	251
Contract	267
Convicts	270
Coroner	271
Corporations	275
Costs	280
Counterfeiting	283
Counties and Townships	289
Covenant	291
Cruelty	292
Custom and Usage	294
Damages	295
Debt	296
Debtor and Creditor	298
Deeds	300
Defalcation	307
Distress for Rent	310
District Attorneys	315
Docket	316
Docket Entries and Fees	318
Docket Entries in Criminal Cases	330
Dogs	333
Drunkenness	334
Duelling	337
Eaves-dropping	338
Elections	338
Embezzlement	362
Embracery	365
Engrossing, Forestalling and Regrating	366
Escape	366
Evidence	369
Execution	385

TABLE OF CONTENTS.

xi

	PAGE
Executors and Administrators	391
Extortion	395
Factories	396
Factors	398
False Imprisonment	399
False Personation	399
False Pretences	400
Fees	403
Female	411
Femme Sole Trader	411
Fences	412
Ferries	415
Fires	417
Firing of Guns, Fireworks, &c.	418
Firing of Woods	418
Fish	421
Fixtures	421
Floating Lumber	423
Forcible Entry and Detainer	426
Forgery	428
Fornication and Bastardy	430
Fortune Telling	433
Frauds	434
Fraudulent Conveyances	436
Freeholder	437
Fugitives from Justice	438
Gambling	440
Game	445
Guaranty	447
Hawkers and Pedlars	449
Homicide	452
Horse Racing	455
Horse Stealing	458
House of Refuge	459
Incest	463
Indictment	464
Infant	464
Informers	466
Inns and Taverns	466
Insolvent Laws	472
Instalments	481
Interest	481
Jail	484
Judgment	486
Judgment, Lien of	488
Jurisdiction of Justices of the Peace	490
Justices of the Peace, or Aldermen	493
Justices of the Peace, Actions against	518
Justices of the Peace, Jurisdiction of, under U. S. Laws	522

	PAGE
Landlord and Tenant	52
Larceny and Receiving Stolen Goods	55
Law Forms	55
Lewdness	59
Libel	59
Lien	59
Limitation of Actions	59
Limited Partnership	66
Lotteries	60
Malicious Mischief	60
Malicious Prosecution	60
Markets	60
Marriage	61
Married Women	61
Master and Servant	61
Mayhem	62
Mechanics' Lien	62
Milk	64
Mill-Dams	64
Misfeasance	64
Money	64
Name	64
Naturalization Laws	80
Negligence	64
Notary Public	64
Notice	64
Nuisance	64
Oaths and Affirmations	65
Officers, Public	65
Original Entries	65
Parent and Child	65
Partnership	65
Party Wall	67
Pawns or Pledges	67
Penalties	67
Perjury and Subornation	67
Physicians	67
Poisons	67
Poor Laws	67
Principal and Agent	68
Privilege	69
Process	69
Profaneness	69
Promissory Note	69
Prothonotaries	70
Purchasers at Sheriffs' Sales	70
Rape	70
Receipts	71
Records	71

TABLE OF, CONTENTS.

xiii

	PAGE
Riots, Routs and Unlawful Assemblies	712
Roads and Highways	716
Robbery	717
Sale of Real Estate	719
Sale of Personal Property	720
Scire Facias	724
Seal	725
Search-Warrants	726
Seduction	728
Shipping	729
Sodomy	729
Stamps	730
Summary Convictions	738
Summons for Debt	742
Sunday	745
Surety of the Peace	748
Swine	750
Telegraphs	752
Tender	753
Theatres	754
Threatening Letters	755
Timber	756
Time	758
Trade Marks	759
Transcript	762
Treason	764
Trespass and Trover	765
Vagrants	770
Wagers	773
Warrant or Capias	775
Weights and Measures	776
Witnesses	777

APPENDIX.

Code of Criminal Procedure	779
Naturalization of Aliens	804
Authentication of Records	809
Rights and Duties of Jurymen	811

THE
CONSTITUTION

OF THE

UNITED STATES OF AMERICA.^(a)

WE, THE PEOPLE OF THE UNITED STATES,^(b) in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,^(c) do ordain and establish this Constitution for the United States of America.^(d)

ARTICLE I.

OF THE LEGISLATIVE POWER.

SECT. I. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.^(e)

SECT. II. 1. The house of representatives shall be composed of members chosen every second year by the people of the several states;^(g) and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States^(h) and who shall not, when elected, be an inhabitant⁽ⁱ⁾ of that state in which he shall be chosen.^(k)

(a) This constitution went into operation on the first Wednesday in March 1789. 5 Wheat. 420.

(b) The constitution was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble declares, by "the people of the United States." 1 Wheat. 324. 6 Call 277. It required not the affirmance, and could not be negated by the state governments. When adopted it was of complete obligation, and bound the state sovereignties. 4 Wheat. 404. 2 Dall. 471. 6 Wheat. 414. Which are dependent and subordinate, with respect to all the specific purposes for which it was adopted. The General Parkhill, U. S. Dist. Court, E. Penn. 19 July 1861. But retain, in severalty, a distinct but qualified sovereignty. 3 Blatch. 88. And see 6 Pet. 569, where it is said by McLEAN, J., to have been formed "by a combined power, exercised by the people, through their delegates, limited in their sanctions to the respective states." See also, 2 Wils. Works 120. 1 Spr. 602.

(c) The preamble to the constitution is constantly referred to, by statesmen and jurists, to aid them in the exposition of its provisions. See 2 Dall. 475. 12 Wheat. 455-6. 1 Story Const. ch. 6.

(d) The United States is a government, and consequently, a body politic and corporate,

capable of attaining the objects for which it was created, by the means which are necessary for their attainment. 2 Brock. 109. 1 Dall. 44. Through the instrumentality of the proper department to which those powers are confided, it may enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. 5 Pet. 128. As a corporation, it has capacity to sue, by its corporate title. 1 Brock. 177. 3 Wheat. 181. It may compromise a suit, and receive real and other property in discharge of the debt, in trust, and sell the same. 3 McLean 365. 12 How. 107-8.

(e) See 1 Story Const. ch. 7-8.

(g) See Cl. & Hall 69.

(h) See Cl. & Hall 23.

(i) See Cl. & Hall 224. An inhabitant of a state, is one who is "bona fide a member of the state, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer." Cl. & Hall 411. A person residing in the district of Columbia, though in the employment of the general government, is not an inhabitant of a state, so as to be eligible to a seat in congress. Ibid. But a citizen of the United States residing as a public minister at a foreign court, does not lose his character of inhabitant of that state of which he is a citizen, so as to be disqualified for election to congress. Ibid. 411, 497.

(k) The constitution having fixed the quali-

3. Representatives and direct taxes (a) shall be apportioned among the several states (b) which may be included within this union, according to their respective numbers; which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three. (c)

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies. (d)

5. The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECT. III. 1. The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, (e) for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; (g) and if vacancies happen by resignation, (h) or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments (i) until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, (k) and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

fications of members, no *additional* qualifications can rightfully be required by the states. Cl. & Hall 167.

(a) A tax on carriages is not such a direct tax. 3 Dall. 171. See Rawle Const. 80. 8 Wall. 533.

(b) This does not exclude the right to impose a direct tax on the district of Columbia, in proportion to the census directed to be taken by the constitution. 5 Wheat. 317.

(c) Under the eighth census, the states are entitled to the following representation in congress, viz.:

Alabama . . .	6	Mississippi . . .	5
Arkansas . . .	3	Missouri . . .	9
California . . .	3	Nebraska . . .	1
Colorado . . .	1	Nevada . . .	1
Connecticut . . .	4	New Hampshire . . .	3
Delaware . . .	1	New Jersey . . .	5
Florida . . .	1	New York . . .	31
Georgia . . .	7	North Carolina . . .	7
Illinois . . .	14	Ohio . . .	19
Indiana . . .	11	Oregon . . .	1
Iowa . . .	6	Pennsylvania . . .	24
Kansas . . .	1	Rhode Island . . .	2
Kentucky . . .	9	South Carolina . . .	4
Louisiana . . .	5	Tennessee . . .	8
Maine . . .	5	Texas . . .	4
Maryland . . .	5	Vermont . . .	3
Massachusetts . . .	10	Virginia . . .	8
Michigan . . .	6	West Virginia . . .	3
Minnesota . . .	2	Wisconsin . . .	6

And the following territories of the United States each send one delegate to congress, with the right of debating, but not of voting, viz.:

Arizona, Idaho, Montana, Dakotah, New Mexico, Utah, Washington and Wyoming. See the 14th amendment, sect. 2.

(d) The executive of a state may receive the resignation of a member, and issue writs for a new election, without waiting to be informed by the house that a vacancy exists. Cl. & Hall 44, 92.

(e) Where the election is by a joint convention of the two houses of the legislature, it is not necessary that there should be a concurrent majority of each house in favor of the candidate declared to be elected. 2 Cong. El. Cas. 627. The election, however, must be substantially by both houses, as distinct bodies; the mere fact that a majority of the joint body, or even of each body, is present, does not constitute the aggregate body a legislature, unless the two bodies, acting separately, have voted to meet, and have actually met accordingly. 2 Cong. El. Cas. 621. 20 Law Rep. 1-6.

(g) The senate is a permanent body; its existence is continued and perpetual. Cushing's Law of Legislative Assemblies 19.

(h) The seat of a senator is vacated by a resignation addressed to the executive of the state, notwithstanding he may have received no notice that his resignation has been accepted. Cl. & Hall 869.

(i) It is not competent for the executive of a state, during the recess of the legislature, to appoint a senator, to fill a vacancy which *shall happen*, but has not happened, at the time of the appointment. Cl. & Hall 871.

(k) See Cl. & Hall 851

4. The vice-president of the United States shall be president of the senate,(a) but shall have no vote, unless they be equally divided.

5. The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

6. The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside;(b) and no person shall be convicted without the concurrence of two-thirds of the members present.(c)

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law.

SECT. IV. 1. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof;(d) but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators.(e)

2. The congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.(g)

SECT. V. 1. Each house shall be the judge of the elections, returns and qualifications of its own members,(h) and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members(i) for disorderly behavior, and with the concurrence of two-thirds, expel a member.(k)

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECT. VI. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony and breach of the peace,(l)

(a) See 1 Story Const. § 739.

(b) The chief justice, in such case, is a constituent member of the court, and has a right to vote as such. 1 Johns. Trial 185, 187.

(c) A judgment of impeachment in the English house of lords, requires that at least twelve of the members should concur in it. And "a verdict by less than twelve would not be good." Com. Dig. Parliament, L. 17.

(d) Where the legislature of a state have failed to "prescribe the times, places and manner" of holding elections, as required by the constitution, the governor may, in case of a vacancy, in his writ of election, give notice of the time and place of election; but a reasonable time ought to be allowed for the promulgation of the notice. Cl. & Hall 135.

(e) See act 25 July 1866 as to the mode of electing senators. 2 Bright. Dig. 130. By act 14 July 1862, members of the house of representatives are to be elected by single districts. 2 Bright. Dig. 131.

(g) The constitutional term of congress does not expire until 12 o'clock at noon on the 4th March. 11 Stat. 788.

(h) The returns from the state authorities are *prima facie* evidence only of an election, and are not conclusive upon the house. Cl. & Hall 157, 353. And the refusal of the executive of a state to grant a certificate of election, does not prejudice the right of one who may be entitled to a seat. Ibid. 95.

(i) This does not exclude the power to punish, for contempts, others than members of the house. The constitution says nothing of contempts. These were left to the operation of the common law principle, that every court has a right to protect itself from insult and contempt, without which right of self-protection, they could not discharge their high and important duties. 1 Am. L. J. 139. 6 Wheat. 204. And see 1 Story Const. § 845-9. 1 Dall. 296.

(k) It seems to be settled, that a member may be expelled for any misdemeanor, which, though not punishable by any statute, is inconsistent with the trust and duty of a member. 1 Story Const. § 838. And see 1 Hall L. J. 459.

(l) This would seem to extend to all indictable offences, as well those which are in fact attended with force and violence, as those

be privileged from arrest,(a) during their attendance at the session of their respective houses, and in going to, and returning from, the same;(b) and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office(c) under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.(d)

SECT. VII. 1. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve, he shall sign it,(e) but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds(g) of that house agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days, (Sundays excepted,) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return, in which case it shall not be a law.(h)

3. Every order, resolution(i) or vote, to which the concurrence of the senate and house of representatives may be necessary, (except on a question of adjournment,) shall be presented to the president of the United States: and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. 1 Bl. Com. 166. 1 Story Const. § 865.

(a) They are privileged not only from arrest both on judicial and meane process, but also from the service of a summons or other civil process while in attendance on their public duties. 4 Dall. 107. 1 Wall. Jr. 191. 1 Story Const. § 860. See 3 Dall. 478. 4 Ibid. 341. 4 Y. 347. 1 Ch. Leg. N. 245.

(b) One who goes to Washington, duly commissioned to represent a state in congress, is privileged from arrest *enendo, morando et redeundo*, and though it be subsequently decided by congress that he is not entitled to a seat there, he is protected until he reaches home, if he return as soon as possible after such decision. 4 Penn. L. J. 237. They are privileged only while at congress, or actually going to, or returning therefrom. 2 Johns. Cas. 222. See 1 Ibid. 415.

(c) The acceptance, by a member, of any office under the United States after he has been elected to, and taken his seat in, congress, operates as a forfeiture of his seat. Cl. & Hall 122. So does the acceptance of a military commission in a volunteer regiment mustered into the service of the United States. 2 Cong. El. Cas. 93. Ibid. 395.

(d) Continuing to execute the duties of an office under the United States after one is elected to congress, but before he takes his seat, is not a disqualification; such office being

resigned prior to the taking of the seat. Cl. & Hall 287, 314, 316.

(e) Every bill takes effect as a law, from the time when it is approved by the president, and then its effect is prospective and not retrospective. The doctrine that, in law there is no fraction of a day, is a mere legal fiction, and has no application in such a case, 2 Story 571. 3 McLean 285. 1 Cal. 400. But this is denied to be law. 20 Verm. 653. 21 Ibid. 619.

(g) On the 7th July 1856, the senate of the United States decided, by a vote of thirty-four to seven, that two-thirds of a quorum only were requisite to pass a bill over the president's veto, and not two-thirds of the whole senate. 19 Law Rep. 196. In the ratification of treaties, it is expressly provided that two-thirds of the senators present shall concur. And see Cushing's Law of Legislative Assemblies, § 2387.

(h) The acts of congress as they stand approved by the president, and enrolled in the department of state, are conclusive evidence of the written laws. 9 Opin. 1. And see 2 McLean 195. 3 Ibid. 111.

(i) A joint resolution, approved by the president, or duly passed without his approval, has all the effect of law. But separate resolutions of either house of congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the president or of the heads of departments. 6 Opin. 680.

SECT. VIII. 1. The congress shall have power,

2. To lay and collect taxes, duties, imposts and excises, (a) to pay the debts and provide for the common defence and general welfare of the United States; (b) but all duties, imposts and excises shall be uniform throughout the United States:

3. To borrow money on the credit of the United States: (c)

4. To regulate commerce (d) with foreign nations, (e) and among the several states, (g) and with the Indian tribes: (h)

5. To establish an uniform rule of naturalization; (i) and uniform laws on the subject of bankruptcies throughout the United States: (k)

(a) The power to levy and collect taxes, duties, imposts and excises, is coextensive with the territory of the United States. 5 Wheat. 317.

(b) Congress is not empowered to tax for those purposes which are within the exclusive province of the states. 9 Wheat. 199. A tax for a private purpose is unconstitutional; a public use or purpose is essential to the idea of tax. 18 Am. L. R. 156.

(c) The states have no power to tax the loans of the United States. 2 Pet. 449, 465. 2 Bl. 620. 2 Wall. 200. 4 McLean 26. Nor an officer of the United States for his office or emoluments. 16 Pet. 435. See 9 Law Rep. 110. But congress has no power to exempt property from taxation, unless it be made so by the constitution. 37 N. Y. 9.

(d) This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. 9 Wheat. 196. Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for the purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states. 4 W. C. C. 378. 18 How. 421. 6 McLean 70, 209, 237, 518. 6 Wall. 35. 16 Am. L. R. 149. See 3 Grant 128. This clause confers the power to impose embargoes. 9 Wheat. 191. 2 Hall L. J. 255, 272. To punish crimes upon stranded vessels. 12 Pet. 72. And to prohibit the slave trade. *United States v. Bates*, Pamph. p. 129. It does not, however, interfere with the right of the several states to enact inspection, quarantine and health laws of every description, as well as laws for regulating their internal commerce. 9 Wheat. 203. 11 Pet. 102. 28 Ala. 185. 11 S. & R. 92. 13 Ibid. 405. Nor with the power to regulate pilots. 12 How. 299. Or to protect their fisheries. 18 How. 71. 3 Gray 268.

(e) A state law, which requires the masters of vessels engaged in foreign commerce to pay a certain sum to a state officer, on account of every passenger brought from a foreign country into the state, or before landing any alien passenger in the state, conflicts with the constitution and laws of the United States. 7 How. 283. And see 6 Wall. 31. So does a state law which requires an importer to take a license and pay \$50 before he should be per-

mitted to sell a package of imported goods. 12 Wheat. 419. See 13 S. & R. 405. But a state law imposing a tax on brokers dealing in foreign exchange is not repugnant to this clause of the constitution. 8 How. 73. Nor is one imposing a tax on legacies payable to aliens. Ibid. 490. Nor are the license laws of certain states, forbidding the sale of spirituous liquors, under less than certain large quantities. 5 How. 504. 4 Am. L. R. 533. See 4 Cal. 46-7.

(g) Congress have power to prevent the obstruction of any navigable river which is a means of commerce between any two or more states. 5 McLean 426. 6 Ibid. 237. 3 Am. L. R. 79. 15 Ibid. 238. But a court of the United States has no jurisdiction to restrain, by injunction, the erection of a bridge over a navigable river, lying wholly within the limits of a particular state, where such erection is authorized by the legislature of the state; though a port of entry has been erected by congress above the bridge. 6 Am. L. R. 6. And see 3 Wall. 713. And a state law granting the exclusive privilege of navigating a part of an unnavigable stream, which is wholly within the state, on condition of rendering such part navigable, is not repugnant to the constitution. 14 How. 568. And see 2 Pet. 251. But a state law that imposes additional restrictions on vessels licensed for the coasting trade is unconstitutional and void. 22 How. 227. Ibid. 245. This clause does not confer on congress the right to establish and regulate ferries over rivers which are the boundaries of two or more states. 1 Bl. 604.

(h) Under the power to regulate commerce with the Indian tribes, congress have power to prohibit all intercourse with them, except under a license. 1 McLean 254. See 21 How. 366.

(i) The power to pass naturalization laws would seem to be exclusively in congress. 2 Wheat. 269. 2 Dall. 372. 5 How. 585. 7 Ibid. 556. 3 W. C. C. 314.

(k) See 2 Story 648. The states have authority to pass bankrupt laws, provided they do not impair the obligation of contracts and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such laws. 4 Wheat. 122. Ibid. 209. But an act of a state legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is invalid so far as it attempts to discharge the contract. 6 Wheat. 131. A mere insolvent law, however, is not within the prohibition. 12 Wheat. 213. Ibid. 370. 6 Pet. 348, 635. 9 Ibid. 329. And see 14 Ibid. 67. 5 How. 295. 9 Am. L. R. 104.

6. To coin money, regulate the value thereof, (a) and of foreign coin ; and fix the standard of weights and measures : (b)

7. To provide for the punishment of counterfeiting the securities and current coin of the United States : (c)

8. To establish post offices and post roads : (d)

9. To promote the progress of science and useful arts, (e) by securing for limited times, to authors, (y) and inventors, the exclusive right to their respective writings and discoveries :

10. To constitute tribunals inferior to the supreme court : (h)

11. To define and punish piracies (i) and felonies committed on the high seas, and offences against the law of nations :

12. To declare war, (k) grant letters of marque and reprisal, and make rules concerning captures on land and water :

13. To raise and support armies ; (l) but no appropriation of money to that use shall be for a longer term than two years :

14. To provide and maintain a navy : (m)

15. To make rules for the government and regulation of the land and naval forces :

16. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions : (n)

(a) Congress have no power to issue paper money and make it a legal tender in payment of pre-existing debts. 8 Wall. 603.

(b) This does not extinguish the right in the states over the same subject, until congress shall have exercised the power conferred. 5 C. 27.

(c) This power is limited to the coining and stamping the standard of value upon what the government creates or shall adopt, and to punishing the offence of producing a false representation of what may have been so created or adopted. 5 How. 433. Whether congress have power to provide for the punishment of the offence of passing counterfeit coin, has been doubted. 12 Law Rep. 90. But see 10 Ibid. 400. This power is certainly possessed by the states. 5 How. 410. And congress may, without doubt, provide for punishing the offence of bringing into the United States, from a foreign place, false, forged and counterfeit coins, made in the similitude of coins of the United States ; and also for the punishment of the offence of uttering and passing the same. 9 How. 560. The power to provide for the punishment of counterfeiting the current coin of the United States, may be exercised by the several states concurrently with congress. 1 Doug. 207. 18 Am. L. R. 192.

(d) It is under this power that congress have adopted the mail regulations of the union, and punish all depredations on the mail. 3 McLean 393. The power to establish post roads, is restricted to such as are regularly laid out under the laws of the several states. *Cleveland, Painesville and Ashtabula Railroad Co. v. Franklin Canal Co.*, Pittsburgh Leg. J. 24 Dec. 1853. 9 Am. L. R. 148. But see 18 How. 421.

(e) Patents are entitled to a liberal construction, since they are not granted as restrictions upon the rights of the community, but "to promote the progress of science and useful arts." 3 Sumn. 535. 2 Story 164. 6 Pet. 218. 6 How. 486. 15 Ibid. 223. The power of congress to legislate upon the subject of patents is plenary, by the terms of the con-

stitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents. 1 How. 206. Therefore, congress have the power to grant the extension of a patent which has been renewed under the act of 1836. 5 McLean 158. Their power to reserve rights and privileges to assignees, on extending the term of a patent, is incidental to the general power conferred by the constitution. 1 Blatch. 258.

(g) In the United States, an author has no exclusive property in a published work, except under some act of congress. 8 Pet. 591. And see 30 Eng. L. & Eq. 1. 3 N. Y. 9.

(h) See 1 Pet. 546.

(i) The crime of piracy is defined by the law of nations with reasonable certainty. 5 Wheat. 153.

(k) As a consequence of the power of declaring war and making treaties, the government possesses the power of acquiring territory either by conquest or by treaty. 1 Pet. 542. When the legislative authority has declared war, the executive authority, to whom its execution is confided, is bound to carry it into effect ; he has a discretion vested in him, as to the manner and extent ; but he cannot lawfully transcend the rules of warfare established among civilized nations. 8 Cr. 153.

(l) Congress have a constitutional power to enlist minors, in the navy or army, without the consent of their parents. 1 Mas. 71. 2 Hall L. J. 192. Crabbe 265. 4 Binn. 487. 5 Ibid. 423. 1 Phila. R. 381. 5 Cr. C. C. 554. Public policy requires that a minor shall be at liberty to enter into a contract to serve the state whenever such contract is not positively forbidden by the state itself. 11 S. & R. 94. 1 Barn. & Cress. 345.

(m) See 20 How. 65.

(n) The act of 1795, which confers power on the president to call forth the militia in certain exigencies, is constitutional ; and the president is the exclusive and final judge whether the exigency has arisen. 12 Wheat. 19.

17. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, (a) reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress :

18. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of congress, become the seat of the government of the United States ; (b) and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings : (c) And,

19. To make all laws which shall be necessary (d) and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECT. IX. (e) 1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight ; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, (g) unless when in cases of rebellion or invasion the public safety may require it.

(a) The militia of the several states are not subject to martial law, unless they are in the actual service of the United States, 19 Johns.

7. And this does not commence until their arrival at the place of rendezvous. 5 Wheat.

20. So far as congress has provided for organizing the militia, the legislative powers of the states are excluded. 5 Wheat. 51. 3 S. & R. 169. But a state legislature may lawfully provide for the trial by courts martial, of drafted militia, who shall refuse or neglect to march to the place of rendezvous, agreeably to the orders of the governor, founded on the requisition of the president of the United States. *Ibid.*

(b) This includes the power of taxation. 5 Wheat. 317. The charter of the city of Washington did not authorize the corporation to force the sale of lottery tickets in states whose laws prohibited such sales. 6 *Ibid.* 264.

(c) The right of exclusive legislation carries with it the right of exclusive jurisdiction. 2 Mas. 60, 91. 6 Opin. 577. But the purchase of lands by the United States for public purposes, within the territorial limits of a state, does not of itself oust the jurisdiction or sovereignty of such state, over the lands so purchased. 2 Mas. 60. The constitution prescribes the only mode by which they can acquire land as a sovereign power, and therefore they hold only as an individual when they obtain it in any other manner. Bright. R. 302. 17 Johns. 225. See 2 Wh. Cr. Cas. 490, 548. It seems, however, that the states have not the right to tax lands purchased by the United States for public purposes, although the consent of the legislature may not have been given to the purchase. 2 Wall. Jr. 72. And see 7 Opin. 628. 18 Leg. Int. 396.

(d) This does not mean absolutely necessary, nor does it imply the use of only the most direct and simple means calculated to produce the end. 6 Binn. 270-1. 4 Wheat. 413. But it requires that the means used in the exercise of an express power should be appropriate to the end. 8 Wall. 603. 1

Story Const. § 1253. Therefore, congress had power to charter the bank of the United States, as a necessary and useful instrument of the fiscal operations of the government. 4 Wheat. 316, 422. So, also, they have power, under this general authority, to provide for the punishment of any offences which interfere with, obstruct or prevent commerce and navigation with foreign states, and among the several states, although such offences may be done on land. 12 Pet. 78.

(e) This section has no application to the state governments. 1 W. C. C. 499.

(g) The president has no power to suspend the privilege of the writ of *habeas corpus* without an act of congress to authorize it. 9 Am. L. R. 524. 24 Law Rep. 78. 4 West. L. Mo. 449. 1 Pacific L. Mag. 360. The effect of a suspension of the privilege of the writ of *habeas corpus* is to confer on the executive the power immemorially exercised by the British Crown, before the passage of the *habeas corpus* act, 31 Car. II., (but which was thenceforth taken away by that statute) namely, the power to arrest, by warrant, for treason in *generality*, or suspicion of treason or treasonable practices, without specially expressing the nature of the treasonable acts charged, as required by the *habeas corpus* act, and to imprison the party so arrested on such warrant, for an indefinite period, without bail or trial. See And. 297, pl. 305. 1 Hallam Const. Hist. 252. In the exercise of such a power, there must be a warrant, and it must be for treasonable practices. A suspension of the *habeas corpus* does not oust the civil courts of the right to inquire into the legality of the detention of a person claimed to have been enlisted into the army, through fraud or duress. Such power is inconsistent with the existence of a free government ; it is without precedent to justify it ; it is against the spirit of the constitution, and of all the foundations on which it is erected. Binney on Habeas Corpus, part III. And it has been held, that a soldier illegally enlisted, and not charged with any offence against the government, could not be held against a writ

3. No bill of attainder or *ex post facto* law shall be passed.(a)

4. No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.(b)

5. No tax or duty shall be laid on articles exported from any state.(c) No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear or pay duties in another.(d)

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law;(e) and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office(g) or title of any kind whatever, from any king, prince or foreign state.

SECT. X. 1. No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit;(h) make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder,(i) *ex post facto* law,(k) or law impairing the obligation of contracts,(l) or grant any title of nobility.

of habeas corpus, under the act of 1863, suspending the privilege of the writ. 44 Barb. 98. See Hemp. 306. 2 Spr. 91. A suspension of the privilege of the writ of habeas corpus, does not suspend the writ itself: the writ issues as a matter of course; and on its return, the court decides whether the applicant is denied the right of proceeding any further. 4 Wall. 4.

(a) Where no other time is fixed for the operation of a penal statute, it takes effect from the time of its passage; and ignorance of the existence of such act forms no *legal excuse* for a violation of it. 1 Gall. 62. *Ex post facto* laws are such as create or aggravate crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. 3 Dall. 390. 4 Wall. 278. The phrase only applies to penal and criminal laws, which inflict forfeitures or punishments, and not to civil proceedings which affect private rights retrospectively. 8 Pet. 110. 17 How. 463. 6 Cr. 138. 2 Gall. 138. 2 W. C. C. 366. 6 Binn. 271. 5 Ibid. 363-4. 4 S. & R. 364. 1 W. 356. There is nothing in the constitution which forbids congress to pass laws violating the obligation of contracts, though such a power is denied to the states. Pet. C. C. 323.

(b) 3 Dall. 171. 5 Wheat. 320-1. 8 Wall. 533.

(c) A state law imposing a stamp duty on bills of lading is unconstitutional. 24 How. 169. This clause does not apply to the imposition of tonnage duties on foreign vessels. 3 Blatch. 140.

(d) A state law requiring the payment of pilotage fees, does not infringe this clause. 12 How. 314-15. See 18 Ibid. 421.

(e) Whether the public moneys at the disposal of the postmaster-general are technically in the treasury or not, the spirit of this provision applies to them, and ought to be faithfully observed in their expenditure. 3 Opin. 13. No other remedy exists for a creditor of the government, than an application to congress for payment; he cannot have a lien on the public property in his possession or custody. 3 Hall L. J. 130. 2 Wh. Cr. Cas. 513. Nor can a mandamus issue to the secretary of the treasury to cause a credit to be entered on

the books of the department, when there is no special law requiring such a credit to be entered. 11 Law Rep. 448.

(g) Thus, a marshal of the United States cannot, at the same time, hold the office of commercial agent of France. 6 Opin. 409.

(h) To constitute a bill of credit within the constitution, it must be issued by a state, involve the faith of the state, and be designed to circulate as money, on the credit of the state, in the ordinary uses of business. 11 Pet. 257. As to what are such bills of credit; see 4 Ibid. 410. 8 Ibid. 40. 10 How. 205. 13 Ibid. 12. 15 Ibid. 317-18. 3 Phila. 290.

(i) A bill of attainder is a legislative act which inflicts punishment without a judicial trial; the states cannot, under the form of creating a qualification, in effect, inflict a punishment for a past act which was not punishable at the time it was committed. 4 Wall. 277.

(k) See *supra*, note a. The constitution does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. 8 Pet. 110. 11 Ibid. 420. 4 S. & R. 364. 14 N. Y. 23. 7 W. 300. 4 Wall. 172. Retrospective laws divesting vested rights are impolitic and unjust; but they are not *ex post facto* laws within the meaning of the constitution, nor repugnant to its provisions; 2 Paine 74; unless they impair the obligation of a contract. 10 How. 401. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might thereafter be entered into, should nevertheless be valid and binding upon the parties, all would admit the retrospective character of such an enactment, but it would not be repugnant to the constitution of the United States. 2 Pet. 412. A state legislature may, constitutionally, pass a private act authorizing a court to decree, on the petition of an administrator, a private sale of the real estate of an intestate for payment of his debts, though it require no notice to the heirs, and though the subject be regulated by a general statute. 2 Wall. 210.

(l) This provision has never been under-

2. No state shall, without the consent of the congress, lay any imposts or duties on imports (a) or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, (b) keep troops or ships of war, in time of peace, enter into any agreement or compact (c) with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

OF THE EXECUTIVE.

SECT. I. 1. The executive power shall be vested in a president of the United States of America. (d) He shall hold his office during the term of four years, and together with the vice-president, chosen for the same term, be elected as follows :

2. Each state shall appoint, in such manner as the legislature thereof may direct,

stood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. 4 Wheat. 629. A private charter is such a contract. Ibid. 518. 2 Wall. 10. See 22 How. 365. 3 Wall. 210. An act incorporating a banking institution. 4 Pet. 514. 3 How. 133. 6 Ibid. 301. 15 Ibid. 304. 1 Doug. 225. A grant of land by the legislature of a state. 6 Cr. 87. 9 Ibid. 43. And so is a compact between two states. 8 Wheat. 1. 1 Sumn. 276. And see 2 Pars. on Cont. 509. An appointment to a salaried office, however, is not a contract within the meaning of the constitution. 10 How. 402. 5 W. & S. 418. 6 S. & R. 322. 4 Barr 49. All contracts are subject to the right of eminent domain existing in the several states; and the exercise of this power does not conflict with the constitution. 6 How. 507. 14 Ibid. 80. Nor does the exercise of the power of taxation. 4 Pet. 514. 4 Wall. 143. See 2 C. 242. So, the states may pass limitation acts. 3 Pet. 289-90. 5 Ibid. 457. 1 How. 315. 8 Ibid. 168. 20 How. 23. Exemption laws. 1 How. 315. Insolvent laws, discharging the person of a debtor from imprisonment. 12 Wheat. 370. 9 Pet. 329. Recording acts, postponing an elder to a younger title, after a limited period. 3 Pet. 289. And laws relating to divorces. 4 Wheat. 629. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alterations do not impair the obligation of the contract; 3 Johns. Cas. 75; but if that effect be produced, it is immaterial whether it be done by acting on the remedy or directly on the contract itself. 1 How. 316. 2 Ibid. 608. 24 Ibid. 461. The extent of change is not material, any postponement or acceleration of the performance of the contract impairs its obligation. 8 Wheat. 1, 75. 2 How. 608. And see Hemp. 313, 533, 536. 2 C. 287. 4 Wr. 324. 8 Ibid. 313. 13 Ibid. 299. This clause does not affect the laws of Texas passed before its admission into the Union. 11 How. 185. 14 Ibid. 79. A contract to be within the protection of this clause, must be one of perfect obligation. 22 How. 365.

It has been decided by the supreme court

of the United States, that a state legislature may, by contract, surrender the right of taxation, as to the property of a corporation; and that a succeeding legislature has not the power to pass a law impairing the obligation of such a contract. 16 How. 369. 18 Ibid. 331, 380, 384. 1 Bl. 437. Ibid. 474. 2 Ibid. 544. This doctrine, however, has been repudiated by the supreme courts of Pennsylvania and Ohio. 6 C. 9. 1 Ohio St. 563, 623, 591. 3 Ibid. 578, 586. 7 Ibid. 481. But see 1 Wr. 340, where it is held, that if a state legislature, in creating a corporation, prescribe a law of taxation, and expressly release the power to impose further taxes, or do not reserve such power, a subsequent tax law does impair the obligation of the contract, and is void.

(a) The term "imports" embraces only articles from foreign nations, subject to the payment of duties to the United States, and not merchandise carried from one state to another. 10 Rich. 474. 8 Wall. 110, 123, 148. See 13 S. & R. 408. 12 Wheat. 419. 3 Keyes 374.

(b) See 6 Wall. 31.

(c) These words are used in their broadest sense; they were intended to cut off all negotiation and intercourse between the state authorities and foreign nations. 14 Pet. 572, 574. And therefore, no state can, without the consent of congress, enter into any agreement or compact, express or implied, to deliver up fugitives from justice from a foreign state, who may be found within its limits. Ibid. 3 Opin. 661. This prohibition is political in its character, and has no reference to a mere matter of contract, or to the grant of a franchise which in nowise conflicts with the powers delegated to the general government of the states. 14 Geo. 327. A compact entered into between two states, with the assent of congress, is binding on those states, and the citizens of each. 1 McLean 185.

(d) An act done by one president, vesting a right in a citizen, is not subject to review or reversal by his successor. 6 Opin. 605. It has, however, been held, that a conditional pardon granted by one president, may be revoked by his successor, before delivery to the prisoner. 10 Int. R. Rec. 34. 2 Am. L. T. Rep. 130.

a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. [The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.](a)

4. The congress may determine the time of choosing the electors,(b) and the day on which they shall give their votes;(c) which day shall be the same throughout the United States.

5. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the president from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly until the disability be removed, or a president shall be elected.

7. The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear, (or affirm,) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States."

SECT. II. 1. The president shall be commander-in-chief of the army and navy of the United States,(d) and of the militia of the several states, when called into the actual service of the United States;(e) he may require the opinion, in writing,

(a) This clause is altogether altered and supplied by the 12th amendment.

(b) On the Tuesday next after the first Monday in November; by act 23 January 1845. 5 Stat. 721. 1 Bright. Dig. 254, pl. 13.

(c) On the first Wednesday in December; by act 1 March 1792. 1 Stat. 329. 1 Bright. Dig. 253, pl. 1.

(d) If a state of war exist, the president, as

commander-in-chief, has the authority, without any act of congress, to exercise all belligerent rights, such as to institute a blockade. 24 Law Rep. 144. 18 Leg. Int. 334. Blatch. Pr. Cas. 69. Or to levy contributions on the enemy. 9 How. 615. 16 Ibid. 164, 190.

(e) The president is not obliged to take, personally, the command of the militia, when called into the service of the general govern-

of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons (a) for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, (b) and by and with the advice and consent of the senate, (c) shall appoint (d) ambassadors, other public ministers (e) and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. (g) But the congress may by law vest the appointment of such inferior officers, (h) as they think proper, in the president alone, in the courts of law, or in the heads of departments.

3. The president shall have power to fill up all vacancies that may happen during

ment, but he may place them under the command of officers of the army of the United States, to whom, in his absence, he may delegate the powers vested in him by the constitution. Any officer of the army may, therefore, be required, by orders emanating from the president, to perform the appropriate duties of his station, in the militia, when in the service of the United States, whenever the public interest shall so require. But this power must be exercised in strict accordance with the right of appointment of militia officers, which is expressly reserved to the states. 2 Opin. 711-12. See 2 Story Const. § 1490-2.

(a) He may pardon as well before trial and conviction as afterwards. 6 Opin. 20. And after the expiration of the imprisonment, which forms a part of the sentence. 1 Phila. 302. 9 Opin. 478. And he may remit a fine after the death of the offender. 11 Ibid. 35. He may grant a conditional pardon; 18 How. 307; 1 Opin. 341: provided the condition be compatible with the genius of our constitution and laws. Ibid. 482. Where the condition is such that the government has no power to carry into effect, the pardon will be in effect unconditional. 5 Ibid. 368. See 8 W. & S. 197. 7 Pet. 161. 1 Parker C. R. 47. 3 Johns. Cas. 333. 8 Opin. 281. The pardoning power includes that of remitting fines, penalties and forfeitures under the revenue laws; 2 Opin. 329; passenger laws; 6 Ibid. 393; the laws prohibiting the slave trade; 4 Ibid. 573; fines imposed on defaulting jurors; 3 Ibid. 317; 4 Ibid. 458; for a contempt of court; 3 Ibid. 622; and in criminal cases; Ibid. 418. And the same power is possessed over a judgment after security for its payment shall have been given as before. Ibid. But the president has no power to remit the forfeiture of a bail-bond. 4 Ibid. 144. Nor a condemnation as prize of war. 10 Opin. 452. Nor a forfeited recognisance. 11 Opin. 124. Nor, it seems, can he, by a pardon, defeat a legal interest or right which has become vested in a private citizen; as, for example, the vested right of an officer making a seizure. 4 W. C. C. 64. 4 Opin. 576. 6 Ibid. 615. And see 5 Ibid. 532, 579. The grant of the pardoning power neither requires nor authorizes the president to re-examine the case upon new facts; nor to grant a pardon upon the assumption of the new facts alleged. 1 Opin. 359. A par-

don is a private though official act; and it must be delivered to and accepted by the criminal, and cannot be noticed by the court, unless brought before it judicially by plea, motion or otherwise. 7 Pet. 150. The president alone can pardon offences committed in a territory, in violation of acts of congress. 7 Opin. 561. He has power to order a *nolle prosequi* in any stage of a criminal proceeding, in the name of the United States. 5 Ibid. 729.

As to the effect of a pardon, see 2 Wh. 453. 1 Chit. Cr. L. 770 n. 1 Gr. 329. 6 Wall. 766.

(b) The nomination and appointment are voluntary acts and distinct from the commissioning. 1 Cr. 155-6. Even after confirmation, the president may, in his discretion, withhold a commission; and until a commission has been signed, the appointment is not fully consummated. 4 Opin. 218. 9 Ibid. 297.

(c) The senate cannot originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the president's nominations; and such nominations fail whenever it disagrees with them. 3 Opin. 188. Congress have no power to enlarge the term of one holding for a fixed period. 16 Am. L. R. 786. 8 Int. R. Rec. 137.

(d) The power of the president to appoint to office, necessarily includes the power to remove all officers appointed and commissioned by him, where the constitution has not otherwise provided. Therefore, he may remove a territorial judge, in his discretion. 5 Opin. 288. 3 Ibid. 673. 4 Ibid. 603, 608-9. 4 Elliott's Debates 350. 13 Pet. 259.

(e) This gives him power to appoint diplomatic agents of any rank, at any place, and at any time, in his discretion, subject to the approbation of the senate; and this power cannot be limited by act of congress. 7 Opin. 186.

(g) The effect of this and the other clauses in the constitution on the subject of appointments to office, is, to declare that all offices under the federal government, except in cases where the constitution itself may otherwise provide, shall be established by law. 2 Brock. 96.

(h) Clerks of courts are such officers; and in such cases the power of removal is incident to the power of appointment. 13 Pet. 230, 259.

the recess of the senate, (a) by granting commissions which shall expire at the end of their next session. (b)

SECT. III. He shall, from time to time, give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed: (c) and shall commission all the officers of the United States.

SECT. IV. The president, vice-president, and all civil officers (d) of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. (e)

ARTICLE III.

OF THE JUDICIARY.

SECT. 1. The judicial power of the United States (g) shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. (h) The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; (i) and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office. (k)

(a) He has no power, during a recess of the senate, to fill a vacancy that occurred, by expiration of commission, during a previous session. 16 Am. L. R. 786. 8 Int. R. Rec. 137. Nor can he make an original appointment, during the recess, to an office created at the previous session. *Schenck v. Peay*, Circuit Court, Arkansas, April 1869, Pamph. 11. Brees 68. Serg. Const. Law 373. Nor can he fill a vacancy, which occurred during a previous recess, a session of the senate having intervened. 1 Cong. El. Cas. 874. 2 Ibid. 612, 613. As to what is deemed a session of the senate, and what is deemed a recess, see 16 Am. L. R. 786. 8 Int. R. Rec. 137.

(b) The commission of an officer appointed during a recess, who is afterwards nominated and rejected, is not thereby determined; it continues in force to the end of the next session, unless sooner determined by the president. 2 Opin. 336. 4 Ibid. 30.

(c) If hostilities be actually waged against the constitution and laws, and assume the dimensions of a general war, it is the duty of the president to prosecute opposing hostilities, offensive as well as defensive, upon such a proportional scale as may be necessary to re-establish, or to support and maintain the government. *The General Parkhill*, U. S. Dist. Court. E. Penn. 19 July 1861. As incident to this power, he has authority to appoint commissioners and agents to make investigations required by acts or resolutions of congress; but cannot pay them, except from an appropriation for that purpose. 4 Opin. 248. It is not, in general, judicious for him, in the exercise of this power, to interfere with the functions of subordinate officers further than to remove them for any neglect or abuse of their official trust. 5 Ibid. 287. But where combinations exist among the citizens of one of the states to obstruct or defeat the execution of acts of congress, and the question of the con-

stitutionality of such laws is made in suits against a marshal of the United States, the president is justified in assuming his defence on behalf of the United States. 6 Ibid. 220, 500. The president cannot be restrained, by injunction, from carrying into effect an act of congress, on the ground of its alleged unconstitutionality. 4 Wall. 475.

(d) A senator or representative in congress is not such civil officer. *Blount's Trial* 22, 102. *Whart. St. Tr.* 260, 316. 1 *Story Const.* §§ 793, 802. Nor is a territorial judge, not being a constitutional, but a legislative officer only. 3 Opin. 409.

(e) No previous statute is necessary to authorize an impeachment for any official misconduct. What are, and what are not high crimes and misdemeanors, is to be ascertained by a recurrence to the rules of the common law. 1 *Story Const.* § 799. For the rules of proceeding prescribed in cases of impeachment, see *Peck's Trial* 56-9; 1 *Johns. Trial* 13.

(g) The jurisdiction of the courts of the United States, depends exclusively on the constitution and laws of the United States. 1 *Brock*. 203. See 1 *Pet.* 511. 1 *Curt. Comm.* § 4. *Hemp.* 320, 444. They are not regarded in the state courts as the courts of another sovereign. 8 *P. F. Sm.* 26, 43.

(h) Congress having the power to establish inferior courts, must as a necessary consequence have the right to define their respective jurisdictions. 8 *How.* 448-9. See 9 *Wheat* 788.

(i) Courts in which the judges hold their offices for a specific number of years, are no constitutional courts, in which the judicial powers conferred by the constitution can be deposited. 1 *Pet.* 511, 546.

(k) This prohibits the imposition of a tax upon a judge's salary. 5 *W. & S.* 415.

SECT. II. 1. The judicial power shall extend to all cases, (a) in law (b) and equity, (c) arising (d) under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting (e) ambassadors, other public ministers, and consuls; (g) to all cases of admiralty and maritime jurisdiction; (h) to controversies to which the United States shall be a party; (i) to controversies between two or more states; (k) between a state and citizens of another state; (l) between citizens of different states; (m) between

(a) A "case" arises, within the meaning of the constitution, whenever any question respecting the constitution, laws or treaties of the United States has assumed such a form, that the judicial power is capable of acting on it. 9 Wheat. 819.

(b) By "cases in law," are to be understood suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognised and equitable remedies administered; or where the proceeding is in the admiralty. 3 Pet. 447. 3 Wheat. 212. 20 How. 565.

(c) By "cases in equity," are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction as established in English jurisprudence. 3 Wheat. 222-3. 4 Ibid. 108. 2 McLean 570-1. 4 Ibid. 18. 2 Sumn. 401. 5 Mas. 95. 2 Curt. C. C. 465. And see 1 Curt. Comm. § 27-9.

(d) A case is said to "arise" under the constitution or a law of the United States whenever its correct decision depends on the construction of either. 6 Wheat. 379. A bill in equity to enforce specific performance of a contract to convey a patent, is not "a case arising under the laws of the United States" as to patents, so as alone to give jurisdiction to its courts. 1 W. & M. 34.

(e) The federal courts have jurisdiction of all suits "affecting" public ministers, although they may not be parties to the record. 9 Wheat. 854-5. See 11 Wheat. 467. 2 Dall. 297.

(g) The recognition of the executive of the United States is conclusive as to the public character of the party. 4 Dall. 321. 4 W. C. C. 531.

(h) This embraces what was known and understood in the United States, as the admiralty and maritime jurisdiction, at the time when the constitution was adopted. 12 How. 443. 6 Ibid. 344. 5 Ibid. 441. 5 Am. L. R. 408. Davis 83. 1 Newb. 101. 6 Am. L. R. 296. 4 Wall. 555. The jurisdiction of the admiralty courts in this country, at the time of the revolution, and for a century before, was more extensive than that of the high court of admiralty in England. Ibid. This jurisdiction extends to the navigable lakes and rivers of the United States, without regard to the ebb and flow of the tides of the ocean. 12 How. 443. 1 Newb. 1, 197, 205. 20 How. 296. 22 Ibid. 56. It embraces all maritime contracts, whosoever the same may be made or executed, and whatever may be the form of the stipulations; and also all torts and injuries committed upon waters within its jurisdiction. 2 Gall. 398. 2 Curt. C. C. 322. 1 Spr. 236. 5 Am. L. R. 280. 3 Mas.

242. 2 Story 176. All crimes and offences against the laws of the United States. 4 W. C. C. 371. 3 Wheat. 336. And all cases of seizures for breaches of the revenue laws, and those made in the exercise of the rights of war. 3 Dall. 297. 2 Cr. 406. 4 Ibid. 443. 1 Wheat. 9, 20. 6 How. 344. The admiralty has also jurisdiction of suits for repairs and necessaries furnished to ships in a foreign port, or in the ports of a state to which they do not belong. 4 Wheat. 438. 7 Pet. 324. 1 Sumn. 73. 2 Story 455. 2 W. & M. 92. Dav. 71. 4 W. C. C. 453. Bee 78. 1 Spr. 39, 178, 453. But it does not extend to cases where a lien is claimed for repairs or supplies furnished to a vessel in her home port. 20 How. 393. 22 Ibid. 129. 1 Bl. 522. The admiralty jurisdiction conferred upon the federal courts, by the constitution, is exclusive of the state courts. 4 Wall. 411, 556. 7 Ibid. 624. 54 Barb. 200.

(i) Congress never having authorized suits to be brought against the United States, no such action can be commenced or prosecuted. 6 Wheat. 411-12. See 18 How. 283. 4 Ibid. 286. 9 Ibid. 386. But this does not prevent the exercise of appellate jurisdiction, to obtain by writ of error a reversal of a judgment which has been rendered in favor of the United States. Ibid. Nor does it preclude individuals, when sued by the United States, from availing themselves of credits or set-offs against the United States. 15 Pet. 392. See act 24 February 1855, erecting the Court of Claims. 1 Bright. Dig. 198.

(k) This includes a suit brought by one state against another, to determine a question of disputed boundary. 12 Pet. 657. The individual states having submitted their interfering territorial claims to the judiciary of the United States, are, in respect to those rights, to be deemed to have ceded their sovereignty to the United States, and to be so far considered as corporations. 2 Johns. Cas. 423. This clause only applies to those states that are members of the Union, and public bodies owing obedience and conformity to its constitution and laws. 5 How. 377. And a state is within the operation of this clause only when it is a party to the record, as a plaintiff or defendant, in its political capacity. 9 Wheat. 738. 1 Curt. Comm. § 63.

(l) See 13 How. 518. The 11th article of the amendments, has forbidden suits by individual citizens against the states.

(m) This clause does not embrace cases where one of the parties is a citizen of a territory or of the District of Columbia. 2 Cr. 445. 1 Wheat. 91. Citizenship, when spoken of in the constitution, in reference to the jurisdiction of the federal courts, means nothing more than residence. 3 W. C. C. 546. 6 Pet.

citizens of the same state claiming lands under grants of different states, (a) and between a state, or the citizens thereof, and foreign states, (b) citizens or subjects. (c)

2. In all cases affecting ambassadors, (d) other public ministers and consuls, (e) and those in which a state shall be party, (g) the supreme court shall have original jurisdiction. (h) In all the other cases before mentioned, (i) the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make. (k)

3. The trial of all crimes, except in cases of impeachment, shall be by jury; (l) and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

761. 6 How. 163. 4 W. C. C. 101. A corporation created by, and transacting business in a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all purposes of suing and being sued. 2 How. 497. 16 Ibid. 314. 1 Grant 420. 3 Story 76. The judiciary act confines the jurisdiction, on the ground of citizenship, to cases where the suit is between a citizen of a state where the suit is brought, and a citizen of another state; and, although the constitution gives a broader extent to the judicial power, the actual jurisdiction of the circuit courts is governed by the act of congress. 2 Paine 103. 3 Blatch. 84. (But see act 28 February 1839; 1 Bright. Dig. 15, pl. 2.) So, too, in the same act, there is an exception, that where suit is brought in favor of an assignee, there shall be no jurisdiction, unless suit could have been brought in the courts of the United States, had no assignment been made; this is a restriction on the jurisdiction conferred by the constitution; and yet, this provision has been sustained by the supreme court, since its organization. 4 McLean 122. 8 How. 441. The constitution has defined the limits of the judicial power, but has not prescribed how much of it shall be exercised by the circuit courts. 4 Dall. 10. 7 Cr. 506. 12 Pet. 616. 3 How. 245. It is well understood, by those experienced in the jurisprudence of the United States, that congress has conferred upon the federal courts but a portion of the jurisdiction contemplated by the constitution. 4 Am. L. R. 593.

(a) Cases of grants made by different states are within the jurisdiction, notwithstanding one of the states, at the time of the first grant, was part of the other. 9 Cr. 392. It is the grant which passes the legal title, and if the controversy be founded upon the conflicting grants of different states, the federal courts have jurisdiction, whatever may have been the prior equitable title of the parties. 2 Wheat. 377.

(b) An Indian tribe, or nation, within the United States, is not a "foreign state," within the meaning of this clause. 5 Pet. 1.

(c) If the party to the record be an alien, he is within this clause, whether he sue in his own right, or as trustee, if he have a substantive interest as a trustee. 4 Cr. 306. And if the nominal plaintiff, although a citizen, sue for the use of an alien, who is the real party in interest, the case is within the jurisdiction. 5 Ibid. 303. A foreign corporation is an alien for this purpose. 8 Wheat. 464. But in all these cases the opposite party must be a citizen, and this must appear from the record. 2 Pet. 136. A mere declaration of intention to be-

come a citizen, under the naturalization laws, is not sufficient to prevent an alien from being regarded as a foreign subject within the meaning of this clause. 3 Wall. Jr.

(d) See ante 37, notes (e) and (g).

(e) A state court has no jurisdiction of a suit against a consul; and whenever this defect of jurisdiction is suggested, the court will quash the proceedings. It is not necessary that it should be by plea, before general imparlance. 1 Binn. 138. 6 Pet. 41. 7 Ibid. 276. 5 S. & R. 545. 2 Duer 656. 2 Ben. 240. A consul may, however, be summoned as garnishee in an attachment from a state court. 2 M. 242. The jurisdiction of the supreme court in suits against consuls, although original, is not exclusive of the circuit courts. 4 Blatch. 50.

(g) The circuit courts have no jurisdiction of a suit against a state. 4 W. C. C. 199. In such cases, the supreme court derives its original jurisdiction directly from the constitution. 24 How. 66. A suit by or against the governor of a state, as such, in his official capacity, is a suit by or against the state. Ibid. 4 W. C. C. 344. A state, however, may be a plaintiff in a circuit court. 35 Geo. 315.

(h) This is a negation of original jurisdiction in all other cases. 26 Law Rep. 340. In those cases in which original jurisdiction is given to the supreme court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form. 9 Wheat. 820. But if a case draw in question the laws, constitution or treaties of the United States, though a state be a party, the jurisdiction of the federal courts is appellate; for in such case, the jurisdiction is founded, not upon the character of the parties, but upon the nature of the controversy. 6 Wheat. 392. 1 Ibid. 337.

(i) Congress has no power to confer original jurisdiction on the supreme court, in other cases than those enumerated in this section. 1 Cr. 137. 5 How. 176, 191-2. 14 How. 119. A state may sue an individual in a circuit court. 35 Geo. 315.

(k) The supreme court has no power to review, by certiorari, the proceedings of a military commission. 1 Wall. 243.

(l) This does not constitute them judges of the law in criminal cases. 1 Curt. C. C. 23, 49. Bald. 510. 2 Sumn. 240. And see 2 Blackf. (Ind.) 152. 13 N. H. 536. 10 Met. 263. Wharton on Homicide 481. It only embraces those crimes which by former laws and customs had been tried by jury. 8 Wall. C. C. 106.

SECT. III. 1. Treason against the United States shall consist only in levying war against them,^(a) or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act,^(b) or on confession in open court.

2. The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECT. I. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.^(c) And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.^(d)

SECT. II. 1. The citizens of each state^(e) shall be entitled to all privileges and immunities^(g) of citizens in the several states.^(h)

(a) There must be an actually levying of war; a conspiracy to subvert the government by force is not treason; nor is the mere enlistment of men, who are not assembled, a levying of war. 2 Cr. 75. 2 Wall. Jr. 140. Ibid. 136. 4 Am. L. J. 83. And no man can be convicted of treason who was not present when the war was levied. 2 Burr's Trial 401, 439. See 4 Phila. 396.

(b) This, it seems, refers to the proofs on the trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the grand inquest. 2 Wall. Jr. 138. 1 Burr's Trial 196. 4 Phila. 396. But see Fries's Trial 14. Whart. St. Tr. 480.

(c) A judgment of a state court has the same credit, validity and effect, in every other court within the United States, which it had in the state where it was rendered. 3 Wheat. 234. Crabbe 185. And it matters not that it was commenced by an attachment of property, if the defendant afterwards appeared and took defence. 6 Wheat. 129. Such judgments, as far as the court rendering them had jurisdiction, are to have, in all courts, full faith and credit, in which the merits of the judgment are never put in issue, with the qualification, that it appears by the record that the party had notice. 10 S. & R. 242. They have not, however, by the act of congress, full power and conclusive effect, but only such effect as they possessed in the state whence they were taken. 3 W. C. C. 17. 9 How. 528. And therefore, whatever pleas would be good therein, in such state, and none others, can be pleaded in any other court within the United States. 3 Wheat. 234. 7 Cr. 484. Thus, it would be competent to show that the judgment was obtained by fraud; or that the court rendering it had no jurisdiction. 2 Paine 502. 7 W. & S. 447. A state law which destroys the right of a party to enforce a judgment regularly obtained in another state, is unconstitutional. 5 Wall. 290.

(d) See Act 26 May 1790, 1 Bright. Dig. 265, pl. 9. The legislation of congress amounts to this—that the judgment of another state shall be record evidence of the demand, and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on which the judgment is founded; that it is evidence of an established demand, which,

standing alone, is conclusive between the parties to it. 9 How. 528.

(e) This does not apply to corporations. 2 Paine 502. 30 Barb. 68. 3 Zab. 429. 18 Am. L. R. 109. But see 1 Phila. R. 218-19. Since the adoption of the constitution, no state can, by any subsequent law, make a foreigner, or any other description of persons, citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument. 19 How. 393. 21 Law Rep. 630.

(g) This is confined to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. They may be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty; with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. 4 W. C. C. 380-1. And see 3 H. & M. 553-4. 4 Blatch. 263. It does not embrace privileges conferred by the local laws of a state. 18 How. 591. Such as the rights of representation or election. 2 Munf. 393. 20 N. Y. 608.

(h) A citizen of the United States, residing in any state of the Union, is a citizen of that

2. A person charged in any state with treason, felony or other crime, (a) who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, (b) be delivered up, to be removed to the state having jurisdiction of the crime. (c)

3. No person held to service or labor (d) in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due.

SECT. III. 1. New states may be admitted by the congress into this Union: (e) but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, (g) as well as of the congress.

2. The congress shall have power to dispose of (h) and make all needful rules and regulations respecting the territory (i) or other property belonging to the United States; (k) and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

state. 6 Pet. 762. He is entitled to all the privileges of a citizen of that state, but does not carry with him any rights enjoyed under the laws of another state. The clause has nothing to do with distinctions founded on domicile; such a person has the same rights under the state laws, which a native born citizen, domiciled elsewhere, would have, and no other rights. 20 N. Y. 608.

(a) It is not necessary that the crime charged should constitute an offence at the common law. 3 Zab. 311. It is enough that it is a crime against the laws of the state from which he fled. 24 How. 66. 13 Geo. 97. 9 Wend. 221. 6 Penn. L. J. 428. 1 Am. L. J. 231.

(b) A fugitive from justice may be arrested and detained until a formal requisition can be made by the proper authority. 10 S. & R. 135. 6 H. 39. 3 Zab. 311.

(c) The alleged crime must have been committed in the state from which the party is claimed to be a fugitive; and he must be actually a fugitive from that state. 3 McLean 133. 1 Am. L. J. 231. 3 Zab. 311.

(d) This includes apprentices. 1 Am. L. R. 654.

(e) The territorial legislatures cannot, without permission from congress, pass laws authorizing the formation of constitutions and state governments. All measures commenced and prosecuted with a design to subvert the territorial government, and to establish and put in force in its place a new government, without the consent of congress, are unlawful. But the people of any territory may peaceably meet together in primary assemblies, or in conventions chosen by such assemblies, for the purpose of petitioning congress to abrogate the territorial government, and to admit them into the Union as an independent state, and if they accompany their petition with a constitution framed and agreed on by their primary assemblies, or by a convention of delegates chosen by such assemblies, there is no objection to their power to do so, nor to any measures which may be taken to collect the sense of the people in respect to it; provided such measures be prosecuted in a peaceable manner, in subordination to the existing

government, and in subserviency to the power of congress to adopt, reject or disregard them, at their pleasure. 2 Opin. 726.

(g) It requires the consent of a legislature representing and governing the whole, and not merely a part, of the state proposed to be divided. 10 Opin. 436.

(h) The power of congress to "dispose of" the public lands, is not limited to making sales, they may be leased. 1 McLean 454. 14 Pet. 526. 4 Opin. 487. But no property belonging to the United States can be disposed of except by the authority of an act of congress. 1 Paine 646.

(i) The term "territory," as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. 14 Pet. 537. This clause applies only to territory within the chartered limits of some one of the states when they were colonies of Great Britain. It does not apply to territory acquired by the present federal government, by treaty or conquest, from a foreign nation. 19 How. 395.

(k) The power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, has been said to result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern would seem to be the inevitable consequence of the right to acquire territory. 1 Pet. 542-3. 14 Ibid. 537. 16 How. 194. Congress has the constitutional power to pass laws punishing Indians for crimes and offences committed against the United States. The Indian tribes are not so far independent nations as to be exempt from this kind of legislation. Hemp. 27. Where the country occupied by one of the Indian tribes is not within a state, congress may enact laws to punish offences committed there, either by white persons or Indians. 4 How. 567. The United States, under the present constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a state, and may govern it as

SECT. IV. The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

1. All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation.

2. This constitution, and the laws of the United States, which shall be made in pursuance thereof, ^(a) and all treaties ^(b) made, or which shall be made, ^(c) under the authority of the United States, shall be the supreme law of the land; ^(d) and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. ^(e)

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this constitution; ^(g) but no religious test shall ever be required as a qualification to any office or public trust under the United States.

a territory, until it has a population which, in the judgment of congress, entitles it to be admitted as a state of the Union. During the time it remains a territory, congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States—and may establish a territorial government—and the form of this local government must be regulated by the discretion of congress—but with powers not exceeding those which congress itself, by the constitution, is authorized to exercise over citizens of the United States, in respect to the rights of persons or rights of property. The territory thus acquired, is acquired by the people of the United States, for their common and equal benefit. 19 How. 395.

(a) A lien given by the maritime law is a right thus protected. 1 Newb. 284.

(b) Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected. 5 Cr. 348. 4 Am. L. R. 604. 6 Opin. 291. Walker Ch. 120. 1 Doug. 546. But though a treaty is a law of the land, and its provisions must be regarded by the courts as equivalent to an act of the legislature when it operates directly on a subject, yet, if it be merely a stipulation for future legislation by congress, it addresses itself to

the political and not to the judicial department, and the latter must await the action of the former. 2 Pet. 253. A treaty ratified with proper formalities is, by the constitution, the supreme law of the land, and the courts have no power to examine into the authority of the persons by whom it was entered into on behalf of the foreign nation. 16 How. 635. Though a treaty is the law of the land, under the constitution, congress may repeal it, so far as it is municipal law, provided its subject-matter be within the legislative power. 2 Curt. C. C. 454.

(c) This included subsisting as well as future treaties. 3 D. 277.

(d) See 1 Blatch. 635. The inhabitants of a territory, ceded to the United States, by treaty, become citizens of the United States, without naturalization under the acts of congress. 2 Penn. L. J. 119. But this rule does not apply to naturalized citizens, whose statutory allegiance cannot be transferred by treaty. 1 McAll. 106.

(e) The authority of the federal courts to declare void an act of a state legislature, manifestly in conflict with the constitution, is well settled. 3 Blatch. 170.

(g) The judges being sworn to support the constitution, the courts have necessarily the power to declare whether a law be constitutional or not. 1 Binn. 416.

ARTICLE VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON, *President*,
And Deputy from Virginia.

New Hampshire.

John Langdon,
Nicholas Gilman.

Massachusetts.

Nathaniel Gorham,
Rufus King.

Connecticut.

William Samuel Johnson,
Roger Sherman.

New York.

Alexander Hamilton.

New Jersey.

William Livingston,
David Brearly,
William Patterson,
Jonathan Dayton.

Pennsylvania.

Benjamin Franklin,
Thomas Mifflin,
Robert Morris,
George Clymer,
Thomas Fitzsimmons,
Jared Ingersoll,
James Wilson,
Gouverneur Morris.

Attest: William Jackson, Secretary.

Delaware.

George Read,
Gunning Bedford, jun.,
John Dickinson,
Richard Bassett,
Jacob Broom.

Maryland.

James McHenry,
Daniel of St. Thomas Jenifer.
Daniel Carroll,

Virginia.

John Blair,
James Madison, jun.

North Carolina.

William Blount,
Richard Dobbs Spaight,
Hugh Williamson.

South Carolina.

John Rutledge,
Charles Cotesworth Pinckney,
Charles Pinckney,
Pierce Butler.

Georgia.

William Few,
Abraham Baldwin.

AMENDMENTS TO THE CONSTITUTION.(a)

ART. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;(b) or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ART. II. A well regulated militia being necessary to the security of a free state the right of the people to keep and bear arms shall not be infringed.(c)

ART. III. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ART. IV. The right of the people to be secure in their persons, houses, paper and effects, against unreasonable searches and seizures, shall not be violated; and

(a) These fifteen articles proposed by congress, in addition to, and amendment of the constitution of the United States, having been ratified by the legislatures of the requisite number of the states, are become a part of the constitution. The first ten amendments were proposed by congress at their first session, in 1789. The eleventh was proposed in 1794. The twelfth in 1803. The thirteenth in 1865. The fourteenth in 1866. And the fifteenth in

1869.

(b) The constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States, in this respect, on the states 3 How. 609.

(c) See 2 Litt. 90. 1 Ala. 612. 2 Blackf 299. 1 Kelly 243. 24 Texas 394.

no warrants (a) shall issue, but upon probable cause, supported by oath or affirmation, (b) and particularly describing the place to be searched, and the persons or things to be seized. (c)

ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, (d) except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; (e) nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty or property, without due process of law; (g) nor shall private property be taken for public use without just compensation. (h)

ART. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury (i) of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; (k) to be confronted with the witnesses against him; (l) to have compulsory process for obtaining witnesses in his favor; (m) and to have the assistance of counsel for his defence.

ART. VII. In suits at common law, (n) where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; (o) and no fact tried by a jury shall be otherwise re-examined (p) in any court of the United States than according to the rules of the common law. (q)

ART. VIII. Excessive bail shall not be required, nor excessive fines imposed, (r) nor cruel and unusual punishments inflicted. (s)

(a) This refers only to process issued under the authority of the United States. 18 How. 71. And it was no application to proceedings for the recovery of debts, as a treasury distress warrant. Ibid. 272.

(b) See 3 Binn. 38.

(c) See 3 Cr. 448. 6 Binn. 316. 1 Opin. 229. 2 Ibid. 266.

(d) It is sufficient to describe the grand jury, as jurors of the United States. 1 Cliff. 5.

(e) This only applies to capital cases. 5 C. 325. See 11 H. 12. The court may discharge a jury from giving a verdict in a capital case, without the consent of the prisoner, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would be otherwise defeated. 9 Wheat. 579. See 4 W. C. C. 402. 2 Sumn. 19. 1 Wall. Jr. 127. 2 Opin. 655.

(g) See 18 How. 276. This implies the right to notice to appear and answer, and to a remedy in court. 4 H. 257. And see 12 Ibid. 292.

(h) This provision is only a limitation of the power of the general government; it has no application to the legislation of the several states. 7 Pet. 243. Bald. 220. It is now settled that the first ten amendments to the constitution do not extend to the states. 7 Pet. 551. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the states, and of their citizens. 5 How. 434. 12 S. & R. 221. 3 Cow. 686. 20 How. 84. 1 McAll. 212. 5 Wall. 476. 7 Ibid. 321.

(i) This is only to be intended of those crimes which by our former laws and customs had been tried by jury. Wall. C. C. 106.

(k) This does not entitle him to a copy of the indictment at the expense of the government. 4 Blatch. 337.

(l) This is a privilege that pertains to the

trial in court, not to the preliminary proceedings. 2 Story Const. § 1785-6. United States v. Bates, Pamph. p. 46.

(m) Any person charged with a crime in the courts of the United States, has a right, before, as well as after indictment, to the process of the court to compel the attendance of his witnesses. 1 Burr's Trial 179-80. Wall. C. C. 23.

(n) This includes not merely modes of proceeding known to the common law, but all suits, not of equity or admiralty jurisdiction, in which legal rights are settled and determined. 3 Pet. 433. 3 Dall. 297. 11 How. 437. Bald. 544. It does not apply to a motion for summary relief. 12 H. 289. See 2 Fish. 642.

(o) The guarantee of trial by jury is intended as well for a state of war, as a state of peace; and is equally binding upon rulers and people at all times and under all circumstances. 4 Wall. 3. The right to trial by jury is for the benefit of the parties litigating, and may be waived by them. 2 Paine 578. 3 Pet. 413. But the circuit courts have no power to order a peremptory nonsuit, against the will of the plaintiff. 1 Pet. 469, 476. 6 Ibid. 598. 23 How. 172. Hemp. 8.

(p) See 2 Cr. C. C. 515, 523.

(q) The common law here alluded to, is not the common law of any individual state, but the common law of England; according to which, facts once tried by a jury are never re-examined, unless a new trial be granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court be reversed by a superior tribunal, on a writ of error, and a *venire facias de novo* be awarded. 1 Gall. 20.

(r) See 7 Pet. 573-4.

(s) The disfranchisement of a citizen is not an unusual punishment. 20 Johns. 459. The punishments of whipping and of standing in

ART. IX. The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people. (a)

ART. X. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. (b)

ART. XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity (c) commenced or prosecuted against one of the United States, (d) by citizens of another state, or by citizens or subjects of any foreign state. (e)

ART. XII. 1. The electors shall meet in their respective states, (g) and vote by ballot for president and vice-president; one of whom at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit sealed (h) to the seat of government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, (i) and the votes shall then be counted; the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such a majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately by ballot the president. (k) But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president: a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

8. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

the pillory, are abolished by act 28 February 1839, § 5. 1 Bright. Dig. 206, pl. 23. See 12 S. & R. 220.

(a) See 1 Story Const. § 447. 1 W. & M. 401. 8 S. & R. 169.

(b) See 1 McLean 234. The rule of interpretation for a state constitution differs totally from that which is applicable to the constitution of the United States. The latter instrument must have a strict construction; the former, a liberal one. Congress can pass no laws but those which the constitution authorizes, either expressly, or by clear implication; while the state legislature has jurisdiction of all subjects in which its legislation is not prohibited. 5 H. 119.

(c) It does not extend to suits of admiralty or maritime jurisdiction Bright. R. 9. See 7 Pet. 627.

(d) If the state be not necessarily a defendant, though its interest may be affected by the decision, the courts of the United States are bound to exercise jurisdiction. 2 How. 560. 5 Cr. 115.

(e) A state, by becoming interested with others in a banking or trading corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives; it lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter. 9 Wheat. 904. 8 Pet. 481. 11 Ibid. 824. 2 How. 497. 18 How. 12. 15 Ibid. 809. And see 6 Wheat. 264.

(g) On the first Wednesday in December, by act 1 March 1792. 1 Bright. Dig. 253.

(h) Before the first Wednesday in January, by the same act.

(i) On the second Wednesday in February, by the same act.

(k) On a motion to discharge a defendant arrested upon a *capias ad respondendum*, by a marshal appointed by the president *de facto* of the United States, the court will not decide the question whether he has been duly elected to that office. 8 Cr. C. C. 424.

ART. XIII. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.(a)

ART. XIV. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several states according to their respective numbers, excluding Indians not taxed; but when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being of twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

3. No person shall be a senator, or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ART. XV. 1. The right of citizens of the United States to vote, shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude.

2. The congress shall have power to enforce this article by appropriate legislation.

(a) The civil rights bill of 1866, passed to give effect to this article, naturalized all persons of color within the United States. 16

Am. L. R. 241. Previously, they were not citizens. 19 How. 393.

THE
CONSTITUTION
OF THE
COMMONWEALTH OF PENNSYLVANIA OF 1790,
AS AMENDED IN 1838;(a)
WITH THE SUBSEQUENT AMENDMENTS ADOPTED IN 1850, 1857 AND 1864.

WE, the people of the commonwealth of Pennsylvania, ordain and establish this constitution for its government.(b)

ARTICLE I.

OF THE LEGISLATURE.

SECT. I. The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives.(c)

SECT. II. The representatives shall be chosen annually by the citizens * * *(d) on the second Tuesday of October.

SECT. III. No person shall be a representative who shall not have attained the age of twenty-one years, and have been a citizen and inhabitant of the state three years next preceding his election, and the last year thereof an inhabitant of the district in and for which he shall be chosen a representative, unless he shall have been absent on the public business of the United States or of this state.(e)

SECT. IV.(g) In the year one thousand eight hundred and sixty-four, and in every seventh year thereafter, representatives to the number of one hundred, shall be apportioned and distributed equally, throughout the state, by districts, in proportion to the number of taxable inhabitants in the several parts thereof; except that any county containing at least three thousand five hundred taxables, may be allowed

(a) The amendments to the constitution of 1790 are to be considered as having been "adopted" on the 11 December 1838. 8 W. 331.

(b) The object of the constitution is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power of the legislature to make laws would be absolute. 15 N. Y. 549. 6 W. & S. 117. The rule of interpretation for the state constitution differs totally from that which is applicable to the constitution of the United States. The latter instrument must have a strict construction; the former a liberal one. Congress can pass no laws but those which the constitution authorizes, either expressly or by clear implication; while the assembly has juris-

diction of all subjects on which its legislation is not prohibited. 5 H. 119. 2 P. F. Sm. 474.

(c) See 1 J. 494. 3 H. 20.

(d) Third amendment of 1857.

(e) If a majority of the votes have been cast for a disqualified person, the one who received the next highest number is not to be returned as elected. 6 P. F. Sm. 270. 1 Chand. 112. 13 Cal. 145. And see 2 Ash. 273. Will. on Corp. § 547. 2 Kyd Corp. 11-12. 28 Eng. L. & Eq. 307. 7 Q. B. 406. 10 East 211 a. Cowp. 537. 2 Dow 124. 5 B. & Ald. 81. Heywood 537-8. 1 Doug. 398 n., 399. 14 East 549. 1 M. & S. 76. 2 Burr. 1021.

(g) Third amendment of 1857.

a separate representation; (a) but no more than three counties shall be joined, and no county shall be divided in the formation of a district. Any city containing a sufficient number of taxables to entitle it to at least two representatives, shall have a separate representation assigned it, and shall be divided into convenient districts of contiguous territory, of equal taxable population as near as may be, each of which districts shall elect one representative.

SECT. V. The senators shall be chosen for three years, by the citizens * * * (b) at the same time, in the same manner, and at the same places where they shall vote for representatives.

SECT. VI. The number of senators shall, at the several periods of making the enumeration before mentioned, be fixed by the legislature, and apportioned among the districts formed, as hereinafter directed, according to the number of taxable inhabitants in each; and shall never be less than one-fourth, nor greater than one-third, of the number of representatives.

SECT. VII. The senators shall be chosen in districts to be formed by the legislature; but no district shall be so formed as to entitle it to elect more than two senators, unless the number of taxable inhabitants in any city or county shall, at any time, be such as to entitle it to elect more than two, but no city or county shall be entitled to elect more than four senators; when a district shall be composed of two or more counties, they shall be adjoining, * * * and no county shall be divided in forming a district: The city of Philadelphia shall be divided into single senatorial districts of contiguous territory as nearly equal in taxable population as possible; but no ward shall be divided in the formation thereof. (c)

SECT. VIII. No person shall be a senator who shall not have attained the age of twenty-five years, and have been a citizen and inhabitant of the state four years next before his election, and the last year thereof an inhabitant of the district for which he shall be chosen, unless he shall have been absent on the public business of the United States or of this state; and no person elected as aforesaid shall hold said office after he shall have removed from such district.

SECT. IX. The senators who may be elected at the first general election after the adoption of the amendments to the constitution, shall be divided by lot into three classes. The seats of the senators of the first class shall be vacated at the expiration of the first year; of the second class at the expiration of the second year; and of the third class at the expiration of the third year; so that, thereafter, one-third of the whole number of senators may be chosen every year. The senators elected before the amendments to the constitution shall be adopted, shall hold their offices during the terms for which they shall respectively have been elected.

SECT. X. The general assembly shall meet on the first Tuesday of January, in every year, unless sooner convened by the governor.

SECT. XI. Each house shall choose its speaker and other officers; and the senate shall also choose a speaker *pro tempore*, when the speaker shall exercise the office of governor.

SECT. XII. Each house shall judge of the qualifications of its members. Contested elections shall be determined by a committee to be selected, formed and regulated in such manner as shall be directed by law. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized by law to compel the attendance of absent members, in such manner and under such penalties as may be provided.

SECT. XIII. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member, but not a second time for the same cause; and shall have all other powers necessary for a branch of the legislature of a free state. (d)

(a) In *Cessna's* case, it was decided by the house of representatives, that under the constitution of 1790, Bedford county was entitled to a separate representation. January 1862. MS.

(b) Third amendment of 1857.

(c) From third amendment of 1857; which further provides with reference to sections IV. and VII. above, as follows:

"The legislature, at its first session, after the adoption of this amendment, shall divide the city of Philadelphia into senatorial and representative districts, in the manner above provided; such districts to remain unchanged until the apportionment in the year 1864." See 3 Keyes 110.

(d) See 9 H. 147, Google

SECT. XIV. The legislature shall not have power to enact laws annulling the contract of marriage in any case where by law, the courts of this commonwealth are or may hereafter be empowered to decree a divorce. (a)

SECT. XV. Each house shall keep a journal of its proceedings, and publish them weekly, except such parts as may require secrecy; and the yeas and nays of the members on any question, shall, at the desire of any two of them, be entered on the journals.

SECT. XVI. The doors of each house, and of committees of the whole, shall be open, unless when the business shall be such as ought to be kept secret.

SECT. XVII. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECT. XVIII. The senators and representatives shall receive a compensation for their services, (b) to be ascertained by law, and paid out of the treasury of the commonwealth. They shall in all cases, except treason, felony and breach or surety of the peace, be privileged from arrest, during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

SECT. XIX. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this commonwealth, which shall have been created, or the emoluments of which shall have been increased during such time; and no member of congress, or other person holding any office (except of attorney-at-law, and in the militia) under the United States, or this commonwealth, shall be a member of either house, during his continuance in congress, or in office. (c)

SECT. XX. When vacancies happen in either house, the speaker shall issue writs of election to fill such vacancies.

SECT. XXI. All bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments as in other bills.

SECT. XXII. No money shall be drawn from the treasury but in consequence of appropriations made by law.

SECT. XXIII. Every bill which shall have passed both houses, shall be presented to the governor; if he approve, he shall sign it; (d) but if he shall not approve, he shall return it with his objections, to the house in which it shall have originated, who shall enter the objections at large upon their journals, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent with the objections, to the other house, by which likewise it shall be reconsidered, and if approved by two-thirds of that house, it shall be a law; but in such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly, by their adjournment, prevent its return; in which case it shall be a law, unless sent back within three days after their next meeting.

SECT. XXIV. Every order, resolution or vote to which the concurrence of both houses may be necessary (except on a question of adjournment), shall be presented

(a) Where the rights of parties depend on the validity of a divorce granted by the legislature, evidence is admissible to show that the causes for which it was granted were within the jurisdiction of the courts, and hence the legislature had no power to grant it. 2 J. 350. The presumption is, that every legislative act of divorce is for a just cause, but it is not a conclusive presumption that the case is outside the jurisdiction of the courts. 4 P. F. Sm. 255. See Ibid. 265.

(b) See 7 W. & S. 16.

(c) See 6 H. 521.

(d) When a bill has passed the senate and

house of representatives, and been approved by the governor, it is a law. The constitution does not require that it should be signed by the presiding officers of the two houses. 10 H. 376. An act of assembly is passed only when it has gone through all the forms made necessary by the constitution, to give it force and validity as a binding rule of conduct for the citizen. 9 C. 202. The governor may sign a bill after the adjournment of the legislature. 21 N. Y. 517. One branch of the legislature has no power, by resolution, to recall a bill, after it has been sent to the governor for approval. 33 N. Y. 269. Digitized by Google

to the governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill.

SECT. XXV. No corporate body shall be hereafter created, renewed or extended, with banking or discounting privileges, (a) without six months' previous public notice of the intended application for the same, in such manner as shall be prescribed by law; nor shall any charter for the purposes aforesaid, be granted for a longer period than twenty years; and every such charter shall contain a clause reserving to the legislature the power to alter, revoke or annul the same, (b) whenever, in their opinion, it may be injurious to the citizens of the commonwealth; in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation. (c)

SECT. XXVI. (d) The legislature shall have the power to alter, revoke or annul, any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the commonwealth; in such manner, however, that no injustice shall be done to the corporators. (e)

ARTICLE II.

OF THE GOVERNOR.

SECT. I. The supreme executive power of this commonwealth shall be vested in a governor.

SECT. II. The governor shall be chosen on the second Tuesday of October, by the citizens of the commonwealth, at the places where they shall respectively vote for representatives; the returns of every election for governor shall be sealed up and transmitted to the seat of government, directed to the speaker of the senate, who shall open and publish them in the presence of the members of both houses of the legislature; the person having the highest number of votes shall be governor; but if two or more shall be equal and highest in votes, one of them shall be chosen governor by the joint vote of the members of both houses. Contested elections shall be determined by a committee to be selected from both houses of the legislature, and formed and regulated in such manner as shall be directed by law.

SECT. III. The governor shall hold his office during three years from the third Tuesday of January next ensuing his election, and shall not be capable of holding it longer than six, in any term of nine years.

SECT. IV. He shall be at least thirty years of age, and have been a citizen and an inhabitant of this state seven years next before his election, unless he shall have been absent on the public business of the United States or of this state.

SECT. V. No member of congress, or person holding any office under the United States or of this state, shall exercise the office of governor.

SECT. VI. The governor shall, at stated times, receive for his services a compensation which shall be neither increased nor diminished during the period for which he shall have been elected.

SECT. VII. He shall be commander-in-chief of the army and navy of this commonwealth, and of the militia, except when they shall be called into actual service of the United States.

(a) The exercise of the banking privilege of discounting notes by a saving fund society, incorporated without such notice, renders the notes so discounted, void in their hands; such illegal action cannot be a ground of title. 5 Phila. 18. The privileges granted to building associations are not within this prohibition. 11 C. 223. 3 Grant 297. 3 Phila. 115. 6 C. 465.

(b) This clause reserves to the state the right to impose taxes upon a bank, according to the legislative discretion, notwithstanding a provision in its charter "that the capital stock in such bank shall not be subject to taxation, for other than state purposes." 1

Wt. 340. It forms a part of the contract with every banking corporation. 21 N. Y. 9.

(c) To create, renew or extend a charter within the meaning of this section, means to make a charter which never existed before to revive an old one which has expired; or to increase the time for the existence of one which would otherwise reach its limit at an earlier period. 3 C. 380, 388. And see 9 H. 200.

(d) Fourth amendment of 1857.

(e) The legislature is not the final judge whether the *casus judicis*, upon which the authority to repeal a charter is based, has accrued. 8 P. F. Sm. 26.

SECT. VIII. He shall appoint a secretary of the commonwealth during pleasure; and he shall nominate, and by and with the advice and consent of the senate, appoint all judicial officers of the courts of record, unless otherwise provided for in this constitution. He shall have power to fill all vacancies that may happen in such judicial offices during the recess of the senate, by granting commissions, which shall expire at the end of their next sessions: *Provided*, That in acting on executive nominations the senate shall sit with open doors; and in confirming or rejecting the nominations of the governor, the vote shall be taken by yeas and nays.

SECT. IX. He shall have power to remit fines and forfeitures,^(a) and grant reprieves and pardons,^(b) except in cases of impeachment.

SECT. X. He may require information in writing, from the officers of the executive department, upon any subject relating to the duties of their respective offices.

SECT. XI. He shall, from time to time, give to the general assembly information of the state of the commonwealth, and recommend to their consideration such measures as he shall judge expedient.

SECT. XII. He may, on extraordinary occasions, convene the general assembly; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months.

SECT. XIII. He shall take care that the laws be faithfully executed.

SECT. XIV. In case of the death or resignation of the governor, or his removal from office, the speaker of the senate shall exercise the office of governor, until another governor shall be duly qualified; but in such case, another governor shall be chosen at the next annual election of representatives, unless such death, resignation or removal, shall occur within three calendar months immediately preceding such next annual election, in which case a governor shall be chosen at the second succeeding annual election of representatives. And if the trial of a contested election shall continue longer than until the third Monday of January next ensuing the election of governor, the governor of the last year, or the speaker of the senate, who may be in the exercise of the executive authority, shall continue therein until the determination of such contested election, and until a governor shall be duly qualified as aforesaid.

OF THE SECRETARY OF THE COMMONWEALTH.

SECT. XV. The secretary of the commonwealth shall keep a fair register of all the official acts and proceedings of the governor; and shall, when required, lay the same and all papers, minutes and vouchers relative thereto, before either branch of the legislature; and shall perform such other duties as shall be enjoined him by law.

ARTICLE III.

OF ELECTIONS.

SECT. I. In elections by the citizens, every [white]^(c) freeman of the age of twenty-one years, having resided in this state one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a state or county tax,^(d) which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector; but a citizen of the United States who had previously been a qualified voter of this state, and removed

(a) The fines and penalties which he may remit, are such only, as are now, or were originally payable to the state. 3 Barr 126. He may remit a forfeited recognisance, after judgment for the use of the county. 9 W. 142.

(b) He may pardon, as well before trial, as after. 7 W. 155. 9 Wr. 372. 10 Ibid. 357. So, he may grant a conditional pardon. 8 W. & S. 197. A pardon, although after sentence, is a release of all fines or imprisonment for the offence. 4 C. 297. 2 Phila. 256. But not of the costs to the payment of which a prisoner may have been sentenced. 2 Wh.

440. 10 Wr. 446. But see 7 Ibid. 53. A pardon must be proved by the production of the warrant itself, or its loss must be accounted for. 6 W. 338. And see 1 Gr. 329. A pardon obtained by fraud may be revoked before actual delivery. 8 Wr. 210. 10 Int. R. Rec. 24. Without words of restitution, a pardon does not restore a forfeited estate. 3 Grant 158.

(c) Altered by the 15th amendment to the constitution of the United States.

(d) It must be a personal tax. 2 S. & R. 297.

therefrom, and returned, and who shall have resided in the election district, and paid taxes as aforesaid, shall be entitled to vote, after residing in the state six months: *Provided*, That [white] freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the state one year, and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.(a)

SECT. II. All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *visâ voce*.

SECT. III. Electors shall, in all cases, except treason, felony and breach or surety of the peace, be privileged from arrest, during their attendance on elections, and in going to and returning from them.

SECT. IV. Whenever any of the qualified electors of this commonwealth shall be in any actual military service, under a requisition from the president of the United States, or by the authority of this commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.(b)

ARTICLE IV.

OF IMPEACHMENT.

SECT. I. The house of representatives shall have the sole power of impeaching.

SECT. II. All impeachments shall be tried by the senate.(c) When sitting for that purpose, the senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present.

SECT. III. The governor and all other civil officers under this commonwealth, shall be liable to impeachment for any misdemeanor in office;(d) but judgment in such cases shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under this commonwealth; the party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment, according to law.

ARTICLE V.

OF THE JUDICIARY.

SECT. I. The judicial power of this commonwealth(e) shall be vested in a supreme court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphans' court, register's court and a court of quarter sessions of the peace for each county, in justices of the peace, and in such other courts as the legislature may from time to time establish.(g)

SECT. II.(h) The judges of the supreme court, of the several courts of common pleas, and of such other courts of record as are or shall be established by law, shall be elected by the qualified electors of the commonwealth in the manner following, to wit: the judges of the supreme court, by the qualified electors of the commonwealth at large: the president judges of the several courts of common pleas and of such other courts of record as are or may be established by law, and all other judges required to be learned in the law, by the qualified electors of the respective districts over which they are to preside or act as judges: and the associate judges of the

(a) No constitutional qualification of a voter can be abridged, added to, or altered by legislation. 8 P. F. Sm. 338.

(b) First amendment of 1864.

(c) A member of the house of representatives, who votes in favor of prosecuting an impeachment, is not, thereby, disqualified, if subsequently elected a senator, from sitting on the trial thereof. Addison's Trial 21-8. Porter's Trial 53.

(d) A president judge is liable to impeachment, for preventing one of his associates from delivering his opinion to a grand or petit jury, upon a matter before the court. Addison's Trial 16, 17, 114, 151. The presiding

judge is the proper organ of the court, to express its opinion; but each member has a right, and it is his duty, to deliver his sentiments upon every subject that occurs in court. Ibid. 114. 4 D. 225. See Porter's Trial 61.

(e) The legislature has no judicial power, and therefore cannot grant a new trial. 3 H. 18. 4 H. 265. Or, a review of a decree of the orphans' court. 7 Wr. 512. 19 Leg. Int. 372. The legislature cannot abolish any of the courts mentioned in this article. 8 P. F. Sm. 226.

(g) See 7 W. & S. 68. 8 W. & S. 382. 2 Barr 244. 16 Pet. 60.

(h) Amendment of 1850.

courts of common pleas by the qualified electors of the counties respectively. The judges of the supreme court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well, (subject to the allotment hereinafter provided for, subsequent to the first election.) The president judges of the several courts of common pleas, and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well. The associate judges of the courts of common pleas shall hold their offices for the term of five years, if they shall so long behave themselves well: all of whom shall be commissioned by the governor, but for any reasonable cause which shall not be sufficient grounds of impeachment, the governor shall remove any of them on the address of two-thirds of each branch of the legislature. The first election shall take place at the general election of this commonwealth next after the adoption of this amendment, and the commissions of all the judges who may be then in office shall expire on the first Monday of December following, when the terms of the new judges shall commence.(a) The persons who shall then be elected judges of the supreme court shall hold their offices as follows: one of them for three years, one for six years, one for nine years, one for twelve years, and one for fifteen years; the term of each to be decided by lot by said judges as soon after the election as convenient, and the result certified by them to the governor, that the commissions may be issued in accordance thereto.(b) The judge whose commission will first expire shall be chief justice during his term, and thereafter each judge whose commission shall first expire shall in turn be the chief justice, and if two or more commissions shall expire on the same day, the judges holding them shall decide by lot which shall be the chief justice. Any vacancies happening by death, resignation or otherwise, in any of the said courts, shall be filled by appointment by the governor, to continue till the first Monday of December succeeding the next general election.(c) The judges of the supreme court and the presidents of the several courts of common pleas shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished (d) during their continuance in office, but they shall receive no fees or perquisites of office, nor hold any other office of profit under this commonwealth,(e) or under the government of the United States, or any other state of this Union. The judges of the supreme court, during their continuance in office, shall reside within this commonwealth, and the other judges, during their continuance in office, shall reside within the district or county for which they were respectively elected.

SECT. III. Until otherwise directed by law, the courts of common pleas shall continue as at present established.(g) Not more than five counties shall at any time be included in one judicial district organized for said courts.

SECT. IV. The jurisdiction of the supreme court shall extend over the state,(h) and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery, in the several counties.(i)

(a) The terms of office of the new judges, elected under this section, expire on the first Monday of December, in the year of their limitation. 5 C. 518.

(b) The legislature cannot abolish a judicial district, and thus legislate out of office the president judge, before the expiration of his term. *Commonwealth v. Graham*, Supreme Court, 7 July 1869.

(c) The act 27 April 1852, which prescribes that such vacancy shall be filled by an election, at the next general election which shall happen more than three calendar months after the vacancy occurs, does not conflict with this provision, and is a valid and binding exercise of legislative power. 3 C. 444. See 13 N. Y. 350.

(d) The legislature cannot diminish the compensation of a president judge, whose

salary has been increased since his appointment; neither can they impose a state tax upon his salary, to be deducted at the treasury before payment. 5 W. & S. 403.

(e) See 1 S. & R. 1.

(g) See 2 Barr 244.

(h) The division of the state into districts does not affect the jurisdiction. 11 H. 355. The constitution invests the supreme court with jurisdiction co-extensive with the state, and the legislature has no power to limit it, or to prohibit the court from issuing its process, at any time, to all parts of the state. The division of the state into districts is merely for the convenient transaction of business. 1 Wr. 237.

(i) Each of the judges of the supreme court has power to hold a court of oyer and terminer in any county of the state. 9 C. 80.

SECT. V. The judges of the court of common pleas in each county shall, (a) by virtue of their offices, be justices of oyer and terminer and general jail delivery, for the trial of capital and other offenders therein; any two of the said judges, the president being one, (b) shall be a quorum; but they shall not hold a court of oyer and terminer or jail delivery in any county, when the judges of the supreme court, or any of them, shall be sitting in the same county. (c) The party accused as well as the commonwealth may, under such regulations as shall be prescribed by law, remove the indictment and proceedings, or a transcript thereof, into the supreme court.

SECT. VI. The supreme court and the several courts of common pleas shall, beside the powers heretofore usually exercised by them, have the power of a court of chancery, so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the state, (d) and the care of the persons and estates of those who are *non compos mentis*; and the legislature shall vest in the said courts such other powers to grant relief in equity, as shall be found necessary, and may, from time to time, enlarge or diminish those powers, or vest them in such other courts as they shall judge proper, for the due administration of justice. (e)

SECT. VII. The judges of the court of common pleas of each county, any two of whom shall be a quorum, shall compose the court of quarter sessions of the peace, and orphans' court thereof; and the register of wills, together with the said judges, or any two of them, shall compose the register's court of each county.

SECT. VIII. The judges of the courts of common pleas shall, within their respective counties, have the like powers with the judges of the supreme court to issue writs of *certiorari* to the justices of the peace, and to cause their proceedings to be brought before them, and the like right and justice to be done. (g)

SECT. IX. The president of the court in each circuit, within such circuit, and the judges of the court of common pleas, within their respective counties, shall be justices of the peace, so far as relates to criminal matters. (h)

SECT. X. A register's office, for the probate of wills and granting letters of administration, and an office for the recording of deeds, shall be kept in each county.

SECT. XI. The style of all process shall be "The Commonwealth of Pennsylvania." (i) All prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude "against the peace and dignity of the same." (k)

(a) They have no power to hold a court of oyer and terminer out of their proper districts. 9 C. 80.

(b) See 7 W. & S. 68. 8 Ibid. 382. 2 Barr 244. 5 Ibid. 67, 204. 1 H. 194. 7 C. 198.

(c) This only applies to a case in which the judges of the supreme court are holding a court of oyer and terminer in the same county. 6 Pitts. Leg. J. 177.

(d) This is an equity proceeding, and is to be exercised under chancery rules; therefore, written notice of the rule, and of the names of the commissioners, must be served on the adverse party, at least fifteen days before the commission issues, and they must be so designated as to inform the party, to a reasonable certainty, where they may be found. 1 Wr. 510. It is under this clause, that commissioners appointed by the courts to take depositions derive authority to administer oaths. 9 P. F. Sm. 386.

(e) This does not prohibit the legislature from taking away or modifying the powers before that time usually exercised by the judges of the supreme court. It was intended to have an affirmative effect, by introducing certain chancery powers, and not the negative one of prohibiting the taking away of any powers theretofore exercised. 4 B. 117. But the

legislature cannot vest the determination of legal rights in a court of equity, so as to exclude the constitutional right of trial by jury. 6 Wr. 488.

(g) The writ of *certiorari* may issue from the common pleas wherever a new jurisdiction is conferred upon magistrates, and the proceeding is summary. 1 Brewst. 411.

(h) A new power was hereby intended to be superadded to their offices; but the judges of the supreme court were invested with the like power by the provincial act of 1722, which conferred upon them all the powers of the justices of the court of King's Bench in England, who are justices of the peace throughout the kingdom, *ex officio*. And these powers were secured to them by the constitution. 3 Y. 96.

(i) Process must go in the name of the commonwealth of Pennsylvania; but it is immaterial in what part of the precept the commonwealth is introduced, so that the command be given in its name. 6 B. 184.

(k) The proper conclusion of an indictment is "against the peace and dignity of the commonwealth of Pennsylvania." 5 S. & R. 463. A conclusion "against the peace of the state, the government and dignity of the same," is defective. 1 Gr. 262-3.

ARTICLE VI.

OF SHERIFFS AND CORONERS.

SECT. I. Sheriffs and coroners shall, at the times and places of election of representatives, be chosen by the citizens of each county. One person shall be chosen for each office, who shall be commissioned by the governor. They shall hold their offices for three years, if they shall so long behave themselves well, and until a successor be duly qualified; but no person shall be twice chosen or appointed sheriff in any term of six years. Vacancies in either of the said offices shall be filled by an appointment, to be made by the governor, to continue until the next general election, and until a successor shall be chosen and qualified as aforesaid.

OF THE MILITIA.

SECT. II. The freemen of this commonwealth shall be armed, organized and disciplined for its defence, when, and in such manner, as may be directed by law. Those who conscientiously scruple to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service.

OF PUBLIC OFFICERS.

SECT. III. Prothonotaries of the supreme court shall be appointed by the said court for the term of three years, if they so long behave themselves well. Prothonotaries and clerks of the several other courts, recorders of deeds and registers of wills, shall, at the times and places of election of representatives, be elected by the qualified electors of each county, or the districts over which the jurisdiction of said courts extends, and shall be commissioned by the governor. They shall hold their offices for three years if they shall so long behave themselves well, and until their successors shall be duly qualified. The legislature shall provide by law the number of persons in each county who shall hold said offices, and how many and which of said offices shall be held by one person. Vacancies in any of the said offices shall be filled by appointments to be made by the governor, to continue until the next general election, and until successors shall be elected and qualified as aforesaid. (a)

SECT. IV. Prothonotaries, clerks of the peace and orphans' courts, recorders of deeds, registers of wills and sheriffs, shall keep their offices in the county town of the county in which they respectively shall be officers, unless when the governor shall, for special reasons, dispense therewith, for any term not exceeding five years after the county shall have been erected.

OF COMMISSIONS.

SECT. V. All commissions shall be in the name and by the authority of the commonwealth of Pennsylvania, and be sealed with the state seal, and signed by the governor.

OF THE STATE TREASURER.

SECT. VI. A state treasurer shall be elected annually, by joint vote of both branches of the legislature.

OF JUSTICES OF THE PEACE AND ALDERMEN AND OTHER OFFICERS.

SECT. VII. Justices of the peace, or aldermen, shall be elected in the several wards, boroughs and townships, at the time of the election of constables, by the qualified voters thereof, in such number as shall be directed by law, and shall be commissioned by the governor for a term of five years. But no township, ward or borough shall elect more than two justices of the peace or aldermen, without the consent of a majority of the qualified electors within such township, ward, or borough.

SECT. VIII. All officers whose election or appointment is not provided for in

(a) The death of the person elected to fill the office of clerk of the orphans' court, before he has qualified himself according to law, does not create a vacancy which can be filled by the governor, but the incumbent holds over. 9 Barr 513. On the death of the pro-

thonotary, the court does not possess power to make a temporary appointment, until the vacancy is filled by the governor. Case of the Prothonotary of Phila. Co., C. P. Phila., 14 May 1850. MS.

this constitution, shall be elected or appointed as shall be directed by law. No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment, if the county shall have been so long erected; but if it shall not have been so long erected, then within the limits of the county or counties out of which it shall have been taken. No member of congress from this state, or any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time (a) hold or exercise any office in this state, to which a salary is, or fees or perquisites are by law annexed, and the legislature may by law declare what state offices are incompatible. (b) No member of the senate, or of the house of representatives, shall be appointed by the governor to any office during the term for which he shall have been elected.

OF MISBEHAVIOR IN OFFICE.

SECT. IX. All officers for a term of years, shall hold their offices for the terms respectively specified, only on the condition that they so long behave themselves well; and shall be removed on conviction of misbehavior in office, or of any infamous crime. (c)

DUELLING.

SECT. X. Any person who shall, after the adoption of the amendments proposed by this convention to the constitution, fight a duel, or send a challenge for that purpose, or be aider or abettor in fighting a duel, shall be deprived of the right of holding any office of honor or profit in this state, and shall be punished otherwise in such manner as is, or may be prescribed by law; but the executive may remit the said offence and all its disqualifications.

ARTICLE VII.

EDUCATION.

SECT. I. The legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the state, in such manner that the poor may be taught gratis. (d)

SECT. II. The arts and sciences shall be promoted in one or more seminaries of learning.

RELIGIOUS SOCIETIES AND CORPORATIONS.

SECT. III. The rights, privileges, immunities and estates of religious societies and corporate bodies, shall remain as if the constitution of this state had not been altered or amended.

SECT. IV. The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor before such property shall be taken. (e)

ARTICLE VIII.

OF THE OATH OF OFFICE.

Members of the general assembly, and all officers, (g) executive and judicial, shall

(a) See 17 S. & R. 228-30. 4 D. 229.

(b) Under the act of 16 April 1838, a deputy marshal of the United States is incompetent to hold the office of commissioner of an incorporated district, although there are no fees or perquisites annexed to the office. 5 Barr 67.

(c) A conviction of the offence of bribing an elector to vote for him, does not disqualify a sheriff from exercising the duties of his office. 3 W. & S. 338.

(d) Laws providing for the establishment throughout the commonwealth of common schools, for the education of all between the

age of five and twenty-one years, are not unconstitutional. 5 H. 118.

(e) When private property is taken for public use, it is not necessary that the compensation to the owner should be actually ascertained and paid before the property is appropriated; but it is sufficient, if an adequate remedy be provided by which he can obtain compensation, without any unreasonable delay. 10 Barr 97. 3 W. & S. 460. 1 Barr 132, 218. 6 W. & S. 113. 4 H. 192-3. Bright. R. 183. See art. IX. § 10.

(g) A county commissioner is such an officer. 7 S. & R. 386.

be bound by oath or affirmation, to support the constitution of this commonwealth,(a) and to perform the duties of their respective offices with fidelity.

ARTICLE IX.

DECLARATION OF RIGHTS.

That the general, great and essential principles of liberty and free government may be recognised and unalterably established, **WE DECLARE**

SECT. I. That all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.(b)

SECT. II. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends, they have at all times an unalienable and inalienable right to alter, reform or abolish their government, in such a manner as they may think proper.

SECT. III. That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences;(c) that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience;(d) and no preference shall ever be given by law to any religious establishments, or modes of worship.

SECT. IV. That no person who acknowledges the being of a God, and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office, or place of trust or profit, under this commonwealth.(e)

SECT. V. That elections shall be free and equal.(g)

SECT. VI. That trial by jury shall be as heretofore,(h) and the right thereof remain inviolate.(i)

SECT. VII. That the printing presses shall be free(k) to every person who undertakes to examine the proceedings of the legislature, or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, or where the matter published is proper for public information,(l) the truth thereof may be

(a) See 12 S. & R. 353.

(b) See 9 H. 147.

(c) Christianity is a part of the common law of Pennsylvania; not Christianity founded on any particular religious tenets, but Christianity with liberty of conscience to all men. 11 S. & R. 394, 400. 6 Barr 96. 8 Ibid. 327. 11 Leg. Int. 14. See 2 Story Const. § 1871. 1 P. R. 13. 2 How. 198. 9 Am. L. R. 591. Every religious society, for its own internal order, and for the mode in which it fulfils its functions, is a law unto itself, provided it keep within the bounds of social order and morality. 5 Wr. 14.

(d) Those who keep the seventh day as their Sabbath, may be punished for working on Sunday. 3 S. & R. 48. 8 Barr 132. 9 H. 426. And see 10 H. 114. 11 Leg. Int. 14. 17 S. & R. 160.

(e) See 2 W. & S. 262. 2 C. 277.

(g) This does not require that the regulations should be uniform throughout the state. 10 P. F. Sm. 54.

(h) This does not interfere with the summary conviction of rogues and vagabonds.

6 Wr. 89. And see 1 P. F. Sm. 96, 412. It is error, if it do not appear, by the record of the trial of an indictment, that the defendant was tried by twelve jurors, lawfully sworn. 3 S. & R. 237. A waiver of this right, by the consent of the defendant, in a criminal case, is a nullity. 7 Am. L. R. 289. 18 N. Y. 129. The 37th section of the Code of Criminal Procedure, giving the commonwealth four peremptory challenges, does not conflict with this provision. 1 Wr. 45. 4 Wr. 462.

(i) See 1 B. 424. 5 Barr 204. 7 Pet. 551-2. Trial by jury is a constitutional right, which cannot be waived by implication. 6 W. 133. 7 C. 310. 18 N. Y. 129. The legislature has no power either to provide that a petit jury may be composed of a less number than twelve; or that a number of the petit jury, less than twelve, may render a verdict. 23 Law Rep. 458. 1 Ch. Leg. N. 437. A municipal corporation, being the creature of the legislature, cannot claim the constitutional right of a trial by jury. 2 P. F. Sm. 374.

(k) 1 D. 325. 3 Y. 520. 4 Y. 269.

(l) 4 Y. 267.

given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

SECT. VIII. That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation. (a)

SECT. IX. That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, (b) to demand the nature and cause of the accusation against him, (c) to meet the witnesses face to face, (d) to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment, or information, a speedy public trial by an impartial jury of the vicinage: He cannot be compelled to give evidence against himself, (e) nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land. (g)

SECT. X. That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; or by leave of the court for oppression or misdemeanor in office. (h) No person shall, for the same offence, be twice put in jeopardy of life or limb, (i) nor shall any man's property be taken, or applied to public use, without the consent of his representatives, and without just compensation being made. (k)

(a) A warrant of arrest, issued upon common rumor and report of the party's guilt, though it recite that there is danger of his escaping before witnesses could be summoned to enable the judge to issue it upon oath, is illegal; and no officer is bound to execute it. 3 B. 38. But an arrest for felony may be made without warrant. 6 B. 316.

(b) It need not appear by the record that the prisoner was allowed counsel. 1 Wr. 108.

(c) The 20th section of the Code of Criminal Procedure of 31 March 1860 does not conflict with this provision. 1 Wr. 109.

(d) In all criminal cases, the witnesses must be examined in the presence of the accused, and be subject to cross-examination. 1 P. F. Sm. 338. This clause applies to impeachments, which are criminal prosecutions. Porter's Trial 100-12. But depositions were taken and read on the trial of Judge Hopkinson. Hopkinson's Trial 40-3. It does not, however, abrogate the common law principle that dying declarations are admissible in evidence in cases of homicide. 7 How. (Miss.) 655; 1 Meigs 265; 11 Geo. 355; 8 Ohio St. 131; 7 Iowa 347.

(e) See 3 Y. 515. 24 N. Y. 74.

(g) A private act is not such a law. 5 W. & S. 171. 6 Barr 87. And see 1 Curt. C. C. 311. It means judgment of law, in its regular course of administration through courts of justice. 10 Wr. 460.

(h) See 3 D. 490. 2 D. 112. 1 Y. 206, 370, 419. 2 Y. 429. 1 S. & R. 382.

(i) This only applies to capital offences. 5 C. 323. The court, even in a capital case, may discharge a jury, before verdict, in case of absolute necessity; but mere inability to agree is not such a case; and if a jury be discharged under such circumstances, the prisoner may plead it in bar of another trial. 3 R. 498.

(k) See art. VII. § 4. This clause is a

disabling, not an enabling one. 10 W. 66.

It is a limitation, not on the taxing power, but on the right of eminent domain. 2 Bl. 510.

There are no other limitations to the power of the state over private property, than those that are placed upon it by the constitution. 6 W. & S. 113. The commonwealth has a constitutional right to authorize a turnpike company to lay out a road through the private ground of a citizen without making compensation for the soil. 6 B. 509. Such compensation having been originally made in each purchaser's particular grant. 3 Y. 373. When property is not seized, and directly appropriated to public use, though it may be subjected in the hands of the owner to greater burdens than it was before, it is not taken. 9 H. 147.

6 W. & S. 113. 8 Ibid. 85. 1 Wr. 479. 4 H. 192-3. 6 Wh. 25. 5 P. F. Sm. 340. See 9 N. Y. 100. The mere laying out of streets through private property, is not a taking within the meaning of the constitution; it is only when they are actually opened and applied to public use, that the owners are entitled to compensation. 2 W. & S. 320. It is not necessary that the compensation should be actually ascertained and paid before the property is appropriated; it is enough, that an adequate remedy is provided by which the owner can obtain compensation without unreasonable delay. 1 Barr 309. 10 Ibid. 97. 8 P. F. Sm. 26. See 5 H. 524. And a law limiting the time within which the owner's claim for damages shall be exhibited, is not unconstitutional. 11 N. Y. 308. The legislature may, constitutionally, require the owners of property benefited by a public improvement to pay the damages sustained by those whose property is taken, in proportion to the benefits received by each of them. 3 W. 296. 7 Barr 175. 8 Wend. 85. 4 N. Y. 419. But the government cannot take the property of one citizen for the mere purpose of transferring it to another, even for a full

SECT. XI. That all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law,^(a) and right and justice administered without sale, denial or delay. Suits may be brought against the commonwealth in such manner, in such courts, and in such cases, as the legislature may by law direct.^(b)

SECT. XII. That no power of suspending laws shall be exercised, unless by the legislature or its authority.

SECT. XIII. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

SECT. XIV. That all prisoners shall be bailable by sufficient sureties unless for capital offences,^(c) when the proof is evident or presumption great;^(d) and the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.

SECT. XV. That no commission of oyer and terminer or jail delivery shall be issued.

SECT. XVI. That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

SECT. XVII. That no *ex post facto* law,^(e) nor any law impairing contracts, shall be made.^(g)

SECT. XVIII. That no person shall be attainted of treason or felony by the legislature.

SECT. XIX. That no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth; that the estates of such persons as shall destroy their own lives, shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

SECT. XX. That the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.

SECT. XXI. That the right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned.^(h)

compensation, where the public is not interested in such transfer; such an arbitrary exercise of power is an infringement of the spirit of the constitution, not being within the power delegated by the people to the legislature. 1 Barr 309. 2 Ibid. 24. 6 Ibid. 91. 1 H. 217. 4 Ibid. 264. 7 C. 90. 5 P. F. Sm. 16. 6 N. Y. 358. The legislature may, indeed, authorize a trustee of the legal estate in land to convert it into money, for the purpose of distributing the proceeds among the parties entitled. 2 Barr 277, 393. 5 H. 434. 9 Ibid. 201. But they cannot authorize the sale of the property of parties *sui juris*, and seized of a vested estate, against their consent. 4 H. 256. 7 C. 87.

(a) This requires that the law relating to the transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered in its substance by any subsequent law. 9 C. 495.

(b) 6 W. & S. 116, 117.

(c) A prisoner charged with homicide, may be admitted to bail, even after indictment found, where the evidence shows that the offence is not a capital one. 10 Pitts. Leg. J. 122.

(d) This clause has reference to the guilt of the prisoner, not to the nature or degree of the offence. 10 Pitts. Leg. J. 122.

(e) Any law changing the punishment of offences committed before its passage, is *ex post facto* and void, under the constitution, unless the change consist in the remission of some separable part of the punishment before prescribed, or be referable to prison discipline or penal administration as its primary object. 22 N. Y. 95. An act granting a new trial is unconstitutional. 3 H. 18. 4 H. 265. 7 Wr. 512. 19 Leg. Int. 372.

(g) See 4 W. & S. 218. 2 Wh. 396. 8 W. & S. 49. 5 Wr. 441. 9 Am. L. R. 561. An act of assembly cannot impair a contract made, after it has passed both houses of the general assembly, but before its approval by the governor. 9 C. 202. The legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws. 7 W. 300. 6 P. F. Sm. 57. See 7 C. 288, 301. 6 P. F. Sm. 46. But a contract which has become void, by force of its inherent conditions, cannot be reinstated by act of assembly. 3 Wr. 435. See 1 P. F. Sm. 9. Whenever a power to repeal, alter, or amend a charter is reserved in it, its exercise does not impair the obligation of the contract. 5 P. F. Sm. 452. See 8 Wall. 430. The charter of a municipal corporation is not a contract within the prohibition of the constitution. 9 P. F. Sm. 174.

(h) See 2 Litt. 90. 1 Ala. 612. 3 Blackf. 229. 1 Kelly 243. 24 Texas 394.

SECT. XXII. That no standing army shall, in time of peace, be kept up without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power.^(a)

SECT. XXIII. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

SECT. XXIV. That the legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer term than during good behavior.

SECT. XV. The emigration from the state shall not be prohibited.

SECT. XXVI. To guard against transgressions of the high powers which we have delegated, WE DECLARE, that every thing in this article is excepted out of the general powers of government, and shall for ever remain inviolate.

ARTICLE X.

OF AMENDMENTS.

Any amendment or amendments to this constitution may be proposed in the senate or house of representatives, and if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the secretary of the commonwealth shall cause the same to be published three months before the next election, in at least one newspaper in every county in which a newspaper shall be published; and if in the legislature next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the secretary of the commonwealth shall cause the same again to be published in the manner aforesaid, and such proposed amendment or amendments shall be submitted to the people in such manner and at such time, at least three months after being so agreed to by the two houses, as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the qualified voters of this state voting thereon, such amendment or amendments shall become a part of the constitution; but no amendment or amendments shall be submitted to the people oftener than once in five years: *Provided*, That if more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly.

ARTICLE XI.^(b)

OF PUBLIC DEBTS.

SECT. I. The state may contract debts, to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars, and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

SECT. II. In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

SECT. III. Except the debts above specified, in sections one and two of this article, no debt whatever shall be created by or on behalf of the state.

SECT. IV. To provide for the payment of the present debt, and any additional debt contracted as aforesaid, the legislature shall, at its first session after the adoption of this amendment, create a sinking fund, which shall be sufficient to pay the accruing interest on such debt, and annually to reduce the principal thereof by a sum not less than two hundred and fifty thousand dollars; which sinking fund shall consist of the net annual income of the public works, from time to time owned by the state, or the proceeds of the sale of the same, or any part thereof, and of the

income or proceeds of sale of stocks owned by the state, together with other funds or resources that may be designated by law. The said sinking fund may be increased from time to time, by assigning to it any part of the taxes, or other revenues of the state, not required for the ordinary and current expenses of government, and unless in case of war, invasion or insurrection, no part of the said sinking fund shall be used or applied otherwise than in extinguishment of the public debt, until the amount of such debt is reduced below the sum of five millions of dollars. (a)

SECT. V. The credit of the commonwealth shall not, in any manner or event, be pledged or loaned to any individual, company, corporation or association; nor shall the commonwealth hereafter become a joint owner or stockholder in any company, association or corporation.

SECT. VI. The commonwealth shall not assume the debt, or any part thereof, of any county, city, borough or township; or of any corporation or association; unless such debt shall have been contracted to enable the state to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the state in the discharge of any portion of its present indebtedness.

SECT. VII. The legislature shall not authorize any county, city, borough, township or incorporated district, by virtue of a vote of its citizens, or otherwise, to become a stockholder in any company, association or corporation; or to obtain money for, or loan its credit to, any corporation, association, institution or party. (b)

SECT. VIII. No bill shall be passed by the legislature, containing more than one subject, which shall be clearly expressed in the title, except appropriation bills. (c)

SECT. IX. No bill shall be passed by the legislature granting any powers or privileges, in any case, where the authority to grant such powers or privileges has been, or may hereafter be, conferred upon the courts of this commonwealth. (d)

ARTICLE XII. (e)

OF NEW COUNTIES.

No county shall be divided by a line cutting off over one-tenth of its population (either to form a new county or otherwise), without the express assent of such county, by a vote of the electors thereof; nor shall any new county be established containing less than four hundred square miles.

SCHEDULE

TO THE AMENDMENTS OF 1838.

That no inconvenience may arise from the alterations and amendments in the constitution of this commonwealth, and in order to carry the same into complete operation, it is hereby declared and ordained that

I. All laws of this commonwealth, in force at the time when the said alterations and amendments in the said constitution shall take effect, and not inconsistent therewith, and all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, shall continue as if the said alterations and amendments had not been made.

II. The alterations and amendments in the said constitution shall take effect from the first day of January 1839.

III. The clauses, sections and articles of the said constitution, which remain unaltered, shall continue to be construed and have effect as if the said constitution had not been amended.

IV. The general assembly which shall convene in December 1838, shall continue

(a) See 5 Wr. 447. 18 Leg. Int. 404.

(b) See 11 Wr. 189. An act authorizing the imposition of a tax, for the payment of bounties to volunteers, to fill an impending draft, is not forbidden by this section. 14 Wr. 150.

(c) Second amendment of 1864. It is not necessary that the title of an act should be a complete index of its contents. 8 P. F. Sm. 226. See 4 P. F. Sm. 353. 8 N. Y. 241. 16 N. Y. 58. 19 N. Y. 116. 2 Minn. 330.

15 Ind. 449, 14 Md. 184. 15 Grat. 1. 26 Geo. 182. 14 La. An. 7. 10 Cal. 315. 2 Met. (Ky.) 146, 165, 219. 12 Ind. 641. 13 Ibid. 250. 2 Clarke (Iowa) 280. 5 Ibid. 82. 15 Texas 311. 2 Stockt. 171.

(d) Third amendment of 1864. This does not prohibit the erection or division of townships or school districts by the legislature. 8 P. F. Sm. 471. Or the opening of streets. 4 Ibid. 353. 27 Leg. Int. 5.

(e) Second amendment of 1857.

its session as heretofore, notwithstanding the provisions in the eleventh section of the first article, and shall, at all times, be regarded as the first general assembly under the amended constitution.

V. The governor who shall be elected in October 1838, shall be inaugurated on the third Tuesday in January 1839; to which time the present executive term is hereby extended.

VI. The commissions of the judges of the supreme court, who may be in office on the first day of January next, shall expire in the following manner: The commission which bears the earliest date shall expire on the first day of January, Anno Domini 1842; the commission next dated shall expire on the first day of January, Anno Domini 1845; the commission next dated shall expire on the first day of January, Anno Domini 1848; the commission next dated shall expire on the first day of January, Anno Domini 1851; and the commission last dated shall expire on the first day of January, Anno Domini 1854.

VII. The commissions of the president judges of the several judicial districts, and of the associate law judges of the first judicial district, shall expire as follows: The commissions of one-half of those who shall have held their offices ten years or more at the adoption of the amendments to the constitution, shall expire on the twenty-seventh day of February 1839; the commissions of the other half of those who shall have held their offices ten years or more, at the adoption of the amendments to the constitution, shall expire on the twenty-seventh day of February 1842; the first half to embrace those whose commissions shall bear the oldest date. The commissions of all the remaining judges, who shall not have held their offices for ten years at the adoption (a) of the amendments to the constitution, shall expire on the twenty-seventh day of February next, after the end of ten years from the date of their commissions.

VIII. The recorders of the several mayors' courts, and other criminal courts in this commonwealth, shall be appointed for the same time and in the same manner as the president judges of the several judicial districts; of those now in office, the commission oldest in date shall expire on the twenty-seventh day of February 1841, and the others every two years thereafter, according to their respective dates; those oldest in date expiring first.

IX. The legislature, at its first session under the amended constitution, shall divide the other associate judges of the state into four classes. The commissions of those of the first class shall expire on the twenty-seventh day of February 1840; of those of the second class on the twenty-seventh day of February 1841; of those of the third class on the twenty-seventh day of February 1842; and of those of the fourth class on the twenty-seventh day of February 1843. The said classes, from the first to the fourth, shall be arranged according to the seniority of the commissions of the several judges.

X. Prothonotaries, clerks of the several courts (except the supreme court), recorders of deeds, and registers of wills, shall be first elected, under the amended constitution, at the election of representatives, in the year 1839, in such manner as may be prescribed by law.

XI. The appointing power shall remain as heretofore, and all officers in the appointment of the executive department, shall continue in the exercise of the duties of their respective offices, until the legislature shall pass such laws as may be required by the eighth section of the sixth article of the amended constitution, and until appointments shall be made under such laws, unless their commissions shall be superseded by new appointments, or shall sooner expire by their own limitations, or the said offices shall become vacant by death or resignation; and such laws shall be enacted by the first legislature under the amended constitution.

XII. The first election for aldermen and justices of the peace shall be held in the year 1840, at the time fixed for the election of constables. The legislature, at its first session under the amended constitution, shall provide for the said election, and for subsequent similar elections. The aldermen and justices of the peace now in commission, or who may in the interim be appointed, shall continue to discharge the duties of their respective offices until fifteen days after the day which shall be fixed by law for the issuing of new commissions, at the expiration of which time their commissions shall expire.

THE MAGISTRATE'S VOCABULARY

OF

LAW TERMS AND LAW PHRASES,

TRANSLATED AND EXPLAINED,

FROM THE MOST APPROVED AUTHORITIES.

LAW TERMS AND PHRASES

Such as are most frequently used, not only in courts of justice, and in magistrates' offices, but among men of business, and in common conversation, the precise meaning of which is not so generally understood as is desirable—explained and their meanings given, according to the most modern and approved authorities.

ACCESSORY. An *accessory* is he who is not the chief actor in the offence, nor present at its performance; but is some way concerned therein either *before*, or *after*, the fact committed. An *accessory before the fact*, is defined, by Sir Matthew Hale, to be, one who being absent at the time of the crime committed, doth yet procure, counsel or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. An *accessory after the fact*, may be when a person, knowing a felony to have been committed, receives, relieves, comforts, or assists, the felon. Therefore to make an accessory *ex post facto* [after the fact], it is in the first place required that he knows of the felony committed; in the next place he must receive, relieve, comfort, or assist him—and generally any assistance whatever, given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessory. 1 Hale P. C. 616, 618. 2 Hawk. P. C. c. 29, § 32. 4 Bl. Com. 35, 36, 37 Whart. Law Dict. 11.

ACCOMPLICE, one of many equally concerned, in a felony; generally applied to those who are admitted to give evidence against their fellow criminals. Whart. Law Dict. 14.

ACQUITTAL, a release or discharge; it most commonly signifies a deliverance and setting free of a person from the

suspicion or guilt of an offence, as for instance, he that on a trial is discharged of a felony is said to be *acquietatus de feloniam*; and if he be drawn in question again for the same crime he may plead *autrefois acquit*, [before acquitted], as his life shall not be twice put in danger for the same offence. 2 Inst. 385. Whart. Law Dict. 18.

ADJOURNMENT. The same with the French word *adjournment*, and signifies a putting off until another day, or to another place. Cowell. Blount. An *adjournment of Parliament* [of congress or the general assembly] is no more than a continuance of the session from one time to another. 1 Bl. Com. 185. Whart. Law Dict. 29.

AFFIDAVIT. An *affidavit* is an oath in writing, sworn before some judge, or officer of a court, or other person, who hath authority to administer such oath, to evince the truth of certain facts therein contained. 3 Bl. Com. 304. 1 Lill. Abr. 44. Whart. Law Dict. 32.

AFFRAY. An *affray* is the fighting of two or more persons in some public place, to the terror of his majesty's subjects, [or, the people of this Commonwealth]; for, if the fighting be in private, it is no *affray*, but an *assault*. 1 Hawk. P. C. c. 68. 4 Bl. Com. 145. Whart. Law Dict. 84; and there must be a stroke given, or offered, or a weapon drawn, otherwise it is no *affray*. 3 Inst. 158.

AGE is particularly used in law, for

those special times which enable persons of both sexes to do certain acts, which before, through want of years and judgment, they are prohibited to do. As for example, a male at *twelve* years old may take the oath of allegiance; at *fourteen*, is at years of discretion, and therefore may consent or disagree to marriage, and may choose his guardian; at *seventeen*, may be an executor; and at *twenty-one*, is at his own disposal, and may alien his lands, goods, and chattels. A female, also, at *seven* years of age, may be betrothed or given in marriage, at *nine*, is entitled to dower; at *twelve*, is at years of maturity, and therefore, may consent or disagree to marriage; at *fourteen*, is at years of legal discretion, and may choose a guardian; at *seventeen*, may be an executrix; and at *twenty-one*, may dispose of herself and her lands. So that full age, in male or female, is twenty-one years; which age is completed on the day preceding the anniversary of a person's birth; who, till that time, is an infant, and so styled in law. Co. Litt. 78, b. 1 Bl. Com. 462. Whart. Law Dict. 34.

AGREEMENT is the consent of two or more persons, concerning the one in parting with, and the other receiving some property, right, or benefit. 1 Bac. Abr. Whart. Law Dict. 37.

ALDERMAN, see *Ealderman*.

ALIMONY is that allowance the law allows to the wife after a divorce *a mensa et thoro*, [from bed and board], and is made to the woman for her support out of her husband's estate; being settled at the discretion of the ecclesiastical [or other] judge, on consideration of all the circumstances of the case. 1 Bl. Com. 441. Whart. Law Dict. 39.

AMBASSADOR. An *ambassador* is a person sent by one sovereign prince to another, to transact, in the place of his sovereign, such matters as relate to both states.

Ambassadors are either *ordinary*, or *extraordinary*; the ordinary ambassadors are those who reside in the place whither sent; and, as the time of their return is indefinite, so is their business uncertain; arising from emergent occasions: and commonly, the protection and affairs of the merchants is their greatest care. The *extraordinary ambassadors*, are made *pro tempore*, and employed upon some particular great affairs, as condolences, congratulations, or for overtures of

marriage, or the like. 4 Inst. 153. Molloy 144. Whart. Law Dict. 42.

AMICUS CURIÆ. If a judge is doubtful, or mistaken in matter of law, a stander-by may inform the court, as *amicus curiæ*, [a friend of the court.] 2 Co. Litt. 178. Whart. Law Dict. 45.

ANNO DOMINI, [the year of our Lord]; the computation of time from the incarnation of Jesus Christ, which is generally inserted in the dates of all public writings. Jacob. Whart. Law Dict. 4.

ARBITRATION is where the parties injuring and injured submit all matters in dispute concerning any personal chattels, or personal wrong, to the judgment of two or more *arbitrators*, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as *umpire*, to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. 3 Bl. Com. 16. See Whart. Law Dict. 5.

ARBITRATOR, is a person indifferently chosen by third persons, between whom there are any matters in dispute, to determine all such matters in controversy, according to his own judgment, whether they relate to matter of law or fact. Termes de la Ley 54. Whart. Law Dict. 60.

ARRAIGN, to call a man to answer in form of law. To arraign a prisoner, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in an indictment. 4 Bl. Com. 322. Whart. Law Dict. 64. Arraignment is *necessary* only in capital cases. The trial may go on in larceny without arraignment. 5 S. & R. 316. In all cases of misdemeanor, a defendant may appear and plead by attorney. Ibid.

ARRAY, an old French word, signifying the ranking or setting forth of a jury of men impannelled on a cause. 18 H. 6, c. 14. And when we say to *array* a panel, that is, to set forth the men impannelled one by another. F. N. B. 157. Whart. Law Dict. 64. To *challenge* the *array* of the panel, is at once to except against all persons *arrayed* or impannelled, in respect of partiality, or some default in the sheriff, [or county commissioners]. Co. Lit. 156, a.

ARREST, a restraint of a man's person, obliging him to be obedient to the

law; and it is defined to be the execution of the command of some court of record, or officer of justice. An *arrest* is the beginning of imprisonment where a man is first taken and restrained of his liberty by power of a lawful warrant. 2 Shep. Abr. 648. Wood's Inst. 575. And *arrests* are either in *civil* or *criminal* cases; and there is this difference between the two, that none shall be arrested for debt, trespass, detainee or other cause of action, but by virtue of a precept or commandment out of some court: but for treason, felony or breaking of the peace, every man hath authority to arrest without warrant or precept. Termes de la Ley 52. Whart. Law Dict. 65.

ARREST OF JUDGMENT. To move an *arrest of judgment*, is to show cause why judgment should not be stayed, notwithstanding a verdict given. 3 Inst. 210. Whart. Law Dict. 65.

ASSETS, signifies goods and chattels of a saleable nature, in the hands of the executor or administrator, sufficient, or enough, to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. 2 Bl. Com. 511. Whart. Law Dict. 67.

ASSIGNEE, one that is assigned or appointed by another, to do any act, or perform any business. It also signifies one that taketh any right, title or interest, in things, by an assignment from an assignor [the person who assigns]. Dyer 6. Whart. Law Dict. 69.

ASSUMPSIT is a voluntary promise, made by word, by which a man assumes, or takes upon him to perform, or pay any thing to another: this word also comprehends any verbal promise made upon consideration. Termes de la Ley 63. An *action of assumpsit* is given to a party injured by the breach, or non-performance of a contract legally entered into; and it is founded on a contract either express or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 1 Bac. Abr. Whart. Law Dict. 71.

ATTORNEY AT LAW is a person duly admitted in the courts, and who is appointed by another person, usually denominated his *client*, to prosecute or defend some suit on his behalf; and he is considered as a public officer, belonging to the courts of justice in which he may be admitted. 3 Bl. Com. 25. Whart. Law Dict. 73.

BACKING OF WARRANTS is the signing of an authority on the back thereof, by a magistrate of a different county from that mentioned in the body thereof, empowering the officer to execute the same in such other county. 4 Bl. Com. 291. Whart. Law Dict. 80.

BAIL is used, in our common law, for the freeing, or setting at liberty, of one arrested or imprisoned upon action, either civil or criminal, on surety taken for his appearance at a day and place certain. Bract. lib. 8. In civil cases, there is both *common* and *special* bail: *common* bail is in actions of small concern; and it is called *common*, because any sureties, in that case, are taken. Whereas, in causes of greater weight, as actions upon bonds, or specialty, or other matters, where the debt amounts to £10, *special* bail, or surety, may be taken. 4 Inst. 179. Whart. Law Dict. 80.

BAILMENT is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee [the person to whom the goods are delivered]. As if cloth be delivered, or (in our legal dialect) *bailed* to a tailor, to make a suit of clothes, he has it upon an implied contract, to render it again when made, and that in a workman-like manner. 2 Bl. Com. 451. Whart. Law Dict. 82.

BARON AND FEME are husband and wife. Co. Litt. 112. 1 Bl. Com. 441. Whart. Law Dict. 87.

BARRISTER, a counsellor learned in the law; admitted to plead at the bar, and there to take upon him the protection and defence of clients. Fortescue. Whart. Law Dict. 88.

BATTERY is an injury done to another in a violent manner, as by striking or beating of a man, pushing, jolting, &c. And it is also defined by our law to be a trespass committed by one man upon another, *vi et armis, et contra pacem, &c.* Termes de la Ley 85. Whart. Law Dict. 89.

BIGAMY signifies a double marriage, or marriage of two wives, one after another; and not the having of two together, more properly called polygamy. 3 Inst. 88. 4 Bl. Com. 163. Whart. Law Dict. 93.

BILL, *single* or *penal*, is a writing under seal, wherein one man is bound to another, to pay a sum of money on a day

that is future, or presently on demand, according to the agreement of the parties at the time it is entered into, and the dealings between them; and is divided into two sorts, viz. a bill *single*, without a penalty, and a bill *penal*, under a penalty. Rol. Abr. 148.

BOND is a deed or obligatory instrument, in writing, whereby one doth bind himself, his heirs, executors and administrators, to another, to pay a sum of money, or to do some other act, as to make a release, surrender an estate, for quiet enjoyment, to stand to an award, save harmless, perform a will, or the like. It contains an obligation with a penalty, and a condition which expressly mentions what money is to be paid, or other things to be performed, and the limited time for the performance thereof, for which the obligation is peremptorily binding. 2 Bl. Com. 339. Whart. Law Dict. 103.

BRIBERY is where a person, in a judicial place, takes any fee, gift, reward or brokerage [brokerage], for doing his office other than that which is lawful. 3 Inst. 145. But taken largely it signifies the receiving, or offering, any undue reward to, or by, any person concerned in the administration of public justice, whether judge, officer or the like, to act contrary to his duty; and sometimes it signifies the taking, or giving, a reward for a public offence. 3 Inst. 9. Whart. Law Dict. 109.

BROKERS are those that contrive, make and conclude bargains and contracts, between merchants and tradesmen, in matters of money and merchandise for which they have a fee or reward. Cowell. Blount. Whart. Law Dict. 110.

CAPTION. When any commission at law, or in equity, is executed, the commissioners subscribe their names to a certificate, testifying when, and where, the commission was executed; and this is called a *caption*. Also, when a man is arrested, the act of taking him, is termed a *caption*. There is, also, the *caption* of an indictment, which is the setting forth of the style of the court before which the jurors made their presentment. Jacob. Whart. Law Dict. 121.

CASH (sale for). In Pennsylvania, if one sell goods for cash, and the vendee [the purchaser] take them away, without payment of the money, the vendor [the seller] may pursue the party and retake

them; and he would be justified in doing so by force. 1 Yeates 527.

CAVEAT EMPTOR is a maxim which enters into every purchase, where the contrary is not stipulated, and equity cannot relieve against it, any more than it can against the terms of a bargain. 3 Penn. Rep. 447. See Whart. Law Dict. 126.

CLERGY, BENEFIT OF. By stat. 8 Edw. 1, c. 8, it is enacted, that for the scarcity of clergy in the realm of England to be disposed of in religious houses, or for priests, deacons and clerks of parishes, there should be a prerogative allowed to the clergy; that if any man, that could read as a clerk, were to be condemned to death, the bishop of the diocese might, if he would, claim him as a clerk; and he was to see him tried in the face of the court, if he could read or not; if the prisoner could read, then he was to be delivered over to the bishop, who would dispose of him in some place of the clergy, as he should think meet; but if either the bishop would not *demand him*, or the prisoner *could not read*, then he was to be put to death. 2 Hale's Pl. Cr. 377. Whart. Law Dict. 91.

COHABITATION. For civil purposes reputation and cohabitation are sufficient evidence of marriage. 1 Penn. Rep. 450.

COMMISSION. The commission of a justice, or a judge, is conclusive evidence of his appointment. 1 Peters' C. C. 188.

COMMITMENT is the sending of a person to prison by warrant, or order, who hath been guilty of any crime. 4 Bl. Com. 296. Whart. Law Dict. 160.

COMMON LAW. The common law is grounded upon the general customs of the realm, and includes, in it, the law of nature, the law of God, and the principles and maxims of the law; it is founded upon reason; and is said to be the perfection of reason acquired by long study, observation and experience, and refined by learned men in all ages. Co. Litt. 97, 142. 1 Bl. Com. 68, et seq. Whart. Law Dict. 161.

COMPETENCY (Witnesses). The general rule is that all are competent as witnesses who are both *able* and *willing* to declare the truth. Consequently, the circumstances, which wholly disqualify a person as a witness, are, 1st, the want of religious belief, such as renders the party incapable of the obligation of an oath: 2d,

the infamy of his character: 3d, certain legal relations between the party and witness. 2 Stark. Ev. 892.

COMPOUNDING FELONY, or *theft bote*, is where the party robbed, not only *knows* the felon, but also *takes* his goods again, or other amends, upon agreement not to prosecute. 1 Hawk. P. C. c. 59, § 5. Whart. Law Dict. 163.

CONSPIRACY is an agreement of two or more persons, falsely to indict one, or to procure him to be indicted, for felony, riot, or other misdemeanor; who, after acquittal, shall have a writ of conspiracy. *Termes de la Ley* 173. Whart. Law Dict. 171.

CONTINUANCE. A party who neglects up to the day of hearing by a justice to take out a subpoena, or resort to the proper legal steps, to obtain the attendance of his witnesses, is not legally entitled to a continuance. 1 Ash. R. 221.

CONVERSION is where a person has found another's goods and refuses to deliver them, on demand, but converts them to his own use. 3 Bl. Com. 152. Whart. Law Dict. 181.

COURT. A justice of the peace must, necessarily, have his court, or place of administering justice, at which his duties ought to be performed. 1 Penn. R. 15.

COURT OF ADMIRALTY is a court erected for deciding maritime causes. It hath jurisdiction only to determine causes arising wholly upon the sea out of the jurisdiction of a county. 4 Inst. 260. Whart. Law Dict. 25.

CREDIT. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust, for there is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust, and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority. 1 Bl. Com. 430.

CRIME is a positive breach, or disregard of some existing public law, and generally means such offences as amount to a felony. 4 Bl. Com. 5. Whart. Law Dict. 196.

CUSTOM AND USAGE. To make a custom, or usage of trade, obligatory, as a law of that trade, it must be certain,

uniform, reasonable and sufficiently ancient, to be generally known.

DAMAGE signifies generally any hurt or hindrance that a man receives in his estate; but in a particular sense, it is applied to what the jurors are to inquire of and bring in when any action passeth for the plaintiff. Co. Litt. 257. Whart. Law Dict. 205.

Damages are a species of property acquired and lost by suit and judgment at law, and are given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for battery, for imprisonment, for slander, for trespass. 2 Bl. Com. 498.

DATE of a deed is the description of the time; viz. the day, month, year of our Lord, year of the reign in which the deed was made. 1 Inst. 6. Whart. Law Dict. 208.

DAY, is a certain space of time containing twenty-four hours: the natural day consists of twenty-four hours, and contains the solar day and the night; and the artificial day begins from the rising of the sun, and ends when it sets. Co. Litt. 135. Whart. Law Dict. 208.

DEBT, in the usual acceptance of the word, is a sum of money due from one person to another. But in the legal sense, it is taken to be an action which lieth where a man oweth another a certain sum of money by obligation or bargain, for a thing sold, or by contract, &c., and the debtor will not pay the debt at the day agreed. Selw. N. P. 484. Whart. Law Dict. 211.

DEDIMUS POTESTATEM, is a writ issued out of the court of chancery [or other court], to commissioners, authorizing them to take an answer, to examine witnesses in a cause, to levy a fine in the Common Pleas, &c. Also, when any justice intends to act under any commission of the peace, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons, therein named, to administer the usual oaths to him, which done, he is at liberty to act. 1 Bl. Com. 351. Whart. Law Dict. 215.

DEED, is an instrument in writing, on parchment or paper, and *under seal*, containing some conveyance, contract, bargain or agreement between the parties thereto; and it consists of three principal

points, writing, sealing and delivering. Co. Litt. 171. 2 Bl. Com. 295. Whart. Law Dict. 215.

DEFAMATION is the offence of speaking slanderous words of another. *Termes de la Ley* 233. Whart. Law Dict. 218.

DEFAULT is commonly taken for non-appearance in court at a day assigned, though it extends to any omission of that which we ought to do. Co. Litt. 259. Whart. Law Dict. 219.

DEFENDANT is the party that is sued in a personal action; as *tenant* is he that is sued in an action real. Cowell. Blount. Whart. Law Dict. 220.

DEMAND, signifies a calling upon a man for anything due. 8 Co. 153. Whart. Law Dict. 223.

DEPOSITION is the testimony of a witness, otherwise called a deponent, put down in writing, by way of answer to interrogatories [or questions asked], exhibited for that purpose in courts of equity; and the copies of such depositions regularly taken and published, are read as evidence at the hearing of the cause. Pract. Attorn. edit. 1, p. 234. See Whart. Law Dict. 227.

DILATORY PLEAS are such as are put merely for delay; as *coverture*, *misnomer* and the like. 3 Bl. Com. 301. Whart. Law Dict. 232.

DISCHARGE on writs, and process, &c., is where a man confined by some legal writ or authority, doth that which by law he is required to do; whereupon he is released or *discharged* from the matter for which he was confined. 1 Lill. Abr. 470.

DISTRESS, in the most general sense, is anything which is taken and distrained for rent behind or in arrear. 2 Bl. Com. 42. Selw. Nisi Prius 612. Whart. Law Dict. 238.

DIVORCE is a separation of a man and a woman who have been, *de facto*, married together, made by law, and is of two kinds; the one total, the other partial; the one a *vinculo matrimonii*, the other, merely a *mensa et thoro*. 1 Bl. Com. 439. Whart. Law Dict. 241.

DOCKET, or **DOGGET**, a record in the courts, containing an entry of judgment: thus, when rolls of judgment are brought in they are docketed, i. e. entered on the docket of that term. West Symb. par. 2, § 106. Whart. Law Dict. 241.

DONOR and **DONEE**. *Donor* is he who gives lands or tenements to another in tail, &c. And the person to whom given is the donee. *Termes de la Ley* 287. Whart. Law Dict. 244.

DOWER is the portion which a widow hath of the lands of her husband, after his decease, for the sustenance of herself, and the education of her children. 1 Inst. 30. Whart. Law Dict. 247.

DUCES TECUM is a writ out of chancery, commanding a person to appear at a certain day in court, and to bring with him some writings, evidences, or other things, to be inspected and examined in court. Reg. Orig. Whart. Law Dict. 252.

DUPLICATE signifies a copy or transcript of any deed, writing, or account St. 4 Car. c. 10. Whart. Law Dict. 253

EALDERMAN was a man chosen to a place of superiority on account of his age and experience; as the *Senators* were among the *Romans*: and hence, the word *Alderman*, in corporations; and the word *earl*, which is only a contraction of *ealderman*. 1 Bl. Com. 397. Whart. Law Dict. 255.

EAVES-DROPPERS are such as listen under walls, or windows, or the *eaves* of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales. 4 Bl. Com. 168. Whart. Law Dict. 256.

ESCROW is where the delivery of a deed is made to a third person, to hold till some conditions be performed, on the part of the grantee [the person to whom the sale has been made]; in which case it is not delivered as a *deed*, but as an *escrow*; that is, as a scroll or writing which is not to take effect as a *deed*, till the conditions be performed; and then it is a *deed* to all intents and purposes. Co. Litt. 36. 2 Bl. Com. 807. Whart. Law Dict. 276.

EXACTION, a wrong done by an officer taking a reward, or fee, for that which the law does not allow. And the difference between *exaction* and *extortion* is this: *extortion* is where an officer extorts more than his due, where something is due to him: and *exaction* is where he wrests a fee or reward, where none is due: for which the offender is to be fined and imprisoned, and render to the party twice as much as the money he so takes. Co. Litt. 368. Whart. Law Dict. 279.

EXECUTOR DE SON TORT, or *executor of his own wrong*, is he that takes upon him the office of an executor by intrusion, not being so constituted by the testator; or, for want thereof, appointed by the ordinary [register] to administer. Dyer 166. Selw. Nisi Prius 706. Whart. Law Dict. 287.

EX OFFICIO, an act done in execution of the power which a person has by virtue of an office, to do in certain cases, and without being applied to; thus a justice of the peace may not only grant surety of the peace upon the complaint or request of any person; but he may demand, and take it *ex officio*, at discretion, &c. Dalt. 270. Whart. Law Dict. 289.

EX PARTE, party of the one part; as a commission *ex parte*, in chancery; which is a commission taken out and executed by one side or party only, on the other party's neglecting or refusing to join. Cowell. Blount. Whart. Law Dict. 290.

EX POST FACTO is a term used in the law, signifying something *done after* the time when it *should have been done*: thus, an act done, or estate granted, may be made good by matter *ex post facto*, that was not so at first, by election, &c. 5 Co. 22.

EX POST FACTO LAWS are such as are made to operate on facts committed before the making thereof, by creating or aggravating crime, increasing the punishment, or changing the rules of evidence for the purpose of conviction. 3 Dall. 390. The phrase, as used in the constitution, only applies to penal and criminal laws which inflict forfeitures or punishments, not to civil proceedings. 8 Pet. 110.

FALSE IMPRISONMENT signifies a violent trespass, committed against a person by arresting and imprisoning him without just cause, contrary to law; or where a man is unlawfully detained in prison, without legal process; or kept longer in hold than he ought; or if he be *any way* unlawfully detained. Co. Litt. 124. Selw. Nisi Prius 814. Whart. Law Dict. 295.

FEE SIMPLE is an estate of inheritance, whereby a person is seised of lands, tenements or hereditaments, to hold to him and his heirs for ever, generally, absolutely and simply. 2 Bl. Com. 104. Whart. Law Dict. 297.

FELO DE SE. When a person with

deliberation and direct purpose, kills himself by hanging, drowning, shooting, stabbing, &c., this is *felo de se*, if he be of the age of discretion, i. e. fourteen, and *compos mentis*, [of sound mind]. 3 Inst. 44. Dalt. ch. 145. Whart. Law Dict. 300.

FELONY, in the general acceptation of our English law, comprises every species of crime which occasioned, at common law, the forfeiture of lands or goods. This most frequently happens in those crimes for which a capital punishment either is, or was, liable to be inflicted; for those felonies which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death in all lay, or unlearned offenders; though now, by the statute-law, that punishment is, for the first offence, universally remitted. Treason itself, says Sir Edward Coke, was anciently comprised under the name of *felony*. All treasons, therefore, strictly speaking, are *felonies*; though all *felonies* are not *treason*; and to this also we may add, not only all offences, now capital, are, in some degree or other, *felony*; but that this is likewise the case with some other offences which are not punished with death, as suicide, where the party is already dead; homicide, by chance-medley, or in self-defence; and petit larceny or pilfering; all which are, strictly speaking, *felonies*; as they subject the committers of them to forfeitures. So that, upon the whole, the only adequate definition of felony seems to be, that which is before laid down, viz.: an offence which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital, or other punishment may be superadded according to the degrees of guilt. 3 Inst. 15. 4 Bl. Com. 94. Whart. Law Dict. 300.

FEME COVERTS [married women], and infants [under twenty-one years of age], ought to find bail, and not be bound themselves.

A feme covert cannot contract and be sued as a feme sole [single woman], even though she be living apart from her husband, having a separate maintenance secured to her by deed. 7 Term Rep. 545.

Who are deemed *feme sole* traders in Pennsylvania, see Purd. 474.

FORCIBLE ENTRY AND DETAINER. The first is a violent actual entry into houses or lands; and *forcible detainer* is a withholding, by violence,

and with strong hand, of the possession of land, &c., whereby, he who hath a right of entry is barred or hindered. Lamb. 135. Crompt. 75. Keilw. 22. Whart. Law Dict. 311. See "Forcible Entry and Detainer."

FORGERY signifies where a person fraudulently makes, and publishes, false writings to the prejudice of another man's right; and *forgery* is either at *common law* or *by statute*. *Forgery by the common law*, extends to false and fraudulent making or altering of a deed or writing, whether it be matter of record, or any other writing, deed or will. 3 Inst. 169. 1 Rol. Abr. 65. And Blackstone defines it to be "the fraudulent making or alteration of a writing to the prejudice of another man's right." 4 Com. 245. Whart. Law Dict. 314.

FRAUD is defined to be a *deceit* in grants and conveyances of lands and bargains, and sales of goods, &c., to the damage of another person. Bacon's Abr. 3. Whart. Law Dict. 317.

FUGITIVE FROM JUSTICE. One who steals goods in another state and brings them with him into Pennsylvania cannot be indicted here for the felony. He is to be considered and treated as a fugitive from justice. 5 Binn. 617.

FULL AGE. In *law*, the *full age* of males and females is twenty-one years. 1 Bl. Com. 462.

GAOLER. A gaoler is the servant of the sheriff, and the master, or governor of a prison; and, as such, is considered as an officer relating to the administration of justice. 4 Rol. Abr. 76. 1 Bl. Com. 345. Whart. Law Dict. 326.

HOMICIDE, is the destroying the life of any human creature; it is of three kinds, *viz.*, *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second very little; but the third is the highest against the law of nature that man is capable of committing. First, *justifiable homicide*, is of divers kinds. 1. Such as is owing to some unavoidable necessity, without any will, intention or desire, and without any inadvertence or negligence in the party killing; and, therefore, without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life, by the laws and verdict of his country. Again, in some

cases, *homicide* is justifiable, rather by the *permission*, than by the *absolute command*, of the law, either for the *advancement* of public justice, which, without such indemnification, would never be carried on with proper vigor; or in such instances where it is committed for the *prevention* of some atrocious crime which cannot otherwise be avoided. *Homicides* committed for the advancement of public justice are, 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted, and in the endeavor to take him kills him. 3. In case of a riot, or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law and by the riot act. 1 Geo. 1, c. 5, §4. Where the prisoners, in a gaol, assault the gaoler, or officer, and he, in his defence, kills any of them, it is justifiable for the sake of preventing an escape. 5. If trespassers in forests, parks, chases or warrens, will not surrender themselves to the keepers, they may be slain by virtue of the Stat. 21 Ed. 1st, *de malefactoribus in pacis*, and 3 & 4 W. & M. c. 10. 6. If the champions, in a trial by battle, killed either of them the other, such *homicide* was *justifiable*, and was imputed to the just judgment of God, who was thereby presumed to have decided in favor of the truth. In the next place, such homicide, as is committed for the *prevention* of any forcible and atrocious crime, is *justifiable* by the law of nature, and also by the law of England, [and of Pennsylvania.] If any person attempts a robbery or murder of another, or attempts to break open a house, *in the night time*, which extends also to an attempt to burn it, and shall be killed in such attempt, the slayer shall be acquitted and discharged, &c.

Secondly, *excusable homicide* is of two sorts, either *per infortunium*, by misadventure, or *se defendendo*, upon a principle of self-preservation. 1. *Homicide per infortunium*, or *misadventure*, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by, or where a person qualified to keep a gun is shooting at a mark and undesignedly kills a man, for the act is lawful, and the effect is merely accidental,

&c. 2. *Homicide in self-defence*, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English [and Pennsylvania] law. This species of self-defence must be distinguished from that just now mentioned as calculated to hinder the perpetration of a capital crime, which is not only a matter of *excuse*, but of *justification*. But the self-defence which we are now speaking of is that whereby a man may protect himself from an assault, or the like, in the case of sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*. 8. *Felonious homicide* is an act of a very different nature from the former, being the killing of a human creature, of any age, or sex, without *justification* or *excuse*. This may be done either by killing one's self, or another man. Self-murder, the law of England hath ranked among the highest crimes, making it a peculiar species of felony; a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder. A *felo de se*, therefore, is he, who deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death; as, if attempting to kill another, he runs upon his antagonist's sword; or shooting at another, the gun bursts and he kills himself. The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt which divide the offence into *manslaughter* and *murder*.

The difference between which, consists in this, that *manslaughter* arises from the sudden heat of the passions, *murder* from the wickedness of the heart. *Manslaughter* is therefore thus defined, the unlawful killing of another without malice, either express or implied; which may be either *voluntary*, upon a sudden heat, or *involuntary*, but in the commission of some unlawful act. As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight and one of them kills the other, this is *manslaughter*; and so it is if they, upon such an occasion, go out and fight in a field, for this is one continued act of passion. So also, if a man be greatly provoked, as by pulling his nose, or other great indignity, and imme-

diately kills the aggressor, though this is not *excusable*, *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it *murder*, for there is no previous malice, but it is *manslaughter*. But in this, and in every other case of *homicide*, upon provocation, if there be a sufficient cooling time, for passion to subside and reason to interpose, and the person, so provoked, afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to *murder*, &c. The second branch, or *involuntary manslaughter*, differs also from *homicide excusable* by *misadventure*, in this; that *misadventure* always happens in consequence of a lawful act; but this species of *manslaughter* in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is *manslaughter*, because the original act was unlawful; but it is not *murder*, for the one had no intent to do the other any personal mischief, &c. 1 Hale, P. C. 494, 5, 6. 1 Hawk. P. C. c. 28, c. 65. Post. 296. 8 Inst. 56. 1 Bl. Com. 176, *et seq.* Whart. Law Dict. 353.

HOUSEHOLDER, the occupier of a house. Cowell. Blount. Whart. Law Dict. 356.

IGNORAMUS, the return of the grand jury on a bill of indictment when they reject the evidence as too weak or defective to put the party on trial. 8 Inst. 30. Whart. Law Dict. 364.

IMPANNEL signifies the writing and entering into a parchment schedule, by the sheriff, the names of a jury summoned to appear for the performance of such public service as juries are employed in. Cowell. Blount. Whart. Law Dict. 365.

IMPEACHMENT is the accusation and prosecution of a person in parliament [or the General Assembly] for treason or other crime and misdemeanor. 4 Bl. Com. 259. Whart. Law Dict. 366.

IMPRISONMENT is the restraint of a man's liberty, under the custody of another, and extends not only to a jail, but to a house, stocks, or where a man is held in the street, &c.; for, in all these cases, the party, so restrained, is said to be a *prisoner* so long as he hath not his liberty freely to go about his business as at other times. Co. Litt. 253. Whart. Law Dict. 368.

INCEST is the carnal knowledge of a person within the Levitical degree of kindred. 4 Bl. Com. 64. Whart. Law Dict. 369.

INDICTED. When the grand jury have found a true bill against any one accused by bill preferred to them at the king's suit, for some indictable offence, he is said to be *indicted* thereof. Cowell. Whart. Law Dict. 370.

INDICTMENT is a bill of complaint, or accusation, drawn up in form of law, and exhibited for some offence, criminal or penal, to a grand jury; upon whose oaths it may be found to be true. Lamb. lib. 4, cap. 5. Whart. Law Dict. 370.

INFORMER, a person who informs against, or presents in the king's courts [courts of the Commonwealth], for an offence against any law or penal statute. 2 Bl. Com. 437. Whart. Law Dict. 376.

INVENTORY is a list or schedule, containing a true description of all the goods and chattels of a deceased person at the time of his death, with their value appraised by indifferent persons. Termes de la Ley 428. Whart. Law Dict. 396.

LAND, legally comprehends all things of a permanent, substantial nature, being a word of a very extensive signification; indeed, Sir Edward Coke says, "it comprehendeth any ground, soil or earth whatsoever, as arable meadows, pastures, woods, moors, waters, marshes, fuzes and heath. It legally includeth also all castles, houses, and other buildings; for they consist (saith he), of two things, land which is the foundation and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. 1 Inst. 4. 2 Bl. Com. 16, 17. Whart. Law Dict. 420.

LANDLORD is he of whom lands or tenements are holden. Co. Litt. 57, 205. Whart. Law Dict. 421.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus, we say, the *laws* of motion, of gravitation, of optics, or mechanics, as well as the *laws* of nature and of nations. And it is that rule of action which is prescribed by some *superior*, and which the *inferior* is bound to obey. *Municipal* or *civil law*, is the rule by which particular districts, communities or

nations, are governed; being thus defined by Justinian, "*Jus civile est quod quique sibi populus constituit.*" ["The civil law is that which every nation has established for its own government."] *Municipal law*, thus understood, is properly defined to be, a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong. 1 Bl. Com. 38. Inst. 11. 1 Bl. Com. 43.

The *Municipal law* of England, or that rule of civil conduct prescribed to the inhabitants of this kingdom, may, with sufficient propriety, says Sir William Blackstone, be divided into two kinds:—the *lex non scripta*, the unwritten or common law, and the *lex scripta*, the written or statute law. The *lex non scripta*, or unwritten law, includes not only *general customs*, the common law, properly so called, but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are, by custom, observed only in certain courts and jurisdictions. 1 Bl. Com. 63. The *leges scriptae*, or the written laws of the kingdom, consist of statutes, acts or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in parliament assembled. Ibid. 84. Hale's Com. Law, c. 1, 2.

LEASE. A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years or at will, but always for a *less* time than the lessor hath in the premises; for if it be for the *whole* interest it is more properly an assignment than a *lease*. 2 Bl. Com. 317. Whart. Law Dict. 428.

LIBEL signifies literally a little book. A *libel* is defined to be a malicious defamation of any person, especially a magistrate, expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt or ridicule. 2 Hale 192. Selw. N. P. 931. Whart. Law Dict. 440.

LIEN is a specific charge on real or personal property. A *real lien* is a judgment, statute, recognisance, or an original claim against an heir, which binds the land; a *personal lien* is a bond, covenant or contract. Termes de la Ley 416. There are two species of *liens* known to the

namely *particular liens* and *general liens*. *Particular liens* are where persons claim a right to retain goods in respect of labor or money expended on such goods. *General liens* are claimed in respect of a general balance of account, and are founded in custom only. Selw. Nisi Prius 737, n., 1210. Whart Law Dict. 443. In Pennsylvania there are a variety of *liens* given by different acts of Assembly, to particular descriptions of persons and for special purposes.

MALICE, when spoken of in relation to the crime of murder, is not to be understood in so restrained a sense as to signify only a spite or malevolence to the deceased person in particular, but more largely, an evil design in general, the dictate of a wicked, depraved and malignant heart. It is of two kinds: *express* or *implied*. *Malice express* is when one, with a sedate, deliberate mind, doth kill another; which formed design is evidenced by *external* circumstances, discovering that *inward intention*, as lying in wait, antecedent menaces, former grudges and concerted schemes to do him some bodily harm. *Malice implied* is various: as when one voluntarily kills another, without any provocation; or when one wilfully poisons another; in such like cases the law implies *malice*, though no particular enmity can be proved. 4 Bl. Com. 198. Whart. Law Dict. 466. See "Homicide."

MANSLAUGHTER is such a killing of a man as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. There is no difference between *murder* and *manslaughter*, but that *murder* is upon malice aforethought, and *manslaughter* upon a sudden occasion. As if two meet together, and, striving for the wall, the one kills the other, this is *manslaughter* and felony. And so it is if they had, upon that sudden occasion, gone into the field and fought, and the one had killed the other, this had been but *manslaughter* and no *murder*; because all that followed was but a *continuance of the first* sudden occasion, and *the blood was never cooled* till the blow was given. 3 Inst. 55. Whart. Law Dict. 469. Vide "Homicide."

MESNE PROCESS is sometimes put in contradistinction to *original* process, and, in that sense, it signifies an intermediate process, which issues, pending the

suit, upon some collateral interlocutory matter, as to summon juries, witnesses, and the like; sometimes it is put in contradistinction to *final process* or process of *execution*; and then it signifies all such process as intervenes between the beginning and end of a suit. 3 Bl. Com. 279. Whart. Law Dict. 487.

MESSUAGE is, properly, a dwelling-house with some adjacent land assigned to the use thereof. Plowd. 169, 170. Co. Litt. 5, a. Whart. Law Dict. 487.

MISDEMEANOR. This word, in the laws of England, signifies a crime. Every crime is a *misdeemeanor*, yet the law hath made a distinction between crimes of a *higher* and a *lower* nature; the latter being denominated *misdeemeanors*, the former, felonies, &c. A crime, or *misdeemeanor*, is, therefore, an act committed, or omitted, in violation of a public law, either forbidding, or commanding it. This general definition comprehends both crimes and *misdeemeanors*, which, properly speaking, are mere synonymous terms, though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions, of less consequence, are comprised under the gentle name of *misdeemeanors*. 4 Bl. Com. 3, 5. Whart. Law Dict. 491.

MISNOMER is the using one name for another—a *misnaming*. 11 Co. 20, 21. Ld. Raym. 304. Hob. 125. Whart. Law Dict. 492.

MITTIMUS is a precept in writing, under the hand and seal of a justice of the peace, directed to the gaoler, for the receiving and safe keeping of an offender until he is delivered by law. 2 Inst. 590. Whart. Law Dict. 495.

MOLITER MANUS IMPOSUIT, several justifications in trespass, i. e., actions of assault, are called by this name, from the words "gently laid his hands upon him" used in the plea; as where the defendant justifies an assault by showing that the plaintiff was unlawfully in the house of the defendant making a disturbance, and being requested to cease such disturbance, and depart, he refused, and continued therein, making such disturbance; he, the defendant, "gently laid his hands" on the plaintiff and removed him out of the house. So, in various other instances, as for separating two persons fighting, in order to preserve the peace;

so in the legal exercise of an office, &c. 3 Bl. Com. 121. Whart. Law Dict. 496.

MORTGAGE signifies a pawn of land or tenement, or anything immovable, laid or bound, for money borrowed, to be the creditor's for ever, if the money be not paid at the day agreed upon; and the creditor holding land and tenements upon this bargain is called *tenant in mortgage*. He who maketh a pledge, or pawn, of this sort, is called the *mortgagor*, and he to whom it is made, the *mortgagee*. Glanvil. Cowell. 2 Bl. Com. 156. Whart. Law Dict. 501.

MOVABLES are all such things, personal, which may attend a man's person wherever he goes; in contradistinction to things *immovable*, as houses and lands. 2 Bl. Com. 384. Whart. Law Dict. 504.

NOLLE PROSEQUI is where a plaintiff, in any action, will proceed no further; and may be *before* or *after* verdict; though it is usually *before*; and it is then stronger against the plaintiff than a nonsuit, which is only a default in appearance; but this is a voluntary acknowledgment that he hath no cause of action. 2 Lill. 218. 8 Co. 58. Whart. Law Dict. 519.

NOT GUILTY is the general issue or plea of the defendant in any action for a tort, wrong or injury; such as trespass and the like. Palm. 393. Whart. Law Dict. 525.

NUDUM PACTUM is a bare, naked contract without any consideration had for the same; as where there is an agreement to do or pay anything, on one side, without any compensation on the other; this is a *nudum pactum* or *nude contract*, void in law. Termes de la Ley 477. 2 Bl. Com. 445. Whart. Law Dict. 529.

NUISANCE signifies, generally, anything that worketh hurt, inconvenience or damage to the property or person of another. And *nuisances* are of two kinds, *public* or *common nuisances*, which affect the public, and are an annoyance to *all* the king's subjects [people of the commonwealth]; and *private nuisances* which may be defined to be "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another." 3 Bl. Com. 216. Whart. Law Dict. 529.

OATH is a solemn calling or appealing to Almighty God, as a witness of the truth of what we affirm or deny, in the presence of those who are duly authorized to admi-

nister it to us; and it is called *corporal*, because, in taking it, the party is obliged to lay his hands on and *kiss* the Holy Gospel. 3 Inst. 165. Whart. Law Dict. 582.

OFFENCE, an act committed against a law, or omitted where the law requires it, and punishable by it. West Symb. *Offences* are of two sorts, *capital* or *not capital*; *capital offences* are those for which the offender shall lose his life, such as high treason, petit treason and felony; *offences not capital*, include the remaining part of criminal offences or pleas of the crown; and come under the denomination of *misdemeanors*. 2 H. P. C. c. 126, 184. Whart. Law Dict. 533.

OFFICE signifies that function, by virtue whereof a man hath some employment in the affairs of another; as of the king [or the commonwealth], or of another person. Cowell. *Offices* are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. 2 Bl. Com. 36. Whart. Law Dict. 537.

ONUS PROBANDI. The burden of proving anything. Stat. 14 Car. 2, c. 11. Whart. Law Dict. 540.

OVERT MARKET. An open market. 2 Bl. Com. 449. [There is no overt market in Pennsylvania. 5 S. & R. 130. 2 J. 280.]

O YES, corrupted from the French *oyes*, **HEAR YE**, is an expression used by the crier of a court, in order to enjoin silence when any proclamation is made. 4 Bl. Com. 340. Whart. Law Dict. 546.

PARENT. A father or mother; but generally applied to the father. Wood's Inst. 63.

PARTIES are those who are named in a deed, or fine, as parties to it; as those who levy the fine, and to whom the fine is levied: so, they who *make* any deed, and they to whom it is *made*, are called parties to the deed. Cowell. Whart. Law Dict. 561.

PAYMENT OF MONEY INTO COURT is a species of confession of the right of action. It is, for the most part, necessary upon pleading a *tender*, and is, itself, a kind of tender to the plaintiff, by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to

prevent the expense of any further proceedings. 3 Bl. Com. 304. Whart. Law Dict. 567.

PENALTY is a forfeiture inflicted for not complying with the regulation of certain acts of parliament [of the general assembly]. A *penalty* is also annexed to secure the performance of certain covenants in a deed, articles of agreement, &c. In a bond, also, for payment of money, it is usual to annex the penalty in double the amount of the obligation. 3 Bl. Com. 434. Whart. Law Dict. 570.

PERSONS are divided by law into either *natural persons* or *artificial*. *Natural* persons are such as the God of Nature formed us: *artificial* are such as are created and devised by human laws, for the purposes of society and government; which are called corporations, or bodies politic. 1 Bl. Com. 123, 467. Whart. Law Dict. 576.

POLICE is applied to the internal regulations of large cities, particularly of the metropolis. 4 Bl. Com. 162. Whart. Law Dict. 590.

POSSE COMITATUS. For keeping the peace, and pursuing felons, the sheriff may command *all the people of his county* to attend him; which is called *posse comitatus*. 1 Bl. Com. 343. Whart. Law Dict. 594.

POSSESSION is two-fold, *actual*, and *in law*. *Actual possession* is when a man actually enters into lands and tenements to him descended. *Possession in law* is when the lands or tenements are descended to a man, and he has not as yet actually entered into them. Staundf. 198. Whart. Law Dict. 595.

PRECEDENTS are authorities to follow in determinations, in courts of justice. 4 Co. 93. Cro. Eliz. 65. 2 Lill. Abr. 344. Whart. Law Dict. 602. There are also *precedents* or *forms* for conveyances, and pleadings in the courts of law, which are in general use amongst practitioners.

PREMISES, in a deed, are those parts in the beginning thereof, wherein are set forth the names of the parties, with their titles and additions, and wherein are recited such deeds, agreements or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded. And herein, also, is set down the consideration upon which the deed is made, and the certainty of the

thing granted. 2 Bl. Com. 298. Whart. Law Dict. 603.

PRESENTMENT OF OFFENCES.

A *presentment*, generally taken, is a very comprehensive term, including not only presentment, properly so called, but also inquisitions of office, and indictments by a grand jury.

But a *presentment*, properly speaking, is the notice taken by a grand jury, of any offence, from their own knowledge or observation (Lamb. Eirenarch. l. 4, c. 5). without any bill of indictment laid before them at the suit of the king [the commonwealth]; as the *presentment* of a nuisance, a libel, and the like; upon which the officer of the court [the district attorney] must afterwards frame an indictment before the party presented can be put to answer it. 2 Inst. 739. Whart. Law Dict. 605.

PRISON. A place of confinement for the safe custody of persons, in order to their answering any action, or civil or criminal prosecution; and upon conviction of a criminal offence, a *prison* is, innumerable instances, by statute, appointed to be a place of punishment, as well as safe custody. Termes de la Ley, 460. Whart. Law Dict. 609.

PROCESS, in *civil causes*, is the means of compelling a defendant to appear in court. This is sometimes called *original process*, being founded upon the original writ, and also to distinguish it from *mesne* or *intermediate process*, which issues pending the suit, upon some collateral, interlocutory matter; as to summon juries, witnesses, and the like. Finch, l. 436. Whart. Law Dict. 612.

PROMISSORY NOTES, or *notes of hand*, are a plain and direct engagement, in writing, to pay a sum specified at the time therein limited, to a person therein named, or sometimes to his order, or often to the bearer at large. 2 Bl. Com. 467. Whart. Law Dict. 615.

QUANTUM MERUIT, (that is, as much as he has deserved), is an action on the case grounded upon the promise of another, to pay him for doing anything so much as he should deserve or merit. 3 Bl. Com. 163. Whart. Law Dict. 675.

QUANTUM VALEBAT is where goods and wares, sold or delivered by a tradesman, at no *certain price*, or to be paid for them as much as they are worth,

in general, then *quantum valebat* lies. Ibid.

QUID PRO QUO signifieth something for somewhat; and is used in the law for the giving one thing of value for another thing, being the mutual consideration and performance of both parties to a contract. Kitch. 184. Whart. Law Dict. 631.

RECEIPTS are acknowledgments in writing of having received a sum of money, or other value. A *receipt* is either a voucher for an obligation discharged, or one incurred. Whart. Law Dict. 640.

A **RECOGNISANCE** is an obligation of record which a man enters into before some court of record, or magistrate, duly authorized, (Bac. Abr. 24,) with condition to do some particular act; as to appear at the assizes, [quarter sessions,] to keep the peace, to pay a debt, or the like. It is, in most respects, like another *bond*, the difference being chiefly this, that the *bond* is the creation of a fresh debt, or obligation *de novo*; the *recognisance* is an acknowledgment of a former debt upon record; the form whereof is, "that A. B. doth acknowledge to owe to our lord the king, [the commonwealth,] to the plaintiff, to C. D., or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated; in which case the king, [the commonwealth,] the plaintiff, C. D., &c., is called the *recognisee*, as he that enters into the *recognisance* is called the *cognisor*. 2 Bl. Com. 340. Whart. Law Dict. 641.

RECOGNISEE. He to whom one is bound in a recognisance. St. H. 6, c. 10. Whart. Law Dict. 641.

RECOGNISOR. He who enters into the recognisance. Jacob. Whart. Law Dict. 641.

RECORD is a memorial or remembrance, in rolls of parchment, of the proceedings and acts of a court of justice, which hath power to hold plea, according to the course of the common law, of real or mixed actions, or of actions *quare vi et armis*, or of personal actions, whereof the debt or damage amounts to 40s., [shillings], or above; which are called courts of record, and are created by act of parliament, letters patent, or prescription. 1 Inst. 260. In legal acceptation, however, *records* are restrained to the rolls of such courts only as are courts of record, and not the rolls of inferior, or other courts,

which proceed, not according to the law and custom of *England*. Ibid. There are three kinds of *records*: viz. a *judicial record*, as an attainder, &c.; a *ministerial record*, on oath, being an office of inquisition found; and a *record made by conveyance and consent*, as a fine, or deed enrolled. 4 Co. 54. 2 Lill. 421. Whart. Law Dict. 641.

REPLEVIN. The *action of replevin* is founded upon a distress taken wrongfully, and without sufficient cause; being a re-delivery of the pledge, or thing taken in distress, to the owner, or upon his giving security to try the right of the distress and to restore it, if the right be adjudged against him; after which the distrainer may keep it till tender made of sufficient amends; but must then re-deliver it to the owner. Co. Litt. 145. 8 Co. 147. 1 Bl. Com. 147. Whart. Law Dict. 654.

REPORTS are a public relation of cases, judicially adjudged, in courts of justice, with the reasons, as delivered by the judges. Co. Litt. 293. These *reports* are histories of the several cases, with a short summary of the proceedings, which are preserved at large on the record; the arguments on both sides, and the reason the court gave for its judgment, taken down in short notes by persons present at the determination. 1 Bl. Com. 71. Whart. Law Dict. 656.

RESCUE, or RESCOUS, is the taking away, and setting at liberty, against law any distress taken for rent, or services or damage feasant; but it more generally signifies the forcibly and knowingly freeing another from an arrest, imprisonment or some legal commitment. Co. Litt. 160. Whart. Law Dict. 657-8.

RETAINING FEE is a fee given to any sergeant, or barrister, to *retain* him that is, secure his services against the contrary party. *Termes de la Ley* 350. Whart Law Dict. 663.

RIOT. A *riot* seems to be a tumultuous disturbance of the peace by three persons, or more, assembling together, of their own authority, with an intent, mutually, to assist one another against any one who shall oppose them in the execution of some enterprise, of a private nature; and afterwards, actually executing the same in a violent, turbulent manner to the terror of the people, whether the act intended was, of itself, lawful or unlawful. Hawk. P. C. c. 65. 4 P. L. J. 31. Whart. Law Dict. 669.

ROBBERY is a felony committed by a violent assault upon the person of another, by putting him in fear, and taking from his person his money, or other goods, of any value whatever. 3 Inst. 68, c. 16. And this offence was called robbery, either because they bereaved the true man of some of his *robes*, or garments; or because his money or goods were taken out of some part of his garment, or *robe*, about his person. 3 Inst. c. 16. Whart. Law Dict. 670.

ROUT is where three or more persons meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences, upon a right claimed of common, or of way, and make some advances towards it; and the difference between an *unlawful assembly*, a *roust*, and a *riot*, is this,—an *unlawful assembly* is where three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren and the game therein, and *depart without doing it*, or *making any motion towards it*. A *roust* is when, *after their meeting*, they move forward toward the execution of any such act, whether they put their intended purpose in *execution or not*. A *riot* is where they *actually commit* an unlawful act of violence, either with or without a common cause of quarrel; as, if they beat a man, or kill game in another man's liberty, or do any other unlawful act, with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. 4 Bl. Com. 140. Whart. Law Dict. 671. See *Riot*.

RULE OF COURT. An order made either between parties to a suit on motion, or to regulate the practice of the court. Jacob.

SACRILEGE is a church larceny, or a taking of things out of a holy place; as, where a person steals any vessels, ornaments or goods of the church: and it is said to be a robbery of God, at least what is sacred to his service. Cro. Car. 153. Whart. Law Dict. 672.

SALE, or *exchange*, is a translation of property from one man to another, in consideration of some price or recompense in value; for there is no sale without a recompense; there must be a *quid pro quo*, [something given for some other thing.] Noy's Max. 42.

SATISFACTION is the giving of re-

compense for an injury done, or the payment of money due on bond, judgment, &c. 2 Lill. Abr. 495. Whart. Law Dict. 675.

SCHEDULE is a little roll, or long piece of paper, or parchment, in which are contained particulars of goods in a house let by lease. Morg. Whart. Law Dict. 678. *Schedules* are likewise frequently annexed to answers in a court of equity, containing an account of estates, or effects, moneys, debts, &c., received, or disposed of, or expended by, the person putting in the answer; and schedule is a term frequently used instead of inventory. Jacob.

SCILICET, *ss.*, an adverb, signifying—that is to say—or to wit:—often used in law proceedings. It is not a direct and separate clause, but it is rather to usher in the sentence of another. Hob. 171, 172. Whart. Law Dict. 678.

SCRIVENER is a person who receives money to lay out upon security, and to hold the money in his hands until an opportunity offers of laying it out. 18 Eng. L. & Eq. 402.

SET-OFF is when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but, on the other, sets up a demand of his own to counterbalance that of the plaintiff, either in the whole, or in part; as, if the plaintiff sues for £10 due on a note of hand, the defendant may *set off* £9 due to himself for merchandise sold to the plaintiff. 3 Bl. Com. 304. Whart. Law Dict. 690.

SIMPLE CONTRACT, *debt by*. Debts by *simple contracts* are such, where the contract, upon which the obligation arises, is neither ascertained by matter of record, nor yet by deed, or special instrument, but by mere oral evidence, the most simple of any, or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. 3 Bl. Com. 465. Whart. Law Dict. 696.

SINGLE BOND, or deed, whereby the obligor [he who gives the bond] obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another at a day appointed. 2 Bl. Com. 340. Whart. Law Dict. 697.

SLANDER is the defaming of a man in his reputation, profession or livelihood; as, if a man, maliciously and falsely, utter any slander or false tale of another, which may either endanger him in law, by im-

peaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured; or which may exclude him from society, as to charge him with an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt. 3 Bl. Com. 124. Whart. Law Dict. 699.

STOPPAGE IN TRANSITU. When goods are consigned upon credit, by one merchant to another, it frequently happens that the consignee (he to whom the goods are consigned) becomes a bankrupt or insolvent before the goods are delivered; in such case the law permits the consignor (the person who sends the goods) to resume the possession of his goods. This right which the consignor has of resuming the possession of his goods, if the full price has not been paid, in the event of the insolvency of the consignee, is technically termed the right of *stopping in transitu*, that is in its transmission. Selw. Nisi Prius, 1106. Whart. Law Dict. 713.

SUBPENA AD TESTIFICANDUM, a writ of process to bring in witnesses to give their testimony in any cause, not only in chancery, but all other courts. 3 Bl. Com. 369. Whart. Law Dict. 715.

SUBPENA DUCES TECUM. This is a writ or process of the same kind with the preceding subpoena, including a clause of requisition, for the witness to bring, and produce books and papers in his hands, belonging to, or wherein, the parties are interested, or tending to elucidate the matter in question. 3 Bl. Com. 382. Whart. Law Dict. 715.

SUMMARY CONVICTIONS are such as are directed by act of parliament [or act of assembly], for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament [or acts of assembly]. In these cases there is no intervention of a jury; but the party accused is acquitted, or condemned, by the suffrage of such person only as the statute hath appointed for his judge. 4 Bl. Com. 281-2.

SUPERSEDEAS, a writ that lies in a great many cases; and signifies, in general, a command to stay some ordinary proceedings at law, on good cause shown, which ought otherwise to proceed. F. N. B. 236. Whart. Law Dict. 719.

SURETY is the bail or pledge for any person, that he shall do, or perform, such a thing; as *surety for the peace* is the acknowledging a recognisance or bond to

the king [the commonwealth], taken by a competent judge of record for keeping the king's [the commonwealth's] peace. Dalt. c. 116. Whart. Law Dict. 720.

SURETY OF THE GOOD BEHAVIOR includes the peace, and he that is bound to *good behavior*, is therein also bound to the peace. Ibid. c. 122. 4 Bl. Com. 255. Whart. Law Dict. 331.

SURETY OF THE PEACE; so called, because the party that was in fear is thereby secured. This security consists in being bound with one, or more, sureties, in a recognisance or obligation, to the king [the commonwealth], entered on record and taken in some court, or by some judicial officer, whereby the parties acknowledge themselves to be indebted to the crown [the commonwealth] in the sum required (for instance, £100), with condition to be void and of non-effect, if the party shall appear in court, on such a day, and, in the meantime, shall keep the peace either generally towards the king [the commonwealth], and all his liege people, or particularly also with regard to the person who craves the security; or if it be for the *good behavior*, then on condition that he shall demean and behave himself well (or be of *good behavior*), either generally, or specially, for the time therein limited as for one, or more, years, or for life. 4 Bl. Com. 252.

TARIFF, the customs, or the duties, toll or tribute, payable upon merchandise exported and imported, are so called. 1 Bl. Com. 313. Whart. Law Dict. 731.

TENANT signifies one that holds or possesses lands or tenements by any kind of right either in fee, for life, years, or at will. Kitch. fol. 160. Whart. Law Dict. 733.

TENANTS IN COMMON, are such as hold lands for life, or years, by several titles, or by one title, and several rights 1 Inst. 188. 2 Lill. Abr. 559. Whart. Law Dict. 732.

TENDER is an offer to pay a debt, or perform a duty; or it is the offering of money, or any other thing, in satisfaction, or circumspectly to endeavor the performance of a thing. Termes de la Ley 522. Whart. Law Dict. 733.

TERMS OF THE LAW are technical words, and terms of art particularly used in, and adapted to, the profession of the law. 2 Hawk. P. C. 239.

THINGS are, by the law of England,

distributed into two kinds: *things real*, and *things personal*. *Things real* are such as are *permanent, fixed and immovable*, which cannot be carried out of their place, as lands and tenements. *Things personal* are *goods, money and all other movables*, which may attend the owner's person wherever he thinks proper to go. 2 Bl. Com. 16. Whart. Law Dict. 744.

TRANSCRIPT is the copy of an original writing or deed, where it is written over again, or exemplified. Cowell. Whart. Law Dict. 748.

TRESPASS is any transgression of the law, under treason, felony or misprision of either; but it is most constantly used for that wrong or damage which is done by one private man to another, and it is of two sorts: 1. *Trespass general*, otherwise called *trespass vi et armis*, and 2. *Trespass special*, or upon the case. Bro. Trespess. Bract. lib. 4. Selw. N. P. 1152. Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. Therefore, beating another is *trespass*, for which an *action of trespass, vi et armis*, in assault and battery, will lie; taking, or detaining, a man's goods, are, respectively, *trespasses*, for which an *action of trespass vi et armis*, or on the case, in trover and conversion, is given by the law; so, also, non-performance of promises or undertakings is a *trespass* upon which an *action of trespass*, on the case, in *assumpsit*, is grounded; and, in general, any misfeasance, or act of one man whereby another is injuriously treated, or damaged, is a *transgression*, or *trespass*, in its largest sense. 3 Bl. Com. 208-9. In a limited and confined sense, it signifies no more than an entry on another man's goods without a lawful authority, and doing some damage, however inconsiderable, to his real property. 3 Bl. Com. 209. Whart. Law Dict. 751.

TRIAL is the *examination* of a cause, civil or criminal, before a judge who has jurisdiction of it, according to the laws of the land; it is the *trial and examination* of the point in issue, and of the question between the parties whereupon the judgment may be given. 4 Inst. 124. Finch 36. Whart. Law Dict. 751.

TROVER is an action which a man hath against one, that having found any

of his goods, refuseth to deliver them up on demand; or, if another hath in his possession my goods, by delivery to him, or otherwise, and he sells or makes use of them, *without my consent*, this is a conversion for which *trover lies*; so if he doth not actually convert them, but doth not deliver them to me on demand. 2 Lill. Abr. 618. Selw. N. P. 1190. Whart. Law Dict. 752.

UNLAWFUL ASSEMBLY is where three, or more, persons assemble together, with intent, mutually, to assist each other in the execution of some enterprise of a private nature with force or violence. 1 Hawk. 155. Whart. Law Dict. 757. Vide *Riot*.

USURY is the interest, or profit, exacted for a loan beyond what is allowed by statute. 4 Bl. Com. 453. Whart. Law Dict. 763.

VENDOR and VENDEE. Vendor is a person who sells anything, and vendee the person to whom it is sold. 21 Vin. Abr. Whart. Law Dict. 767.

VERDICT is the answer of a jury given to the court, concerning the matter of fact, in any cause committed to their trial, wherein every one of the twelve jurors must agree, or it cannot be a *verdict*. 1 Inst. 226. And a *verdict* is twofold, *general* or *special*. A *general verdict* is that which is given, or brought, into the court, in like general terms to the general issue; as in an action of disseisin the defendant pleadeth *no wrong, no disseisin*, then the issue is *general*, whether the fact be wrong or not, which being committed to the jury, they, upon consideration of the evidence, come in and say, either for the plaintiff, that it is a wrong and disseisin; or, for the defendant, that it is no wrong. A *special verdict* is when they say, at large, that such a thing, and such a thing, they find to be done by the defendant or tenant, so declaring the cause of the fact, as in their opinion it is proved; and, as to the law upon the fact, they pray the judgment of the court; and this *special verdict*, if it contain any ample declaration of the cause from the beginning to the end, is also called a *verdict at large*. Co. Litt. 128. Whart. Law Dict. 768.

VI ET ARMIS are words used in indictments to express the charge of a forcible and violent committing any crime

or *trespass*. 2 Hawk. P. C. 179. 1 Ibid. 150, 220. Whart. Law Dict. 770.

VIVA VOCE is where a witness is examined, personally, in open court. Cowell. Whart. Law Dict. 772.

VOID and VOIDABLE. In the law some things are *absolutely void*, and some are *voidable*. A thing is *void* which is done against law at the very time of the doing of it, and it shall bind no person. But a thing which is only *voidable* and not *void*, will remain *good until it is avoided*. 2 Lill. Abr. 653. Whart. Law Dict. 772.

VOLUNTARY OATH is where a man takes an *oath* in an extra-judicial matter of which the law takes no notice. 4 Bl. Com. 137. Whart. Law Dict. 773.

WARRANTY is a promise, or covenant, by deed, made by the bargainor, for himself and his heirs, to *warrant*, or secure, the bargainee, and his heirs, against all men for the enjoying of the thing granted. Bract. lib. 2, 5. West Symb. part 1. A warranty is either *real* or *personal*. A *real warranty* is a covenant real annexed to lands whereby a man and his heirs are bound to *warrant* the same to some other and his heirs; and that they shall quietly hold and enjoy the lands, and upon voucher or by writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by elder title. And

warranty being a covenant real, bindeth to yield *lands* in recompense. 1 Inst. 365, 384. *Personal warranty* is when it concerns goods and chattels, and it is created by implication; for the purchaser of goods may have a satisfaction from the seller if he sells them as his own and the title proves deficient, although there be no *express warranty* to that purpose. Cro. Jac. 474. Whart. Law Dict. 776.

WHITE-MEATS, are milk, butter, cheese, eggs, and any composition of them, which, before the reformation, were forbidden in Lent, as well as flesh, until Henry VIII. published a proclamation allowing the eating of *white-meats* in Lent, Anno 1543. Cowell. Blount. Whart. Law Dict. 780.

WILL, OR LAST WILL AND TESTAMENT, is a solemn act, or instrument, whereby a person declares his mind and intention, as to the disposal of his lands, goods or effects, and what he would have done after his death. Co. Litt. 111. And the common law calls that a *will* where *lands or tenements* are given; and where it concerns *goods and chattels alone*, it is termed a *testament*. 1 Inst. 111. Whart. Law Dict. 781.

WITNESS is one that gives evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth, and *nothing but the truth*. 2 Lill. Abr. 700. Whart. Law Dict. 787.

TECHNICAL LAW TERMS, EXPLAINED.

In the session of 1815-16 the Senate of Pennsylvania adopted the following resolution—"Resolved, That the table explanatory of sundry technical law terms, inserted immediately following the preface, in a treatise in possession of the Senate, entitled—'A collection of all the public and permanent acts of Assembly of Kentucky' which are now in force, &c., &c., by Harry Goulmin, Secretary of the Commonwealth of Kentucky,' be printed in an appendix to the journal of Senate." From that "explanatory table," thus approved by our Senate, the following selections are made.

Action of detinue, lies against one who *detains* and refuses to deliver things which were put into his hands to keep.

Action of trover and conversion (from *trouver*, to find), lies against a person who having found another's goods refuses to deliver them up on demand, but *converts* them to his own use. The fact of *finding*, however, is immaterial: but the plaintiff,

for form sake, must say that he lost the goods and that the defendant found them.

Action popular, an action given to the *people* in general: as where forfeitures are given at large to any person who will sue for the same.

Sometimes one part is given to the commonwealth or to some public use, and the other part to the informer, or prosecutor,

and then it is called a *qui tam* action, because it is brought by a person *qui tam*,—that is, *who as well* sues for the commonwealth as for himself.

Ad quod damnum, is a writ directing the sheriff to inquire *what damages* will be sustained by certain acts.

Affidavit, an oath in writing, sworn before a person who has authority to take it.

Affirm, to ratify or confirm a former judgment.

Alimony, is that allowance which a married woman is entitled to upon any occasional separation from her husband.

Alias, a second or another writ, which issues after a first has been sued out without effect. It is likewise used for *otherwise called*, when a person goes by more than one name.

Alibi, in another place.

Array, is the ranking or setting forth of a jury. To *challenge* the array of the panel is at once to except against all the persons arrayed or impannelled, on account of partiality, &c.

Arrest of judgment—to move in arrest of judgment, is to show cause, why judgment should be stayed notwithstanding a verdict given.

Arson is a malicious and intentional burning of another's house.

Assault, a violent injury offered to a man's person, which may be committed by *offering* a blow.

Assets (French *assez*, i. e. *satis*, enough), signifies goods *enough* to discharge that burden which is cast upon the executor or heir in satisfying the debts and legacies of the testator or ancestor.

Assumpsit is taken for a voluntary promise, express or implied, by which a man assumes or takes upon him to perform or pay anything to another.

Attach is to take or apprehend in obedience to a writ or precept.

Attachment is an apprehension of a man by his body, or the taking possession of his goods, to bring him to answer the action of the plaintiff.

Attaint is a writ that lieth in certain cases, after judgment against a jury that hath given a false verdict.

Attainted is a word used particularly for such as are found guilty of some crime, and especially of treason or felony. Anciently a person attainted of high treason forfeited his lands, &c., his blood was corrupted, and he and his posterity rendered base.

Averment (from the French *averer*) is an offer of the defendant to make good or justify an exception pleaded in abatement or bar of the plaintiff's action, and it signified the act as well as the offer.

Bailiwick (a word taken from the French, whose territory was divided into bailiwicks as that of England is into counties) is frequently used for county.

Baron hath various significations. It is taken for a degree of nobility next to viscount. In ancient records it includes all the nobility of England. Formerly, likewise, all men were styled barons.

Baron and Feme, husband and wife, who in law are one person, so that neither can be a witness for or against the other; except in cases of high treason [or personal injuries inflicted by the one upon the other.]

Bigamy is having more than one husband or wife at the same time.

Curtsey—where a man marries a woman seised of an estate of inheritance, and has by her issue, born alive, which is capable of inheriting her estate; he shall on the death of his wife hold the lands for his life, as *tenant by the curtesy*.

Coverture is the state and condition of a married woman.

Capias ad respondendum is a writ to take the defendant and make him answer.

Capias ad satisfaciendum (ca. sa.) is a writ of execution, commanding the sheriff to take the defendant's body and keep him till he make satisfaction for the debt and damages.

Caveat (let him take care) is a kind of process to stop the proving of a will, the granting of the administration, or the issuing of a patent for unappropriated land, &c.

De bene esse :—to take a thing *de bene esse*, is to accept it *as well done* for the present;—but when it comes to be more fully examined or tried, to stand or fall according to the merit of the thing in its own nature. As when a complainant's witnesses are aged or sick or going out of the state, so that there is danger of their testimony being lost; the court of chancery will order them to be examined *de bene esse*, so as to be valid, if they cannot be examined afterwards :—but if they live, or return after answer, those depositions are not to be of force, for the witness must be re-examined.

De novo—anew—over again.

Dedimus potestatem (we have given the

power) is a writ giving authority to examine witnesses, &c.

Extent signifies a writ or commission to the sheriff, for the valuing of lands or tenements.

Fee simple. A tenant in fee simple, is he that hath lands, tenements or hereditaments, to hold to him and his heirs for ever, generally, absolutely and simply, without mentioning *what* heirs, but referring that to his own pleasure or to the disposition of the law.

Fee tail, or fee conditional, is a fee restrained to some *particular heirs* to the exclusion of others.

Feme covert, a married woman.

Feme sole, a single woman.

Fieri facias [*fi. fa.*] (literally, *that you cause to be made*) is a writ commanding the sheriff to levy the debt and damages recovered, out of the goods and chattels of the defendant.

Garnishment (from *garnier*, to instruct or inform) is a warning given to one for his appearance.

Garnishes is a third person or party in whose hands money is *attached*, and is so called because he hath had garnishment or *warning* not to pay the money to the defendant, but to appear and answer to the plaintiff's creditor's suit.

Habeas corpus (i. e. *that you have the body*) a writ, so called from those words being used in it,—directing that the body of him who is imprisoned be brought before the court or a judge thereof, with the cause of his detention.

Hereditaments signify all such immovable things as a man may have to him and his heirs by way of inheritance.

Homicide is the killing of a man.

Hue and cry, is a pursuit of one who hath committed felony, from town to town, till he is taken; which all persons who are present where a felony is committed or a dangerous wound given, are bound to raise against the offenders.

Injunction is a prohibition granted in divers cases to suspend further proceedings.

Inquisition is a manner of proceeding by way of search or examination.

Interlocutory order is that which decides not the cause, but only some incidental matter, which happens between the beginning and end of it.

Joint tenants are those that hold lands or tenements jointly by one title.

Jointure is a settlement of lands and tenements made to a woman in considera-

tion of marriage, or a covenant whereby the husband or some friend of his assur-eth them to her for life.

Levant et couchant is a term used with respect to cattle which have been so long on the ground of another, that they have *lain down* and *risen again* to feed.

Levari facias is a writ for levying a sum of money on a man's lands and tenements, goods and chattels, who has forfeited his recognisance.

Mainpernors are those persons to whom a man is delivered out of custody or prison, or those becoming bound for his appearing.

Mainprise is the taking of a person into friendly custody, who otherwise might be committed to prison, upon security being given that he shall be forthcoming at the time and place appointed.

Mandamus (i. e. *we command*) is a command issuing from a superior court of judicature, requiring them to do some particular thing therein specified, which appertains to their office and duty.

Medietas linguae signifies a jury of which one-half consists of foreigners. [It is not allowed in Pennsylvania.]

Mittimus (i. e. *we have sent*) is the name of a precept from a justice to a jailer on sending an offender to him for safe keeping, and likewise of a writ for sending records from one court to another.

Mortgage is a pawn of lands or tenements, &c., to be the creditor's for ever, if the money be not repaid on the day agreed.

Mesne process is that which issues whilst a suit is depending, upon some interlocutory matter, as to summon juries, witnesses, &c. It also signifies such process as intervenes between the beginning and end of a suit.

Ne exeat is a writ to restrain a person from *going out* of the state.

Nihil dicit (i. e. *he says nothing*) is failing by the defendant to answer to the plaintiff's plea by the day assigned.

Nil debet is a plea to an action of debt signifying *he owes nothing*.

Nolle prosequi signifies that the plaintiff is *unwilling to prosecute* the suit.

Non assumpsit is a plea in personals, denying that any *promise* was made.

Non compos mentis is not being of *sound mind*, memory and understanding.

Non est culpabilis is a plea signifying *that he is not guilty*—that the fact charged is not true.

Non est factum is a plea on an action on a bond or deed that it was not executed.

Non est inventus is the return of a sheriff on a writ when the defendant was not found in his county.

Nonsuit is the letting of a suit or action fall.

Non sum informatus is the answer of an attorney when he is not informed or instructed to say anything material in defence of his client.

Nul tiel record:—there is no such record.

Nuncupative will, a will by word of mouth, before a sufficient number of witnesses.

Onus probandi:—the burden of proving.

Oyer and terminer is a commission to hear and determine all treasons, felonies, &c.

Posse comitatus, the power of the county, including all above the age of fifteen, who are able to travel.

Pluries, a writ issued in the third place after the two first have been disobeyed.

Posthumous is where a child is born after the death of his father.

Procedendo is a writ sending a cause back again to an inferior court.

Prochein amy:—the next friend.

Quantum meruit (i. e. how much he hath deserved.) It is an action of the case, grounded on the promise of another to pay him for doing any thing so much as he should deserve.

Replevin is a remedy granted upon a

distress, being a re-deliverance of the thing distrained, to the first possessor, on security or pledges, according to the English law, being given by him to try the right with the distrainer and to answer him in a court of law.

Seisin signifies possession, and to seize is to take possession.

Subpœna is a process to cause witnesses to appear and give testimony, under a penalty for disobedience.

Subpœna duces tecum is a process to compel a witness to bring with him some writing or other evidence, necessary to be produced in the cause.

Supersedeas is a writ for staying proceedings at law, on good cause shown.

Scire facias is a writ commanding the sheriff to cause it to be made known to a defendant against whom judgment has been given, that he must appear on a certain day and show cause why execution ought not to issue.

Testatum is a writ in personal actions, after the sheriff has certified that the defendant is not in the county, upon which this writ is sent into some other county where he is thought to be, or to have wherewith to satisfy.

Test is a word used in the last part of writs wherein the date is contained.

Venire is either a summons to cause the party to come and answer an indictment or presentment, or the process directed to the sheriff to cause a jury to appear.

Voir dire—to speak the truth—to make true answer to such questions as the court shall propose.

LAW PHRASES, ETC., TRANSLATED.

THE following translations have been selected from "Jones' translation of all the Greek, Latin, Italian and French quotations which occur in Blackstone's Commentaries on the Laws of England, and also in the notes of the editions by Christian, Archbold and Williams:"—they are, generally speaking, those which are in most common use.

A fortiori, By a stronger reason.

Ab initio, From the beginning.

Ad valorem, According to the value.

A priori, Beforehand.

A mensa et thoro, From bed and board.

A vinculo matrimonii, From the bond of matrimony.

Assumpsit, He undertook.

Ad satisfaciendum, To satisfy.

Animo furandi, With a design of

stealing them.

Alias, As formerly.

Bona fide, Actual, real, in good faith.

Certiorari, To be certified of.

Curia advisare vult, The court will consider it.

Causa omissa, An omitted case.

Coram non iudice, Before a judge not having jurisdiction.

Cepi corpus, I have taken the body.

Capias, That you take.
Caveat, That he take care.
Contra bonos mores, Against good manners.
De facto, In fact.
De novo, Anew.
Dedimus potestatem, We have empowered.
De bonis non, Of the goods not administered.
Dernier resort, The last resort.
Ex post facto, After the fact.
Ex officio, In the course of duty; by virtue of his office.
Esto perpetua, Mayest thou endure for ever.
E contra, On the other hand.
Enciente, Pregnant.
Ex contractu, Arising from a contract.
Ex delicto, Arising from offence or misdeed.
Ex gratiâ, As matter of favor.
Exoneretur, Let him be exonerated.
Ex visitatione Dei, By the visitation of God.
Feræ naturæ, Of a wild nature.
Fieri facias [*Fi. fa.*], That you cause to be made.
Fus et nefas, Lawful and unlawful.
Felo de se, A self-destroyer.
Flagrante delicto, In open crime.
Habeas corpus, That you have the body.
Jure divino, By divine right.
In extremis, In his last moments.
Ipsò facto, By the fact itself.
In loco parentis, In the place of a parent.
In infinitum, for ever.
Inquisitio post mortem, An inquisition after death.
Indebitatus assumpsit, Being indebted, he undertook.
In nubibus, In the clouds.
In pari passu, In an equal degree.
In foro legis, In a court of law.
In foro conscientiæ, In the forum of conscience.
In personam, In respect to the person.
In rem, In respect to the thing.
In toto, In the whole, entirely.
Inter alia, Among other things.
Imperium in imperio, A government within a government.
In futuro, At a future period.
Instante, Instantly.
Leges non scriptæ, Unwritten laws.
Levari facias, That you cause to be levied.
Malum in se, Crime in itself.

Mala in se, Crimes in themselves.
Mandamus, We command.
Mutatis mutandis, The respective differences being allowed for, or being altered according to the circumstances of the case.
Malum prohibitum, Fault because forbidden.
Meum et tuum, Mine and thine.
Mittimus, We send or commit.
Nudum pactum, A barren compact.
Non compos mentis, Not in his right mind.
Nam qui facit per alium, facit per se, For he who does a thing by the agency of another does it himself.
Nolle prosequi, Do not prosecute.
Nisi prius, Unless before.
Nil debet, He owes nothing.
Oyer and terminer, To hear and determine.
Pro and con, For and against.
Pro bono publico, For the public good.
Primâ facie, On the first view.
Pro formâ, For form's sake.
Pro tanto, For so much.
Pro tempore, For a time.
Post obit, After he dies.
Pendente lite, Pending a suit.
Petitio principii, Begging the question.
Puime, Younger.
Propriâ manu, With his own hand.
Pluries, As more than once.
Quo ad hoc, As to this.
Quo warranto, By what warrant.
Quantum valebat, As much as it is worth.
Supersedeas, That you forbear, a command to stay or forbear doing that which ought not to be done.
Se defendendo, In self-defence.
Sub modo, In a certain degree.
Scire facias, That you make known.
Subpœna ad testificandum, A subpoena to give evidence.
Subpœna duces tecum, You shall bring with you the papers mentioned in the subpoena.
Teste, Witness.
Vivâ voce, By word of mouth.
Vî et armis, By force and arms.
Vice versâ, By converse position.
Verbatim, Word for word.
Venditioni exponas, That you expose for sale.
Venire facias, That you cause to come.
Vexata quæstio, A perplexed question.
Virtute officii sui, By virtue of his office.
Vox populi, vox Dei, The voice of the people is the voice of God.

THE
MAGISTRATE'S DAILY COMPANION,
AND
BUSINESS MAN'S LEGAL GUIDE.

Abatement.

- | | |
|-----------------------------------------|-------------------------------------------------|
| I. Definition of a plea in abatement. | of parties. |
| II. Abatement of the writ or return. | VI. Pendency of former suit for the same cause. |
| III. Pleas to the jurisdiction. | VII. Death of parties. |
| IV. Disabilities of the parties. | VIII. When pleas in abatement to be filed. |
| V. Misnomer, misjoinder and non-joinder | |

I. A PLEA IN ABATEMENT is one which shows some ground for *abating* the plaintiff's action, and makes prayer to that effect. Steph. Plead. 47. Whart. Law Dict. 2.

II. There are some matters of abatement before a justice of the peace, which are not properly the subjects of a plea, but are to be taken advantage of by a defendant, on motion: thus, it is required that a summons in a civil action before a justice (except in the case of a non-resident defendant) be made returnable on a day certain, not more than eight nor less than five days after the date thereof; now, if a summons be issued returnable on a day more than eight or less than five days from its date, this is illegal; and the proper mode of taking advantage of it is, not by a plea in abatement, but by moving the justice to quash the writ, as one inprovidently issued.

So, the law requires that the summons be served on the defendant, in the particular manner prescribed by the act of assembly, at least four days before the time of hearing; if the summons be served less than four days from the time when it is returnable, the course is, not to plead in abatement, nor to move to quash the writ, but to set aside the service thereof: And the same relief may be had, if the return show that the summons was not served in the mode prescribed by law. But this does not extend further than to set aside the return; the writ remains good, and the plaintiff may, at his election, either discontinue his suit, rule the constable to make a good return, issue an *alias* writ, or sue the constable for a false or insufficient return. 4 Barr 501. An appearance before the justice, for the purpose of objecting to a return of the writ, is not a waiver of the defect. 1 Cow. 1.

In deciding upon such motions as these, if the facts be found to correspond with the statement made by the defendant, the objection should be sustained by the justice, and the summons, or service thereof, should be quashed, as the nature of the case may require. The rejection of such an application can only have the effect of subjecting the parties to costs and trouble, without bringing to issue the matter at variance between them. A writ of *certiorari* will remove the proceedings before a higher tribunal, and if any such defect appear, they will be there reversed and set aside.

III. Among pleas in abatement, are usually classed those to the jurisdiction; and such a plea should be carefully and deliberately considered by the justice;

for where there is an entire want of jurisdiction of the subject-matter, it is never too late to object to the jurisdiction. 1 Ash. 168. 1 T. R. 151. If the justice have not jurisdiction, the common pleas has none on appeal. 10 S. & R. 227. And this defect may be taken advantage of, even on a writ of error, in the supreme court. 1 Binn. 219. Want of jurisdiction may be shown by parol. 10 W. 123. 3 Y. 279. 3 Pittsburgh L. J. 301.

IV. Among the proper pleas in abatement, are those which go to the disability of the parties to sue or to be sued. Thus, it is a good plea in abatement, that the plaintiff is a fictitious person. 5 W. 423. 19 Johns. 308. See 10 P. F. Sm. 436. Or, that he died before the commencement of the suit. 1 W. & S. 438.

It may also be pleaded in abatement that the plaintiff is a married woman; for it is a general rule, that a wife cannot, during the marriage, maintain an action without her husband. 1 Chit. Pl. 28. And even in respect to her separate property, suit must be brought in the names of the husband and wife, for the wife's use. Purd. 701. See 11 C. 384. 1 Wr. 251.

The marriage of a female plaintiff after the institution of the suit, was formerly the subject of a plea in abatement. 4 S. & R. 238. But this has been remedied by the act 12th April 1845, which provides that "no suit or other legal proceeding in any court of this commonwealth brought by a *feme sole* [single woman] now, or hereafter pending, shall abate by the marriage of the plaintiff, or petitioner, contracted *after* the commencement of the same, but the husband of such plaintiff or petitioner, shall have power to become a party thereto, and prosecute the same to final judgment or decree." Purd. 27.

The infancy of the plaintiff may also be pleaded in abatement; for an infant can only sue by his next friend or guardian. 8 Barr 264.

V. The misnomer of the plaintiff or defendant is properly matter of abatement; as is, also, the misjoinder and non-joinder of proper parties; but such a plea can now very seldom be made available to a defendant; since it has been provided by the act 4th May 1852, that in "all actions pending, or hereafter to be brought, in the several courts of this commonwealth, and in all cases of judgments entered by confession, the said courts shall have power, in any stage of the proceedings, to permit amendments by changing or adding the name or names of any party, plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party." Purd. 47. And by act 12th April 1858, this is to be "so construed as to authorize the said courts, where by reason of there being too many persons included as plaintiffs or defendants, by mistake, as will prevent the cause from being tried on the merits, to permit an amendment, by striking out from the suit such persons as plaintiffs or defendants." Ibid.

Under these acts, both the christian name and surname of a party may be amended. 8 H. 21. And the christian name of a defendant, which was left blank in the original process, may be inserted. 2 H. 129. In cases originating before justices of the peace, the courts have always exercised great liberality in adding names to the record, to obviate technical objections to the form in which the suit was brought. 8 C. 98. The statutes are confined, however, to cases of clear mistake, and will not be suffered to effect an entire change of the real parties to the suit. 6 Barr 377. If two parties be sued as copartners, and it appear that the contract was made with one only of the defendants, the name of the other may be stricken out, under the act of 1858. 15 Leg. Int. 382. Whenever the rights of a party are liable to be defeated by having joined too many plaintiffs and defendants, such an amendment is proper, and the fact of a mistake will be presumed. 1 Wr. 130. The act 14th April 1851, requires all partnerships to be registered in the office of the prothonotary of the court of common pleas, and provides that "in default or neglect of such partnership so to do, they shall not be permitted in any suits or actions against them in any court, or before any justice of the peace or alderman in this commonwealth, to plead any misnomer, or the omission of the name of any member of the partnership, or the inclusion of the names of persons not members of said partnership." Purd. 776. See 3 Phila. R. 148.

VI. Another matter of abatement is the pendency of a former suit for the same cause of action. 3 R. 320. Thus, the pendency of a domestic attachment issued

by the same plaintiff against the same defendant, may be pleaded in abatement. 1 P. R. 442. But the pendency of a former suit in a foreign country cannot be pleaded in abatement of a suit for the same cause here. 2 W. & S. 133, 190. Nor can the pendency of a former suit in another state of the Union. 8 Wr. 326. 9 Wr. 488.

VII. The death of the parties to a personal action, is cause of abatement, at common law; but our statute gives full power to executors or administrators, to become parties, and to prosecute or defend actions pending at the time of the death of their testator or intestate, "where the cause of action doth by law survive to them," and also to commence and prosecute all personal actions, except actions of slander, for libels, and for wrongs to the person. Purd. 286.

Since the passage of this act, all personal actions survive, except actions for slander, libel, or wrongs to the person. 12 H. 122. And therefore, the action of *trover* survives. 4 Phila. 87. By act 15th April 1851, actions for injuries to the person by negligence or default, shall not abate by reason of the death of the plaintiff. Purd. 754. Nor, by act 12th April 1869, shall actions of trespass to real or personal property. Purd. 1539.

The act of 5th May 1854 provides that if the plaintiff shall die during the pendency of the suit, and no letters of administration or testamentary, shall be taken out in this state within one year after the suggestion of his death upon the record, it shall not be the duty of the defendant to raise an administrator, but the suit shall abate, and the prothonotary of the proper court shall make an entry accordingly; notice, however, is required to be given to the parties entitled to administration, one month before such entry, of which affidavit must be made and filed. Purd. 28.

By act 22d March 1861, no action on any joint contract, note, debt, or obligation shall abate by reason of the death of one or more of the joint obligors, contractors, debtors, or promissors, since the commencement of the suit; but the same shall be proceeded in to judgment and execution against the estate of the decedent, as though commenced against him alone. Purd. 28.

Actions by or against executors, administrators or trustees, do not abate by the death, dismissal, resignation or renunciation of one or more of them, pending the suit; but the survivors may prosecute the action, or their successors may be substituted for that purpose. Purd. 27. An administrator sued as executor may plead the intestacy and granting letters of administration, in abatement. 8 Johns. 126.

VIII. Pleas in abatement cannot be put in after pleas in bar, unless under special circumstances, of which the court must judge. 2 S. & R. 537. 5 W. 373. 6 P. F. Sm. 110. 9 Wr. 161. And a defendant cannot plead in abatement on an appeal, having neglected to do so before the justice. 4 W. 433. The defendant before a justice should put in his plea in abatement as soon as the plaintiff has stated his cause of action, and should not suffer a continuance to intervene.

Abduction.

Act 31 March 1860. Purd. 233.

SECT. 94. If any person shall maliciously, either by force or fraud, lead, take or carry away, or decoy or entice away, any child, under the age of ten years, with the intent to deprive its parent or parents, or any other person having the lawful charge or care of such child, of the possession of such child, by concealing and detaining such child from such parent or parents, or other person or persons having the lawful charge or care of it, or with intent to steal any article of apparel or ornament, or other thing of value or use, upon or about the person of such child, to whomsoever such article may belong, or shall receive and harbor, with any such intent as aforesaid, any such child, knowing the same to have been so by force or fraud, led, taken or carried, or decoyed or enticed away as aforesaid, every such person shall be guilty of a misdemeanor, and, upon conviction thereof, be sentenced to pay a fine not exceeding two thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years: *Provided always*, That no person who shall have claimed to be the father of any illegitimate child, or to have any legal right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of getting possession of such child, out of the possession of the mother or other person having lawful charge thereof.

Abortion.

I. Definition of abortion.
II. Provisions of the Penal Code.

III. Judicial decisions.

I. If a woman be quick with child, and by a potion, or otherwise, killeth it, in her womb, or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was, by the ancient law, homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. But if the child be born alive, and afterwards die in consequence of the potion or beating, it will be murder. 1 Bl. Com. 129. 4 Gilm. 111. 1 Bouv. Inst. 86. See Whart. Law Dict. 8.

In Pennsylvania, the punishment of this offence is now provided for by the revised Penal Code.

II. ACT 31 MARCH 1860. Purd. 232.

SECT. 87. If any person shall unlawfully administer to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child, any drug, poison or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

SECT. 88. If any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any poison, drug, or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

III. In an indictment for administering medicine to procure abortion, the name of the medicine need not be stated, nor need the medicine be described as noxious. 7 Blackf. 592.

Under an indictment for procuring an abortion of a quick child, which is a felony by statute, in New York, the prisoner may be convicted of a misdemeanor, if the child were not quick. 3 Hill 92.

It is not necessary, it *seems*, in an indictment for the production of an abortion, to aver quickness on the part of the mother; it is sufficient to set forth that she was "big and pregnant." 6 Penn. L. J. 29. 1 H. 631. Bright. R. 441. Wh. Pr. 108. Wh. C. L. § 1220.

Where a blow is maliciously given to a child whilst in the act of being born, as for instance, upon the head, as soon as it appears, and before the child has breathed, it will be murder, if the child is afterwards born alive, and dies thereof. If the child has been wholly produced from the body of its mother alive, and she wilfully strangle it while it is alive, and has an independent circulation of its own, this is murder, although the child be still attached to its mother by the umbilical cord. But it must be proved that the entire child has actually been born into the world in a living state; and the fact of its having breathed is not a conclusive proof thereof. Wh. C. L. § 942.

Accessory.

I. Who are deemed accessories.
II. Provisions of the Penal Code.

III. Authorities in relation to accessories.
IV. Forms.

I. AN ACCESSORY is he who is not the *chief actor* in the offence, nor *present at its performance*, but in *some way* concerned therein, either *before* or *after* the *fact committed*. An *accessory before the fact*, is one who, being absent at the time of the crime committed, doth yet procure, counsel or command another to commit a crime. Herein *absence* is necessary to make him an accessory, for if such procurer, or the like, be *present*, he is guilty of the crime as principal. An *accessory after the fact* may be, where a person, knowing a felony to have been committed, receives, relieves, comforts or assists the *felon*: to hinder his being apprehended, tried or suffering punishment, makes the assistant an accessory. 1 H. P. C. 616, 618. 2 Hawk. 29, 32. See Whart. Law Dict. 11.

II. ACT 31 MARCH 1860. Purd. 247.

SECT. 180. Every principal in the second degree, or accessory before the fact, to any felony punishable under this act, for whom no punishment has been hereinbefore provided, shall be punishable in the same manner as the principal in the first degree is by this act punishable. Every accessory after the fact to any felony, punishable under this act, for whom no punishment has been hereinbefore provided, shall, on conviction, be sentenced to a fine not exceeding five hundred dollars, and to undergo an imprisonment, with or without labor, at the discretion of the court, not exceeding two years. And every person who shall counsel, aid or abet the commission of any misdemeanor, punishable under this act, for whom no punishment has been hereinbefore provided, shall be liable to be proceeded against and punished as the principal offender.

This section was introduced by the revisers of the Penal Code to simplify the complications now existing in our criminal legislation, in reference to the punishment of accessories. As the guilt of principal offenders in the second degree, and accessories before the fact, is morally the same with that of the principal offender, their punishment has been made the same; a general provision has also been made in this section, to embrace the cases of accessories after the fact, in felonies, and power is given to the courts to inflict, within certain limits, upon such offenders, a punishment proportionate to their crime, except in the cases of such accessories as are otherwise provided for in the code. Accessories before the fact to misdemeanors,

are now punishable in the same manner, at the common law, as the principal, there being, in fact, no such crime known to the common law as an accessory before the fact to a misdemeanor; all such accessories being deemed principals; the last clause of the section is framed with a view to this principle. Report on the Penal Code 37.

Act 31 March 1860. Purd. 257.

SECT. 44. If any person shall become an accessory before the fact, to any felony, whether the same be a felony at common law, or by virtue of any act of assembly now in force or hereafter to be in force, such person may be indicted, tried, convicted and punished in all respects as if he were a principal felon. (a)

(a) The principle of this section, which prescribes the same punishment against accessories before the fact in felony, under the various synonymes of aiders, abettors, counsellors, comforters, &c., as against principals, is familiar to our criminal legislation; it is found in the 7th section of the act of 1718, 1 Sm. 113; in the 2d section of the act of 8th March 1780, 1 Sm. 499; in the 2d, 3d and 5th sections of the act of 5th April 1790, 2 Sm. 581; and in the 4th section of the act of 23d April 1829, 10 Sm. 481. There is, therefore, nothing new in the principle of this section, which is founded on the theory of the moral guilt of the accessory before the fact being equal to that of the principal offender. The new principle in the section is that which makes the accessory before the fact guilty of a substantive offence, and which subjects him to punishment for his crime, without postponing it until the conviction of the actual perpetrator; or more precisely speaking, which abolishes in felonies the technical distinction now existing between accessories before the fact and principal offenders. This was always the law as regards misdemeanors in which there are no accessories, all being regarded by law as principals; in felony, however, except in certain cases about to be noticed, an accessory cannot be tried before the conviction or outlawry of his principal, unless tried with him. In felonies of frequent occurrence, this was found a great and serious evil, which called for and received partial legislative correction; as early as the act of the 31st May 1718, 1 Sm. 105, it was provided that persons harboring, concealing or receiving robbers, burglars, felons or thieves, or receiving or buying any goods or chattels that should have been feloniously taken or stolen by any such robbers, &c., knowing the same to be stolen, might be proceeded against as is therein directed; and that if any such principal felon *could not be taken, so as to be prosecuted and convicted* for such offence, that nevertheless it should be lawful to prosecute and punish every such person buying or receiving any goods stolen by such principal felon, knowing the same to be stolen, although the principal felon should not be convicted of the felony. This, however, embraced only one class of accessories, to wit, receivers of stolen goods, in cases where the principal was not amenable to justice; afterwards, by the act of 23d September 1791, 8 Sm. 41, it was provided "in all cases of felonies of death, robbery and burglary, it shall be lawful to punish receivers of such felons, robbers and burglars, by a fine and imprisonment, although

the principal felons, robbers and burglars cannot be taken, so as to be prosecuted and tried for said offences; which conviction and sentence of said receivers shall exempt them from being prosecuted as accessories after the fact in case the principal felon, robber or burglar shall afterwards be taken and convicted." This act extended only to accessories after the fact, in cases in which the principals could not be taken.

The act of 11th April 1825, 8 Sm. 438, was passed to avoid a difficulty which afterwards arose in the prosecutions of receivers of stolen goods, in cases in which the principals were amenable to justice. The act of 1718 was taken from the 4th section of 4th and 5th Anne, ch. 81, which only authorized proceedings against such receivers before the conviction or attainder of their principals, when such principals could not be taken. Foster, in his discourse on accomplices, § 6, p. 373, says on this point: "I know attempts have been made, under various shapes, to prosecute the receiver as for a misdemeanor, while the principal hath been in custody and amenable, but not convicted; but I think such devices illegal." The act of 1825 solved the difficulty, by declaring that receivers of property, knowing it to have been feloniously stolen, may be prosecuted although the principal be not before convicted, and whether he is amenable to justice or not.

It will thus be seen, that all our legislation with regard to the trial of accessories to felonies, before the conviction of their principals, applies only to accessories after the fact, a class of offenders who have had no primary connection with the original crime, and whose guilt only consists in having given comfort and succor to the actual offender after its perpetration; except in cases of receivers of stolen goods, this offence is often almost venial, consisting frequently in parents and friends, influenced by the ties of blood, or the impulses of affection, giving aid and comfort to an offender whose crime they abominate and deplore. It seems strange that the common law privilege, which exempted accessories from liability to justice until the conviction or attainder of the principal, should be taken away in cases of accessories after the fact, and left in those of accessories before the fact, whose guilt is always as great, and often much greater, than that of the principal. The 45th section proposes putting our statute laws on the subject of accessories to felonies in harmony with justice and reason. Report on the Penal Code 46-8.

SECT. 45. If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any act of assembly now in force, or that may be hereafter in force, he may be indicted and convicted as an accessory after the fact, to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become accessory, had been committed at the same place as the principal felony: *Provided always*, That no person who shall be once duly tried for any such offence, whether as an accessory after the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence. (a)

III. If several persons set out together, or in small parties, upon one common design, be it murder, or other felony, or for any other purpose, unlawful in itself, and each taketh the part assigned to him, some to commit the fact, others to watch, at proper distances and stations, to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged, they are all, provided the *fact be committed*, in the eye of the law, *present* at it. Forst. Cr. L. 350. 4 Penn. L. J. 156.

In some cases even a person absent may be a principal, as he that puts poison into anything to poison another, and leaves it, though not present when it is taken; and so, it seems, all that are present, when the poison is so infused, and consenting thereto. 1 H. P. C. 216.

If an act of parliament (or act of assembly) enact an offence to be felony, though it mention nothing of accessories before, or after, yet virtually and consequentially those that counsel or command the offence are accessories *before*, and those that knowingly received the offender are accessories *after*. 1 H. P. C. 613. But if the act of parliament (or of assembly) that makes the felony in express terms comprehend accessories *before*, and makes no mention of accessories *after* [the fact], namely, receivers or comforters, then, it seems, there can be no accessories *after*. 1 H. P. C. 614.

It seems agreed that the law hath such a regard to that duty, love and tenderness, which a wife owes to her husband, as not to make her an accessory to felony by any receipt given to her husband; yet if she be any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact in the same manner as if she had been *sole* (single.) Also, it seems agreed that no other relation besides that of a wife to her husband will exempt the receiver of a felon from being an accessory to the felony; from whence it follows, that if a master receives a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are all accessories in the same manner as if they had been mere strangers to one another. 2 Hawk. 820.

But if the wife, alone, the husband being ignorant of it, do receive any other person, being a felon, the wife is accessory, and *not* the husband. But if the husband and wife, *both*, receive a felon, knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. 1 H. P. C. 621.

(a) This section is only an extension of the existing laws, which, as will be seen from the preceding remarks, subjected accessories after the fact, and receivers, to punishment before the conviction or attainder of their principals. It embraces such accessories not only in common law felonies, but those created, or which hereafter may be created, by statute; it authorizes the conviction of such offenders either with or after the conviction of the principals, or for a substantive offence, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be

amenable to justice. It also provides for the case of a party becoming an accessory after the fact in one county to a felony committed in another; giving jurisdiction over the crime of such accessory to the courts of the county having jurisdiction over the crime of the principal offender. This provision supplies the 22d and 28d sections of the act of 1718, 1 Sm. 119, made, probably, to meet a doubt at common law, whether an accessory in one county to a felony in another, was indictable in either. Report on the Penal Code 48.

By the revised Penal Code, persons charged as accessories to murder, manslaughter or other homicide are directed to be tried at a court of oyer and terminer. *Purd.* 255.

IV. WARRANT FOR MISPRISION OF FELONY.

BERKS COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of H— in the County of Berks, greeting:

WHEREAS complaint hath been made before J. R., one of the Justices of the Peace in and for the County of Berks, on oath of J. L., of H—, aforesaid, storekeeper, that R. S., of H—, aforesaid, blacksmith, well knowing that a felony and burglary had been committed by A. B., of H—, aforesaid, laborer, in the night of Sunday, the nineteenth day of December, instant, in the dwelling-house of the said J. L., at H—, aforesaid, did unlawfully conceal his knowledge of the same felony and burglary. These are, therefore, to command you forthwith to take the said R. S., and bring him before the said J. R., to answer unto the said complaint, and further to be dealt with according to law.

WITNESS the said J. R., at H—, aforesaid, the twenty-eighth day of December, in the year of our Lord one thousand eight hundred and fifty-nine.

J. R., Justice of the Peace. [SEAL.]

Return of Constable on the Warrant.

I have taken the within named R. S., whose body I have ready, as within I am commanded. December 30th 1859.

X. Y., Constable.

WARRANT FOR AN ACCESSORY BEFORE THE FACT.

MERCER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Mercer, greeting:

WHEREAS information hath been made on oath before J. R., one of the Justices of the Peace in and for the County of Mercer, that one C. D., of the township aforesaid, laborer, on the night of Tuesday, the seventh day of May, last past, did feloniously break and enter the dwelling-house of E. F., at L. P., in the said county; and that A. B., of the township aforesaid, yeoman, did procure, aid and abet the said C. D. to commit the said felony and burglary. You are, therefore, hereby commanded forthwith to take the said A. B., and bring him before the said J. R., to answer unto the said complaint, and further to be dealt with according to law.

WITNESS the said J. R., at H—, in the said county, the fourth day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

J. R., Justice of the Peace. [SEAL.]

Return of Constable.

By virtue of this warrant, to me directed, on the fifth day of June, instant, I took and arrested the within named A. B., and safely kept him in my custody, until C. S., of S— township, aforesaid, and divers other persons to me unknown, on the sixth day of June, instant, at the township aforesaid, assaulted and ill-treated me, and the said A. B., out of my custody, then and there, rescued. And afterwards, the said A. B. is not found in my bailiwick. June 10th 1859.

X. Y., Constable.

COMMITMENT FOR AN ACCESSORY AFTER THE FACT.

DAUPHIN COUNTY, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said county, and to the Keeper of the Dauphin county prison, greeting:

THESE are to authorize and require you, the said constable, forthwith to convey and deliver into the custody of the keeper of the said prison, the body of J. L., of H—, in the said county, coppersmith, charged, on the affirmation of J. W., of H— aforesaid, farmer, before J. R., one of the Justices of the Peace in and for the said county, with having received, comforted, assisted and relieved a certain R. S., well knowing that a felony and robbery had been committed by the said R. S. upon T. B., of Berks county, yeoman, on the sixth day of March, last past, by assaulting him upon the public highway, leading from L— to H—, and feloniously taking from him the sum of forty-five dollars. And you the said keeper are hereby required and commanded to receive the said J. L. into your custody, in the said prison, and him there safely keep, until he be thence delivered by due course of law.

WITNESS the said J. R., of H— aforesaid, the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine.

J. R., Justice of the Peace. [SEAL.]

When the person charged is brought before the justice and the witnesses examined, if the offence be bailable, he ought to be required to give sufficient surety for his appearance at the succeeding court; if the offence be not bailable, or if the offender refuse or neglect to give such surety, he ought to be committed.

FORMS OF DOCKET-ENTRIES IN CRIMINAL CASES.

THE COMMONWEALTH	Warrant issued April 3d 1869, to the Constable of S— township, on the affirmation of D. W., charging defendant with receiving, &c., R. S., who had committed a robbery upon S. B. April 4th 1869, defendant brought, denies the charge, and tenders bail, which is accepted.
vs.	
J. L.	
COSTS.	
Justice 30 Information 20 Docket-entry 20 Warrant 40 Recognizance 50	J. L. bound in \$100 } for the appearance of J. L. at the next G. D. " " \$100 } session, &c., to answer, &c., and not to depart, &c.
Constable.	
Serving warrant 50	Acknowledged April 4th 1869, before me, J. R. D. W. bound in \$50 for his appearance at next sessions, &c., to testify, &c., and not to depart, &c.
Mileage 54	Acknowledged April 4th 1869, before me, J. R. (Returned to June sessions 1869.)
THE COMMONWEALTH	Warrant issued January 3d 1869, to the Constable of H—, on oath of J. L., charging defendant with concealing S. B., who had committed a burglary in the dwelling-house of the said J. L., December 28th 1868. Defendant brought, and denies the charge. On hearing, he is directed to enter bail for his appearance, &c., which he refuses. Commitment issued.
vs.	
R. S.	
Subpoena issued for three witnesses for Commonwealth: served by constable.	
COSTS.	
Justice \$2.00 Constable 1.43	J. L. bound in \$50 } for their appearance respectively at next J. F. " " \$50 } sessions, &c., to give evidence, &c., and J. D. " " \$50 } not to depart, &c.
	Acknowledged January 3d 1869, before me, J. R., Justice.
	J. L. and J. F. sworn, J. D. affirmed. (Returned to March sessions 1869.)

Actions at Law,

Or Proceedings before Justices of the Peace in Civil Cases.

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| <p>I. General nature of actions at law.</p> <p>II. Civil jurisdiction of justices.</p> <ol style="list-style-type: none"> 1. In actions on contracts. 2. In actions for rent. 3. In actions for penalties. 4. In actions on foreign judgments. <p>III. Proceedings in civil causes.</p> <ol style="list-style-type: none"> 1. Of the process and service. 2. Process in case of non-residents. 3. Amicable actions. 4. Judgments by default. 5. Of the trial before the justice. 6. Of depositions. 7. Proceedings before referees. <p>IV. Of the appeal.</p> <p>V. Of the certiorari.</p> | <p>VI. Proceedings subsequent to the judgment.</p> <ol style="list-style-type: none"> 1. Of the stay of execution. 2. Of the transcript to bind real estate. 3. Of the execution. 4. Liability of the constable. 5. Docket-entries and transcripts. 6. Transcripts to other counties. 7. Satisfaction of judgments. <p>VII. Justices' dockets.</p> <ol style="list-style-type: none"> 1. Transfer of dockets. 2. Proceedings to enforce the delivery of justices' dockets. 3. Proceedings to supply lost dockets. <p>VIII. Special jurisdiction.</p> <p>IX. Outline of proceedings in a civil suit before a justice of the peace, or alderman.</p> |
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I. AN ACTION is defined to be—the lawful demand of one's right. Actions are divided into criminal and civil; as for instance, *criminal actions* are to have judgment of death, &c., or only to have judgment for damages to the party, fine, and imprisonment. Co. Litt. 284. 2 Inst. 40.

Civil actions are divided into *personal*, *real* and *mixed*. Personal actions are such whereby a man claims a debt, or personal duty, or damages, in lieu thereof, and likewise, whereby a man claims a satisfaction in damages for some

injury done to his person or property. The former are said to be founded on contracts, the latter upon torts, or wrongs. Of the former nature are all actions upon debt or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like. 3 Bl. Com. 117.

Real actions, which concern real property only, are such whereby the plaintiff, here called the defendant, claims title to have any lands or tenements, rents, commons or other hereditaments, in fee-simple, fee-tail or for term of life. Ibid.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. Ibid.

Joint actions are where several persons are equally concerned, and the one cannot bring the action, or cannot be sued without the other. *Several actions* are where persons are to be severally charged; as in trespass committed by many, it is several.

Action on the case is a general action given for redress of wrongs and injuries done, *without force*; as for not performing a promise made by the defendant to the plaintiff, or for speaking words by which the plaintiff is defamed, or for other misdemeanors or deceits.

Actions upon an act of assembly.—Upon every act of assembly made for the remedy of any injury, mischief or grievance, an action lies by the party grieved either by the express words of the act, or by implication, and such action shall be either by an action for a recompense to the party, in damages, or by way of prohibition.

Actions qui tam, sometimes called popular actions, are such as are given by act of assembly, which imposes a penalty, and creates a forfeiture for the neglect of some duty, or commission of some crime; to be recovered by action or information, at the suit of him who prosecutes, as well in his own name, as in the name of the party to whom a portion of the penalty is made payable.

It is a settled rule, that the *cause* of action must exist at the *commencement* of the suit, and cannot be varied by subsequent circumstances. 3 Binn. 38. S. & R. 144.

The suing out the writ is the *commencement* of the suit, and the *cause* of action must be antecedent thereto. 1 Caines 40.

An action cannot be sustained in the courts of a state on any agreement entered into in violation of the laws of the United States, or the laws of the particular state. 6 Binn. 321.

A claim which is founded upon a transaction which is either *malum prohibitum*, or *malum in se*, cannot be enforced by an action of any kind. 1 W. & S. 18.

Where a duty, judicial in its nature, is imposed upon a public officer or municipal corporation, a private action will not lie for misconduct or delinquency in its performance, even if corrupt motives are charged. 1 Denio 595.

A party cannot, by assigning part of his claim to another, divide an entire cause of action; nor by any means sustain more than one suit for it, and, if two suits be brought, a recovery in the first is a conclusive bar to the second. 1 S. & R. 78. 6 C. 196.

The plaintiff must commence his suit within a certain period after the cause of action accrued, which varies according to the nature of the subject; otherwise his claim may be defeated by the interposition of the statute of limitations, or by the presumption which the law allows in cases of stale or antiquated demands, that they have been satisfied. It is not a statute to protect parties against loss of evidence merely, but to quiet claims, and promote the security of mankind. Formerly the English courts were disposed against it; but, latterly, they, as well as the courts of the United States, seem inclined, as far as possible, to retrace those steps and get back to the plain construction of the act. 2 Tr. & H. 94. See tit. Limitation of Actions.

II. CIVIL JURISDICTION OF JUSTICES.

1. In Actions on Contracts.

The justices of the peace of the several counties of this commonwealth, shall

have jurisdiction (a) of all causes of action arising from contract, either express or implied, (b) in all cases where the sum demanded is not above one hundred dol-

(a) "Shall have jurisdiction." The general jurisdiction of the justices of the peace will be found laid down more in detail, and defined with more strictness in other parts of this volume, principally under the head "Jurisdiction," and in the notes to this section. "The jurisdiction of justices in civil cases," says Judge KING, "is derived *altogether* from statutes, and when the cause of action is not embraced in any of these, a justice cannot interfere." "A limited authority," says SHIRRES, C. J., in 1 Binn. 106, "such as is given to justices of the peace, must be strictly pursued. They cannot interfere, officially, in a civil controversy, without pursuing the steps pointed out by the act."

(b) The following remarks may not be unacceptable as giving some general idea of what is to be understood by contracts "either express or implied." In all contracts there must be two or more contracting parties, and the law will enforce upon each party the fulfilment of that portion of the contract he may have engaged to perform; the contract itself being for a valid consideration, and founded in good faith. Every contract implies an *assumpsit* in law to perform the same; a contract would be to no purpose if there were no means to enforce its performance. All contracts are to be certain, perfect and complete. A contract made and entered into upon good consideration, may, for good consideration, be dissolved. "A promise," says Blackstone, "is in the nature of a verbal contract, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an *express* contract, as much as any covenant, and the breach of it is an equal injury."

Express contracts include *sales*, *rents* or other agreements where there is a fixed price agreed upon for the articles sold or the property rented; in such cases the seller of the goods, or the renter of the property, may bring suit against the purchaser or the tenant for the sums which they had severally agreed to pay. If the purchaser, however, shall pay the money agreed upon, and the goods sold shall not be delivered according to the agreement, the purchaser may bring suit against the seller to recover back the money he had paid; the seller having, by the non-delivery of the articles at the time agreed upon, failed to fulfil his contract: and further, if the purchaser shall be able to show any damage he has sustained from the non-performance of the contract, he may bring suit not only to recover back the money he has paid, but also for damages.

When the seller of the goods undertakes their delivery to the purchaser, he is answerable for such delivery at the *time* and *place* and in the *condition* agreed upon. But if the purchaser shall undertake to provide a conveyance, or shall direct that the goods be sent by a particular carrier or a certain line of stages, if the seller sends the goods purchased, according to the directions of the buyer, and

they miscarry, or come too late, or get damaged, the *purchaser* must suffer the loss. The reason for this difference is obvious; in the first case, the carrier of the goods is the agent of the *seller*, and in the second case the carrier of the goods is the agent of the *purchaser*.

Where there is no agreement, that is, as to rent, between the owner of a property and the occupant, the owner may recover reasonable satisfaction for the tenements which have been occupied, in an action for use and occupation. This, however, is an *implied* contract. "*Implied* contracts," says the same author, "are such as reason and justice dictate, and which, therefore, the law *presumes* that every man has contracted to perform; and, upon this presumption, makes him answerable to such persons as suffer by his non-performance." For example, on such presumption suits are brought to recover back money paid in *mistake*; or through *deceit*; or by *extortion*: or *imposition*. If a person employ another to do any work or service, the law implies, or presumes, that the employer undertook to pay the person he employed a reasonable compensation, such as is usually paid for such work or services in the vicinity where the work was done, or the services rendered. The law also, with equal reason and justice, presumes the person employed engages to do the work, or render the service in such a manner as such work or such services are usually done, and to be content with the compensation usually paid in that neighborhood for such work and services.

The law raises a similar implication where a person buys goods from another without agreeing upon the price to be paid; and in an infinite variety of other cases the same presumption is assumed; as on promissory notes, orders, due-bills; also to recover back money paid to one acting under a void authority; money paid, laid out, and expended to the use of another, or at his request; or for money had and received by the defendant to the use of the plaintiff; or for goods sold and delivered; or for work and labor done; or for neglect of duty or non-performance of engagements; as where a person loses goods or clothing, &c., at an inn; or where a common carrier, from negligence, fails to deliver the property he had been hired to convey; or a farrier injures a horse in shoeing him; or a tailor, milliner, shoemaker or other mechanic does the work he has undertaken to do in an unskilful or unworkmanlike manner.

In these, and in such like cases, though no agreement shall have been made, yet there exists a legal liability, and the law presumes that the party promised to pay the debt, or perform the duty, and on failure the party injured has a right to redress. There is also an extensive class of contracts, implied by reason and construction of law, which arises from the presumption that every one who undertakes any office, employment, trust or duty, contracts with those who employ him, or intrust him, to perform its duties, with

lars, (a) except (b) in cases of real (c) contract, where the title to lands or tenements may come in question, (d) or action upon promise of marriage. Act 20 March 1810, § 1. *Purd.* 592.

integrity, diligence and skill. If, from a want of any of these qualities, injury accrues to individuals, they have their remedy by legal proceedings.

The legislature, in conferring jurisdiction on justices of the peace, had in view those contracts which arise immediately out of a course of dealing between the parties, and not that sort of contract that arises remotely out of the compact of government. 13 S. & R. 103. 2 P. R. 295. And therefore, justices have no jurisdiction of an action on a sheriff's bond. 17 S. & R. 367. Or a constable's bond. 4 W. 215. Nor in debt against a sheriff for an escape. 13 S. & R. 44. Nor of an action against a constable for not paying arrears of rent out of the proceeds of an execution. 2 J. 379. Nor for a militia fine. 2 Wh. Dig. 120, pl. 50. Nor for a balance due on a judgment of the common pleas. 8 S. & R. 343. 12 S. & R. 58. 17 S. & R. 369. Nor for the penalty for not entering satisfaction on a judgment. 13 S. & R. 102. Nor on a judgment of another justice, except in the particular mode prescribed by the act. 17 S. & R. 369. Nor on the judgment of a justice of another state. 7 W. 314. (But see *infra* 4.) Nor on a devastavit by an executor. 12 S. & R. 58. A forfeited recognisance. 17 S. & R. 370. A bail-bond. *Ibid.* An action for a legacy. 12 S. & R. 59. Account render. 10 S. & R. 227. 5 Wh. 452. Detinue. 1 T. & H. Pr. 26, note 9. An action against another justice for money collected in his official capacity. 6 W. 384. Or for a tort. 2 P. R. 292. 1 Ash. 130, 152. 2 J. 379. 8 W. 179. Or for jurors' fees. 3 Luz. Leg. Obs. 394.

But they have jurisdiction in an action on an insolvent bond. 2 P. R. 462. 3 P. R. 64. An award. 7 Barr 134. A bailment. 7 W. 175, 542. An action for ground-rent. 3 P. R. 461. For fees. 4 B. 167. For the penalty for taking illegal fees. 7 W. 491. For unliquidated damages for breach of contract. 1 Phila. 254. In *assumpsit* for carelessness in the performance of work. 7 C. 14. Of an action against executors for money paid by a devisee which is properly chargeable on the residuary estate. 8 C. 309. Or against a constable for selling goods exempt by law. 3 Gr. 240.

(a) A plaintiff may sue before a justice for a balance of less than \$100, although his claim originally exceeded that amount. *Herbert v. Conrad*, *Purd.* 592 c. Where there have been mutual dealings or partial payments on account, and the balance is under \$100, it has ever been the practice to sue before a justice. 1 J. 281. See 1 W. & S. 57. 4 Barr 330. 7 W. & S. 434. 3 P. R. 525. 1 P. R. 21. 5 Wh. 94. 16 S. & R. 255. But where the plaintiff's demand has not been reduced by payments or by mutual dealings between the parties, to the statutory standard, he cannot give jurisdiction by remitting part, and suing for the balance. 1 Wr. 387. The plaintiff may remit a part, or the whole of the interest due on his claim, so as to bring the case within the jurisdiction. 9 Wr. 235. Where, however,

both the plaintiff's demand, and the defendant's set-off exceed \$100, the plaintiff cannot give jurisdiction to the justice, by admitting one item of set-off, and disputing the residue of the defendant's claim. 1 Leg. Gaz. 91. A judgment will not be reversed, because on appeal, a declaration is filed for a greater sum than \$100. 8 Barr 465. 1 J. 282. 1 Wr. 390. So, a payee of several promissory notes amounting in the aggregate to more than \$100, may bring several suits before a justice. 6 H. 162. In Erie county, the jurisdiction of justices has been extended to \$300 by act 18 February 1869, *Purd.* 1573; in Venango county, by act 13 February 1870, P. L. 188; and in Lawrence county, by act 25 February 1870, P. L. 254.

— If the justice have not jurisdiction, the common pleas has none on appeal. 10 S. & R. 227. 1 Wr. 388. Thus, if a justice give judgment for a certain sum and interest, in the whole above his jurisdiction, and the defendant appeal to the common pleas, although he there plead the general issue and go to trial, judgment will be arrested. 1 B. 219. The proceedings in the common pleas are *de novo* only as to the pleadings; the cause of action must continue the same. 3 B. 45. See 2 P. F. Sm. 442.

(b) "Except." Besides the cases which the words of the law exempt from the jurisdiction of justices of the peace, and those which judicial decisions have declared not to be included in it, there are certain official stations, as senators and representatives, which, for a time, exempt the persons who fill such stations from the service of civil process. There are also certain civil duties which individuals are bound by law to perform, or to be in readiness to perform; as militia men, jurors, witnesses, parties, &c., which, during their existence, exempt the individuals thus subjected from the service of civil process. The 18th section of the 1st article of the constitution of Pennsylvania, declares that the senators and representatives of the state "shall, in all cases except treason, felony, and breach of surety of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from, the same."

(c) An action for the balance of the purchase-money of a lot of ground, is such real contract. 3 P. R. 388. Or to recover back money paid on a contract for the sale of land which is afterwards rescinded because of a defect of title. 2 W. 325. Or to recover damages for a deficiency in quantity in the sale of land. 3 R. 325. But a contract to purchase a judgment which is a lien on real estate is not within the exception. 3 H. 358. Nor is a contract for the produce of land. 14 Leg. Int. 28. And by the act of 1814, jurisdiction is given to them in all actions of trespass for injury to real estate; excluding only those cases in which the title to land actually does come in question; of which the defendant must make oath before the justice. 8 H. 468

(d) This excludes from their cognisance

If any person or persons shall commence, sue or prosecute any suit or suits, for any debt or debts, demand or demands made cognisable as aforesaid, in any other manner than as is directed by this act, and shall obtain a verdict or judgment therein which, without costs of suit, shall not amount to more than one hundred dollars, (a) not having caused an oath or affirmation to be made before the obtaining of the writ or summons or *capias*, and having filed the same in the prothonotary's office of such county, that he, she or they, so making oath or affirmation, did truly believe the debt due or damages sustained, exceeding the sum of one hundred dollars, he, she or they, so prosecuting, shall not recover costs in such suit. (b) *Ibid.* § 26.

Any justice of the peace shall take cognisance of any matter or thing made so by this act, for any sum exceeding one hundred dollars, if the parties voluntarily appear (c) before him (d) for that purpose, and shall proceed for the recovery thereof by entering judgment, if confessed, or if submitted to him by reference; (e) but no execution (g) shall issue before the expiration of one year from the date of such judgment, if the party defendant be a freeholder, or shall have entered special bail, and such judgments shall be prosecuted to recovery as other judgments by this act are made recoverable: but if it shall afterwards appear, (h) by due proof, on

every suit on a contract concerning or in any way connected with realty. 8 H. 468. A justice has no jurisdiction when the title to land may come in question directly or indirectly. 3 P. R. 388. 3 Wh. 110. 2 W. 135. 3 R. 325. 6 H. 240. As of an action on a note given in consideration of a right to dig a mill-race, and conduct water across plaintiff's land. 6 W. 337. It is otherwise, where such note is in the hands of an indorsee. 5 W. 482. But an assignee of the contract cannot sue before a justice. 2 Gr. 37.

(a) If the amount be reduced below \$100, by evidence of set-off, the plaintiff will recover costs, without an affidavit. 3 S. & R. 388. 2 D. 74. 13 S. & R. 287. 16 S. & R. 253. 3 P. F. Sm. 93. And so, where it is reduced below \$100, by evidence of a special contract to pay the debt of a third person. 7 W. 346. 1 W. 39. But it is otherwise where the amount is reduced by direct payments. 5 Wh. 94. 1 W. & S. 57. 1 D. 308, 457. 2 S. & R. 530. 9 W. & S. 66. 4 Barr 330. Where the plaintiff, in an action in the common pleas on a contract, recovers less than \$100, and there is nothing on the record to show that the demand was reduced by set-off, the presumption is that it was within the jurisdiction of a justice. 11 H. 184.

(b) See 9 S. & R. 294. 3 C. 71. 9 C. 378.

(c) "If the parties voluntarily appear." The justice cannot enter judgment on a warrant of attorney, or a judgment note or bond. Such a judgment would be void. The parties must voluntarily appear before the magistrate. No writing, nor evidence of any kind, can be taken as a substitute for the appearance of the parties. To confer jurisdiction, the parties must appear without process. 7 Wr. 247. See 2 Gr. 247. Judgment being confessed, the merits of it cannot afterwards be inquired into by the justice. Numerous authorities to support these assertions may be found among the "judicial decisions" in this volume. They are here given to impress the justice with the absolute necessity which exists for his always keeping strict watch, so that he shall not overstep the limit of his authority. In every

case, the words of the law are his best, as they are his only safe guide.

(d) At his office. 1 P. R. 15. It must appear by the record that the parties appeared in person before him and confessed the judgment. 10 W. 118. The plaintiff, in such case, may appear by his agent, and enter a confession of judgment, for a sum exceeding \$100. 1 C. 145.

(e) A justice has no jurisdiction of a contested claim exceeding \$100, and cannot acquire it by consent. 1 S. & R. 27. 2 S. & R. 489. 4 S. & R. 190. The parties must agree on the sum for which judgment is to be entered, or leave it to the justice to ascertain from mutual accounts, admitted to be fair and just. 1 S. & R. 27-31. The justice cannot appoint referees to decide on such a claim. 1 S. & R. 27. And an award in such case could not be sustained. 2 S. & R. 489. But the parties may cure the defect by a subsequent voluntary confession of judgment. 3 W. 235. No appeal lies from such a judgment. 4 S. & R. 190. Nor can the justice open it, and inquire into the merits. 3 W. 381.

(g) The justice has jurisdiction of proceedings against a constable for a false return to an execution issued on such judgment. 15 S. & R. 75.

(h) Where a judgment is confessed before a justice of the peace, for a sum exceeding \$100, it is not sufficient, in order to certify the case into the court of common pleas for trial, under this section, that a creditor of the defendant should make affidavit, that there is just cause to believe the judgment was confessed for the purpose, and with a view to defraud just creditors; but the justice must certify that he is satisfied, by due proof, that there is just cause for such belief. *Gluyas v. Freudenvoll*, Common Pleas, Philadelphia, July 8, 1858, MS. But if the justice so certify, the court cannot go behind his certificate, and inquire how he made up his mind,—whether after hearing and evidence, or by *ex parte* affidavit; they must take the certificate to be sufficient. *Woodward v. Bower*, Common Pleas, Philadelphia, July 10, 1848. MS.

oath or affirmation, that there is just cause to believe that any such judgment was confessed for the purpose, and with a view to defraud just creditors, it shall be the duty of the justice to transmit a certified transcript of his proceeding to the prothonotary of the proper county, who shall file the same for adjudication of the court of common pleas, whose judgment thereon shall be final; and if on trial of the merits^(a) of the cause, it shall be found that the sum for which judgment was confessed was not actually due at the time, both parties, if both shall have been privy to the fraud, shall each pay a fine equal to the amount of such fraudulent judgment, and also pay the reasonable costs and expenses of the party prosecuting, or in any case of inability to pay such fine and costs, shall be imprisoned for any time not exceeding six months; but if it shall appear on such trial, that the judgment was just, the party prosecuting shall pay all the costs of suit and the reasonable costs of the parties to such judgment. *Ibid.* § 14.

2. In Actions for Rent.

The powers of justices of the peace shall extend to all cases of rent, not exceeding one hundred dollars,^(b) so far^(c) as to compel the landlord to defalcate, or set off, the just account of the tenant out of the same, but the landlord may waive further proceedings before the justice, and pursue the method of distress in the usual manner, for the balance so settled; but if any landlord shall be convicted, after such waiver, in any court of record, of distraining for, and selling more than to the amount of such balance,^(d) and of detaining the surplus in his hands, he shall forfeit to the tenant four times the amount of the sum detained: *Provided*, That no appeal shall lie^(e) in the case of rent, but the remedy by replevin shall remain as heretofore. *Ibid.* § 20.

The said justices of the peace and aldermen shall have original jurisdiction of all cases of rent,^(g) not exceeding one hundred dollars, to be recovered as debts of similar amount are recoverable.^(h) Act 22 March 1814, § 6. *Purd.* 593.

3. In Actions for Penalties.⁽ⁱ⁾

The aldermen and justices of the peace of every city, incorporated township and borough in this commonwealth, shall have power to hear and determine all actions of debt for penalty, for the breach of any ordinance, by-law or regulation of such city, township or borough, in the same manner, and subject to the same right of appeal^(k) as debts under one hundred dollars; and such actions shall be instituted in the corporate name of such city, township or borough.^(l) Act 15 April 1835, § 7. *Purd.* 593.

In all cases of the breach of any by-laws of any city, borough,^(m) town or corpo-

(a) When a case is certified into court, under this section, the practice is either to form a feigned issue, or to try the case on the justice's transcript without pleadings, 4 R. 110. The court of common pleas of Philadelphia county have decided that, on the trial, the plaintiff must make out his case by competent evidence as though the case had been originally brought in the common pleas. When a judgment alleged to be fraudulent is opened, without terms, the plaintiff must establish his case as if no judgment had been entered. The burden of proof, in such case, is on the plaintiff. 2 Gr. 121. But see 12 C. 162; 9 P. F. Sm. 223; and Gilp. 404.

(b) See 2 Luz. Leg. Obs. 324.

(c) It seems, that he cannot proceed to judgment and execution. 4 Y. 237.

(d) The decision is *prima facie* evidence, on the issue of no rent in arrear, in favor of a stranger whose goods were levied on. 1 R. 435.

(e) No appeal lies by the tenant. 1 Br. 69. But the court of common pleas of Philadelphia county have held, that the landlord is not deprived of the right of appeal by this proviso.

(g) An action of covenant for ground-rent is within the act. 3 P. R. 461. And such action may be brought against an assignee of the land. 9 H. 450.

(h) If the defendant, before the trial of the action, shall make oath that the title to lands will come in question, it is the duty of the justice to dismiss the case, under § 2 of this act. 4 P. L. J. 351. Justices have no jurisdiction of a claim for rent where the title to the real estate from which it issued comes into question. 6 H. 240.

(i) See tit. Penalties.

(k) There is no right of appeal where the penalty claimed is less than \$5.33; and in such a case, the court dismissed the appeal, although more than two years had elapsed, and the plaintiff had filed a declaration and entered a rule to plead. *Northern Liberties v. Crocks*, Com. Pleas, Phila., December 1848, MS. Where an appeal does not lie, no waiver will give jurisdiction. 1 Ash. 168. 5 H. 89. 4 S. & R. 190.

(l) An action *qui tam* cannot be sustained. 1 Phila. R. 251.

(m) By act 3 April 1851, § 32, fines and

rate body within this commonwealth, subjecting the offender to a penalty or fine therefor, suits for the recovery thereof may be maintained before any justice of the peace or alderman, in like manner as suits for the recovery of debts under the sum of one hundred dollars may now be maintained before them: *Provided*, The parties shall have the right to appeal as in other cases. Act 5 April 1849, § 7. *Purd.* 594.

4. In Actions on Foreign Judgments.

The justices of the peace of this state shall have jurisdiction in actions of debt, on demands not exceeding one hundred dollars, founded on the judgment or judgments of any justice of the peace of any adjoining state, where a similar jurisdiction is given to justices by the laws of such state, founded on the judgment or judgments of justices of the peace in this state: *Provided*, That it shall appear by a copy of the record or docket-entry of the proceedings had before such justices, certified and authenticated as hereinafter mentioned, that the original cause of action was such as by the laws of this commonwealth would have been within the jurisdiction of the justices of the peace thereof. Act 27 February 1845, § 3, *Purd.* 594.

The plaintiff, or the party in interest, in such cases shall, as evidence of his demand, produce on the trial a copy of the record or docket-entry of the proceedings had before the justice who tried the original action, (a) with his affidavit thereto annexed, certifying the same to be a true and full copy of the record of the proceedings had before him, and that the judgment remains in force, and has not to his knowledge been vacated, annulled or in any manner satisfied; and further certified by the clerk of the court of common pleas, or clerk of the county where such justice keeps his office, under the hand of such clerk, and seal of the court or county, that the person before whom the proceedings purport to have been had, was at the time an acting justice of the peace of such county duly appointed or elected and qualified according to law: *Provided*, That the defendant shall have the right to make the same defence to the action upon said judgment as he was originally entitled to make to the claim or demand upon which it was founded. *Ibid.* § 4.

The copy of the proceedings aforesaid shall be kept by the justice who shall try the case, as a part of the record, and it shall be a part of the record of the proceedings of such justice. *Ibid.* § 5.

III. PROCEEDINGS IN CIVIL CAUSES.

1. Of the Process and Service.

The said justices are hereby respectively empowered and required, upon complaint being made (b) to any of them touching any such demand as aforesaid, to issue a summons, if the party complained of (c) be a freeholder, if not, either a summons or a warrant of arrest, (d) directed to the constable (e) of the township, ward

penalties under the ordinances of any borough, are recoverable before any justice of the peace of the borough; and to be paid over to the treasurer for the use of the corporation. *Purd.* 122.

(a) It would be advisable in actions brought under this act, wherever it is practicable, to have some evidence of the identity of the defendant with the person against whom judgment was obtained in the other state. On this subject, Chief Justice GIBSON, delivering the opinion of the supreme court, says—“Identity of name is ordinarily, but not always, *prima facie* evidence of personal identity. The authorities on this subject may be consulted in *Sewall v. Evans* (14 Ad. & Ellis 632), from which Lord DENMAN, and the other judges of the Queen's Bench, concluded that identity of name is something from which an inference may be drawn, unless the name were a very common one, or the transaction remote; and the reason given for casting the onus on

the party who denies is, that disproof can be readily had, by calling the person, whose identity is contested, into court.” 2 Barr 183. And see 2 W. C. C. R. 201. 12 Verm. 9. 4 Monr. 451, 526. 2 P. L. J. 302. 2 Am. L. R. 499. 2 Eq. Ca. Abr. 585. 18 N. Y. 87.

(b) “Upon complaint being made.” A complaint must be made to the justice by some person in his own case, or as the attorney or agent of another, before he is authorized to issue process. He cannot enter a judgment on a warrant of attorney. 1 B. 105.

(c) If the constable add new names to the summons, without authority of the justice, it vitiates the whole process. 1 Luz. Leg. Obs. 38.

(d) A justice, since the passage of the act of 1842, can only issue a warrant of arrest in cases of trespass or trover, for the recovery of money collected by a public officer, or for official misconduct.

(e) “Directed to the constable.” The

or district where the defendant usually resides or can be found, or to the next constable most convenient to the defendant; (a) if on a summons, commanding him to cause the said defendant to appear before the said justice on a certain day therein to be expressed, (b) not more than eight nor less than five days after the date of the summons; (c) and the service on the defendant shall be by producing the original summons to, and informing him of the contents thereof, or leaving a copy of it at his dwelling-house (d) in the presence of one or more of his family (e) or neighbors at least four days before the time of hearing; (g) but, if on a warrant of arrest, forthwith on the service of the same: *Provided nevertheless*, That in all cases where a warrant or *capias* is issued against the person of a debtor, it shall and may be lawful for the proper constable of the township, ward or district to take bail for the appearance of the defendant before the justice from whom said warrant or *capias* may have been issued, in the following words: "*We, A. B. and C. D., are held and firmly bound unto E. F., constable of ———, or order, in the sum of ———, on condition that the said A. B. shall be and appear before G. H., Esquire, justice of the peace in the said township of ———, on the ——— day of ———, to answer ——— in a plea ———. Witness our hands the ——— day of ———.*"

And if on the return of the said warrant or *capias*, the defendant shall not appear and enter bail before the justice in the nature of special bail, the constable may assign the obligation to the plaintiff, if he will accept the same, which obligation may be sued in the name of the plaintiff, as assignee of the said constable; but if the bail for the appearance so taken by the constable shall be insufficient, the constable shall be liable therefor, as sheriffs now are, to the plaintiff or plaintiffs named in the warrant or *capias*, notwithstanding such assignment; but if the defendant shall appear and enter special bail, the justice may proceed to a final determination of the suit, according to law, and after judgment such bail shall be proceeded against by *scire facias*, (h) and shall be liable in the same manner as special bail

magistrate cannot legally direct his civil process to any other person or description of persons, than those by law specially authorized to serve them. A constable may, but a justice may not, depute another to serve a civil warrant at the request and risk of the plaintiff. There is no such authority vested in the justice.

(a) It is the universal practice for justices to issue their precepts to any constable of the county. 7 S. & R. 353-54. And his sureties are bound, though he be not the constable of the proper township. 7 S. & R. 349. A precept directed to ———, constable, if executed by the proper officer, is well directed. 6 B. 123. But the constable of one township who sells property under an execution directed to the constable of another township, is a mere trespasser, and his acts are utterly void. 3 Barr 349.

(b) The summons is to be returnable "on a certain day therein to be expressed." The form and manner of service, and the constable's return of this process, may be found fully set forth under the title "Summons." "If a warrant shall issue," it becomes the duty of the constable, or his deputy, forthwith, on the arrest of the defendant, to take him before the justice, unless he shall give bail, in the form set forth in the second section of the act now under consideration.

(c) In case of non-residents from two to four days; *infra*, 2. In computing the time, both the day of the issuing and the return-day are to be counted. 5 H. 48. But see 5 C. 524-5. 4 Wr. 372. 21 Leg. Int. 4.

(d) If the defendant does not appear, and thereby waive any defect in the service of

the summons, it is essential that the constable's return should substantially follow the words of the act, or the proceedings will be reversed on *certiorari*, although sued out more than twenty days after the judgment is rendered. In such case, the defendant is not in court, and all the subsequent proceedings are erroneous. A return to a summons, of "personally served," or "served a copy on defendant," is insufficient, where the defendant does not appear. So a return of "left a copy at defendant's boarding-house," is insufficient; and so, also, is a return of "copy served on defendant." Com. Pleas, Phila., Nov. 14, 1848, per KING, President. MS. 2 Pars. 232, 285. Purd. 413, n. 3 Pitts. L. J. 301. 21 Leg. Int. 340. But a judgment rendered on such insufficient return, although irregular, is not void. 6 H. 120. See 3 Am. L. B. 248. A return of service "personally on defendant at his dwelling-house, by leaving a copy of the original summons and making known the contents thereof," is sufficient. 4 P. F. Sm. 90. The defendant's dwelling-house, within the meaning of the law, is one in which he then actually resides, though he may be temporarily absent therefrom. 17 Pitts. L. J. 162.

(e) It is not necessary that the return should show that the copy was left with an adult member of the family. 2 Phila. 259.

(g) Unless process be served before the return day, the proceedings before a justice are *coram non judice*, and void. 8 Barr 410. 4 Comat. 379. 1 Phila. 427-8.

(h) A *sci. fa.* is to be served in the same manner as a summons. 1 Phila. 252-4. It must be issued by a justice of the county where the bail resides. 5 P. L. J. 431.

now is liable, in cases in the courts of common pleas, and may surrender the principal to the jail of the proper county within ten days (a) after the service of the *scire facias*, in the discharge of the bail: nevertheless, the bail to the constable may enter sufficient special bail to the suit, or cause it to be entered at the return of the warrant or *capias* in discharge of the obligation, where the defendant may neglect or refuse to appear, in which case the justice may proceed in the same manner, as if the defendant had appeared. "Act 20 March 1810, § 2. Purd. 594.

[A certified (b) copy of such recognisance, by the justice of the peace, shall be sufficient authority for the special bail, or any person authorized by him, to take the principal within this commonwealth, and to deliver him to the jail of the county wherein the proceedings were had, and the jailer and sheriff are hereby directed to receive him, and keep such principal so surrendered, together with the bail-piece upon which the surrender was made, until he shall be discharged by law:] and there no appeal shall be made from the justice, and the special bail do not surrender the body of the defendant to the jail of the county, for which he shall have authority as above directed, on or before the return day of the *scire facias* issued by the justice against such bail, and cannot show sufficient cause why he should be executed, the justice shall enter judgment and issue execution without stay against him for the same. Ibid. § 5.

No execution issued on any judgment rendered by any alderman or justice of the peace, upon any demand arising upon contract, express or implied, shall contain a clause authorizing an arrest or imprisonment of the person against whom the same shall issue, (c) unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of the alderman or justice of the peace, either that such judgment was for the recovery of money collected by any public officer, or for official misconduct. (d) Act 12 July 1842, § 23. Purd. 595.

No *capias* or warrant of arrest shall issue against any defendant in any case in which, by the provisions of the preceding section, an execution on the judgment recovered could not be issued against the body, and whenever a *capias* or warrant of arrest in such case shall issue, the like affidavit shall be required as for the issuing of an execution by the provisions of said section. Ibid. § 24.

All summons issued by any alderman or justice of the peace, may designate the hours of the day between which the same shall be returnable; and if either of the parties fail to appear during the time so designated, it shall be lawful for the said alderman or justice of the peace to render judgment, or otherwise determine the case, as is provided by law. Act 26 April 1855, § 1. Purd. 595.

2. Process in case of Non-Residents.

Whenever a plaintiff shall reside out of this commonwealth, he may, upon giving bond, with sufficient surety, for the payment of all costs which he may become liable to pay, in the event of his failing to recover judgment against the defendant, have a *capias* or warrant of arrest, if he shall be entitled to such writ, on making the affidavit required in the 23d section of this act, or a summons which may be returnable not less than two nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein, and if the same shall be returned, personally served, the justice or alderman issuing the same, may proceed to hear and determine the case in the manner heretofore allowed by law. Act 12 July 1842, § 25. Purd. 595.

(a) See 1 Ash. 74. 5 S. & R. 399.

(b) The only part of this section that is in issue is the concluding portion, providing for entry of judgment against special bail, in case in which the justice is authorized to issue a *capias* or warrant of arrest.

(c) In an action for a penalty, which is not to be recovered "as debts of like nature are by law recoverable," the defendant is not liable to arrest; an execution, in such case, authorizing the imprisonment of the person is void, and the defendant may be dis-

charged on habeas corpus. *Martin's Case*, Com. Pleas, Phila., 15 April 1854. MS. See 1 D. 135. 4 Y. 237, 240.

(d) Women are not relieved from arrest for debt by this act, but by that of 19 February 1819, (7 Sm. 150), which provides that no female shall be arrested or imprisoned for or by reason of any debt contracted after its passage. And this provision is re-enacted by the act 13 June 1836, § 6, (P. L. 573.) *Morton v. Hofheimer*, District, Phila., 6 June 1860. MS. And see 1 Ash. 373.

Whenever, by the provisions of the 24th section of this act, no *capias* can issue, and the defendant shall reside out of the county, (a) he shall be proceeded against by summons or attachment, returnable not less than two nor more than four days from the date thereof, (b) which shall be served at least two days before the time of appearance mentioned therein. (c) *Ibid.* § 26.

Where any person or persons, not being residents of this commonwealth, shall engage in business, (d) in any county within this commonwealth, and not being in the county at the time of the issuing of any writ or process against such person or persons, it shall be lawful for the officer charged with the service thereof, to serve any writ of summons, or any other mesne process, in like manner as summons are served, upon the agent or clerk of such defendant or defendants at the usual place of business, or residence of such agent or clerk, with the same effect as if served upon the principal or principals personally: *Provided*, That before final judgment is entered in any case under this act, actual notice in writing shall be given to the party defendant, of such action, and the nature thereof; proof of which notice shall be made by the production of a copy of such notice, and the oath or affirmation of the plaintiff, or other person, to the service thereof, to the magistrate or court before which such action may be pending. Act 2 April 1856, § 1. *Purd.* 31.

When any person or persons not being residents of this commonwealth, shall engage in business in any county of this commonwealth, it shall and may be lawful for the officer charged with the execution of any writ or process issued out of any of the courts of this commonwealth, to serve the same upon any clerk or agent of such person or persons, at the usual place of business or residence of such agent or clerk, with like effect as though such writ or process was served personally upon the principal. Act 21 April 1858, § 1. *Purd.* 31.

8. Amicable Actions.

The said aldermen and justices shall take cognisance by amicable suit of all causes of action within their jurisdiction, whether such jurisdiction arises from this act or from an act to amend and consolidate, with its supplements, the act entitled "An act for the recovery of debts and demands not exceeding one hundred dollars, before a justice of the peace, and for the election of constables, and for other purposes." Act 22 March 1814, § 7. *Purd.* 595.

4. Judgments by Default.

In case the defendant does not appear (e) upon summons, on the day ap-

(a) This does not authorize them to issue attachments against the property of persons not residing within the state. 1 H. 128.

(b) If a non-resident of the county be sued by a long, instead of a short summons, the judgment is void; the justice thereby acquiring no jurisdiction of the person of the defendant. 5 Hill 285. 4 N. Y. 384. 3 Lux. Leg. Obs. 80.

(c) See title "Attachment against Absent and Fraudulent Debtors." And *Purd.* 31.

(d) See 1 Leg. Gaz. 131. This does not include one who merely offers for sale, through an agent, town lots situate in the county in which suit is brought. *Ibid.*

(e) "In case the defendant does not appear." This section is full and clear in directing the justice how he is to proceed, what order he is to take, "if the defendant does not appear," and also, "in case the plaintiff does not appear," at the time at which the process issued requires their attendance, or, to use the language of the law, "on the day appointed." It is a generally received maxim, that "the law knows no fractions of a day." The business in the office of a justice of the peace could not however be transacted, with any tolerable convenience to parties, or

rather without much loss of time to parties and witnesses, if the law did not acknowledge and sanction generally recognised divisions of days as well as days themselves. For example, it is believed that every justice of peace, in Pennsylvania, when he issues a summons, appoints an hour, as well as a day, at which he requires the parties to appear. In some districts, as in the city of Philadelphia, the hour having arrived at which the parties are required to appear, half an hour longer is allowed, if the parties are not present and ready to go on, before the justice proceeds to hear the case. In other districts, it is probable, there are other points of time established by custom, before the arrival of which the justices do not proceed to give judgment. The time having at length arrived, and the plaintiff being present, and the defendant, on being called, failing to answer, the justice proceeds to hear and examine the proofs and allegations of the plaintiff, and then gives judgment by default, *publicly*, against such defendant. "In case the plaintiff does not appear," and the defendant does, the justice, if required, may give judgment of nonsuit against the plaintiff; or he may, for sufficient cause, or by consent adjourn the hearing to another time.

pointed, the justice may, on due proof, by oath or affirmation, (a) of the service of the summons as aforementioned, proceed to give judgment by default, (b) publicly, against such defendant, allowing twenty days as aforesaid for an appeal, where the defendant be a freeholder, before any further proceedings are had; but in case he is not a freeholder, the justice may then issue an execution, directed to a constable as aforesaid, who shall proceed as in other cases; but if the defendant, within twenty days after such judgment, shall enter [special] bail, and pay the costs accrued on the execution, he shall then be entitled to an appeal (c) or stay of execution, in the same manner as though the bail had been entered at the time of rendering such judgment: and in case the plaintiff does not appear, either in person or by agent, to substantiate his charge, the justice may then, or at such other day as he may judge reasonable, proceed to give judgment against him by nonsuit, (d) for the costs, and fifty cents per day for the reasonable costs of the defendant, for his trouble in attending such suit. Act 20 March 1810, § 6. Purd. 596.

5. Of the Trial before the Justice.

If the parties appear (e) before the justice, (g) either in person or by agents, (h) the justice shall proceed to hear their proofs and allegations, (i) and if the demand

(a) To sustain a judgment by default, it must appear by the record, that the constable was sworn to his return. *Fitzgibbons v. Esen*, Com. Pleas, Phila., 10 March 1862. MS. Due proof of the service of process is essential to confer jurisdiction. 3 *Las. Leg. Obs.* 80.

(b) He must first hear evidence in support of the plaintiff's claim: the law says he shall give judgment, after hearing the parties, *their proofs* and allegations. 1 Phila. 519. 8 *Pitts. L. J.* 385. 1 *Pennington* 320, 322.

(c) See 1 *Ash*. 408. The entry of bail for an appeal, though it may stay the immediate execution of a *fi. fa.* or other final process, will not avoid all that has been done under such proceedings: in order fully to supersede the execution, it is necessary to perfect the appeal by bringing it into court. *Lee v. Farrell*, Com. Pleas, Phila., 14 May 1853. MS. 5 C. 240. If, however, the execution be returned, the lien is gone, though the appeal be never perfected. 3 *Wr.* 284.

(d) He can only enter judgment of nonsuit where there has been no appearance. 2 *Barr* 89. 5 *H.* 75. No appeal lies from a regular judgment of nonsuit, under this section. 1 *Phila.* 580.

(e) If the parties voluntarily appear before the return day, and consent to the hearing, the justice may proceed to give judgment. 3 *Binn.* 29. 5 *H.* 48.

(g) "If the parties appear before the justice." It is clear from the phraseology of the law, "the justice" before whom the parties are to appear, is the justice who issues the process for their appearance. The issuing of the process, and its service, vest a right in the magistrate who issues it to proceed in the suit, of which he cannot be divested by another whose authority is only equal to his own.

(h) The justice is the judge of the authority of the agent. 5 *H.* 48.

(i) The "justice shall proceed to hear their proofs and allegations." Their "proofs," that is, their evidence, whether written or oral, will be received in the same manner, subject to the like exceptions, and under the usual obligations in which it would be re-

ceived in the court of common pleas. Their "allegations," that is, the statements of the parties, will be heard by the justice, without any oath or affirmation being administered to them. The justice will find it useful to permit the parties to make their allegations, and to talk of the business before him with all reasonable latitude. In the interchange of question and answer, statement and counter-statement, admissions and denials of the parties, he will often have much light shed upon the matters on which he has to give judgment.

The appeal allowed to either of the parties to the court of common pleas, makes it, in an especial manner, the duty of the justice to guard against the admission of any evidence, on the trial before him, which would be rejected by the court to which the appeal lies. A general knowledge of the law of evidence, of what is right to admit and what to reject, seems to be indispensably requisite to a faithful and enlightened discharge of the duties of a justice of the peace. The admission of illegal evidence tends to mislead the judgment, and as, on appeal, it would be rejected, and the judgment founded on it set aside, the consequence would be, that the plaintiff would take nothing for the trouble, time and costs, which he had given to the suit; and instead of justice being administered, injustice and wrong, however unintentional, yet still injustice and wrong, would have been done to the plaintiff, as well as to the defendant, by the very person to whom he had applied, and on whom he had confidently relied that right and justice should be faithfully administered. These truths make it incumbent on every man who undertakes to discharge the high duties, civil and criminal, which appertain to the office of a justice of the peace, to lose no opportunity to qualify himself to do "equal and exact justice" to all who may come before him, whether as plaintiffs or defendants, as accusers or accused.

Where there exists an appellate jurisdiction, it is folly for the court below to govern itself by any other rules of evidence than those which are acknowledged in the court above.

shall not exceed five dollars and thirty-three cents, shall give judgment, as to right and justice may belong, which judgment shall be final: (a) but if the demand or sum in controversy shall be more than that sum, and shall not exceed one hundred dollars, and either party shall refuse to submit the determination of the cause to the justice, he shall in that case request them to choose referees, (b) one, two or three each, and mutually to agree upon a third, fifth or seventh man, all of whom shall be sworn or affirmed, "*well and truly to try all matters in variance between the parties submitted to them;*" and on having heard their proofs and allegations, they, or a majority of them, shall make out an award, under their hands, and transmit the same to such justice, who shall thereupon enter judgment for the sum awarded, (c) and costs, and shall allow each of the said referees fifty cents per day for his service; which judgment so obtained, when not exceeding twenty dollars, (d) shall be final and conclusive to both plaintiff and defendant, without further appeal; and it shall be the duty of the justice to notify, through a constable or some fit person, each of the referees so chosen of their appointment, and of the time and place fixed for a hearing; and if any person so chosen and notified as aforesaid shall neglect or refuse to serve, (e) he shall, for every such neglect or refusal, unless prevented by sickness or some other unavoidable cause, forfeit and pay the sum of two dollars for the use of the poor, and where there are no poor, to be paid to the supervisors of the roads, to be applied by them in repairing the streets or public highways of the city or township in which such person or persons so refusing or neglecting shall reside, which fine shall be recovered before such justice of the peace, on complaint of the party injured, as other fines are by law recoverable: *Provided*, That an action be brought within thirty days after such neglect or refusal. Ibid. § 3.

If either party or their agents shall refuse to refer, the justice may proceed to hear and examine their proofs and allegations, and thereupon give judgment, (g)

(a) "Which judgment shall be final;" the sum in controversy not exceeding \$5.33. It is not intended by the use of the word "final" to take away the right of taking the proceedings by *certiorari* before the court of common pleas: the time and manner of doing this may be found in the 21st section of this act, and under the title "*Certiorari*."

(b) The cause can be referred only by consent of both parties. 3 P. R. 175.

(c) A justice of the peace may set aside an award of arbitrators appointed by consent in a cause pending before him, for malfeasance. And if the grounds of his action do not appear, the court must presume they were sufficient. 9 Barr 106. The award merges in the judgment. 3 Wr. 274.

(d) If the plaintiff's demand do not exceed \$20, he can have no appeal. 2 S. & R. 463. 12 S. & R. 385. 3 P. R. 174. It is the amount of the demand or sum in controversy, and not the amount of the judgment, which regulates the right of appeal. 2 W. 304. 4 S. & R. 72. Where the sum sued for by the plaintiff, and set forth on the docket of the justice, is reduced by the judgment more than \$20, an appeal lies for the plaintiff, although the judgment is for a less sum than \$20. 12 S. & R. 388. 9 W. 17. 3 Barr 454. 1 J. 410. And in such case the defendant is likewise entitled to an appeal by act 20th March 1845. 1 J. 410. But if the plaintiff claim \$25, and there is an award in his favor for \$11, neither party can appeal. 1 C. 340. And see 2 Phila. 291. The amount in controversy may be shown by parol. 2 W. 304.

(e) "Shall neglect or refuse to serve." By

an act passed March 26th 1814, it is enacted that if any referee "shall not attend at the time and place fixed for hearing the cause," the parties or "referee or referees present," shall supply the vacancy. Authority is also given to the referees "to swear or affirm each other," and "to administer oaths or affirmations to witnesses on the cause before them," and to adjourn themselves to such time and place as they may deem proper.

(g) The justice shall "give judgment publicly." That is, after having heard and examined "their proofs and allegations." The duty thus enjoined, and the manner in which it is enjoined, is of a peculiarly impressive character. The justice is not only to hear, but he is commanded to examine, "the proofs and allegations of the parties," and after having so heard and examined, he is to give judgment *publicly*, in the face of the parties, of their counsel, of their witnesses, and of whoever may be present to hear the judgment. It was manifestly the intention of the legislature in making this provision, to make the justice sensible that the eye of his fellow-citizens is upon him, that the ear of the constituted authorities is open to hear, and that his door should be open to admit all who may think proper to enter and conduct themselves in a becoming manner. The justice is to give no judgment in private, he is absolutely forbidden so to do; all, says the law, shall be done "publicly." The constitutional injunction that "all courts shall be open," is here enforced to the letter, and it is elsewhere, in this law, enjoined upon magistrates. The legislature, in making this provision, acted under the conviction, that "publicity,"

publicly, as to him of right may appear to belong; (a) either party having the right to appeal, (b) within twenty days (c) after judgment being given, either by the justice alone, or on award of referees, when such award shall exceed the sum of twenty dollars. (d) Ibid. § 4.

A defendant who shall neglect or refuse in any case to set off his demand, whether founded upon bond, note, penal or single bill, writing obligatory, book account or damages on assumption, (e) against a plaintiff, which shall not exceed the sum of one hundred dollars, (g) before a justice of the peace, shall be, and is hereby, for ever barred (h) from recovering against the party plaintiff, by any after suit: (i) but in case of judgment by default, (k) the defendant, if he has any available light, is a powerful shield against misbehavior as well as crime.

To carry out, as far as it can be carried out, this injunction, in judgments "by default," the writer of this note makes it his constant practice, when asked for a judgment by the plaintiff, to make public inquiry, that is, with a loud voice—"In the case of A. against B., is B. present, or anybody for him?" If there be no answer, the alderman proceeds—"In this case there is judgment for the plaintiff for ——— dollars."

The supreme court, carrying out the intention of the legislature, to keep the justice, in all his acts, before the public, in a recent decision, (1 P. R. 15,) say—"A justice of the peace, being a judicial officer, must have his court, or place of administering justice, and in order to the validity of an amicable judgment, upon his docket, the party confessing the same must be before him, and at his office."

In these amicable actions, and confessions of judgment, it would be well, in all cases, if both the parties were to sign their names upon the docket.

(a) He cannot enter a compulsory nonsuit, after appearance; but such judgment is conclusive, unless appealed from: it is equivalent to a judgment that the plaintiff has no cause of action. 2 Barr 89. 5 H. 75. 3 H. 101. 4 Lux. Leg. Obs. 24. But the discontinuance of an action before a justice, after a hearing, is no bar to a subsequent suit. 2 Am. L. R. 120. Although the plaintiff confess judgment for the costs, 8 H. 9. 1 C. 77. If, however, a plaintiff appeal from a judgment for the defendant on the merits, and then discontinue, he is bound. 3 W. 46. 10 Barr 70.

(b) If the defendant have a cross-demand exceeding \$5.33, and the decision of the justice be against his set-off, he is entitled to an appeal. 3 P. R. 120. 2 W. 304. But it must be a *bond fide* claim to set-off. 6 H. 78-9. The parties may waive the right of appeal. 2 S. & R. 114. 8 W. 372. 1 Ash. 92. But it must be by agreement in writing. 7 S. & R. 366. An appeal lies from a judgment on a *sci. fa.* 3 S. & R. 93. And from a judgment by confession. 1 C. 409. But no appeal lies from a regular judgment of nonsuit. 1 Phila. 580.

(c) In computing the time, the day of judgment is to be excluded. 3 S. & R. 496. 3 Phila. 425. 5 C. 525. (But see 4 H. 14. 2 Phila. 340.) And if the twentieth day fall on Sunday, the appeal may be entered on the next day. 3 P. R. 201. 4 Barr 515. If the justice, by mistake, refuse an appeal, it

may subsequently be entered, after the twenty days. 16 S. & R. 421. 2 Ash. 224. The entry of a rule to show cause why the judgment should not be opened after the expiration of the twenty days, does not give the right of appeal, on the discharge of the rule. 1 Phila. 425. See 3 Barr 211. 4 P. L. J. 105. 9 Barr 106. But if such rule be taken within the twenty days, it extends the time for entering an appeal. 2 Ash. 224. It is too late to enter an appeal after the money is made on an execution, although within the twenty days. 7 W. 337.

(d) The sum in controversy may be shown by parol. 2 W. 304.

(e) This includes unliquidated damages arising from contract. 3 H. 562. 4 W. & S. 290. 6 W. & S. 155.

(g) "Shall not exceed the sum of \$100." If the set-off shall exceed \$100, it must be rejected as beyond the jurisdiction of the justice. 1 Wr. 456. "but if the demand of the defendant be composed of several items, he may set off such of them as do not exceed the jurisdiction of the justice." 3 P. R. 469. And where there have been mutual dealings or partial payments on account, and the balance is under \$100, it has ever been the practice, under the act of 1810, to sue for the balance of the account before a magistrate. 1 J. 281. 1 Wr. 387.

(h) This is imperative. 5 W. & S. 460. After process is issued by one justice, it is unlawful for the defendant to sue for a cross-demand before another. 1 Ash. 171. 2 Ash. 146. If, however, both suits be carried on without objection, both proceedings are valid. 3 C. 71.

(i) But he is not barred from proving such set-off, on the trial of an appeal from the judgment of the justice. 2 Gr. 150.

(k) "But in case of judgment by default," "on proof being made" of certain facts, "the defendant, if he has any account of set-off against the plaintiff's demand, shall be entitled to a rehearing." It is doubted by some, whether a justice has any right to grant the defendant a rehearing, unless the judgment against him shall have been "by default." And it has lately been decided by the court of common pleas of Philadelphia county, that a justice has no power to open his judgment, except under the circumstances and in the manner provided by statute, to wit: 1. At the instance of the appellant, with the consent of the adverse party, under § 4 of the act of 1810: 2. Where the defendant is entitled to a rehearing, after judgment by default, under § 7 of the same act: 3. In a proceeding under the act

count to set off against the plaintiff's demand, shall be entitled to a rehearing^(a) before the justice within thirty days, on proof being made, either on oath or affirmation of the defendant, or other satisfactory evidence, that the defendant was absent when the process was served, and did not return home before the return day of such process, or that he was prevented by sickness of himself, or other unavoidable cause; and the justice shall have power to render judgment for the balance, in favor of the plaintiff or defendant, as justice may require. *Ibid.* § 7.

In all bonds, bills or notes, wherein, by a special provision in writing^(b) for that purpose, is waived the stay of execution, given by this act, any justice may, on application to him made, after such bond, bill or note becomes due, issue a summons [or *capias*,] as the case may be, and proceed to hear and determine the same, as in other cases; and on judgment being rendered in favor of the plaintiff, he shall or may issue execution thereon without stay; nevertheless that in case of judgments, by default, the defendant shall, at any time within twenty days thereafter, be entitled to a rehearing or appeal, agreeably to the provisions of the 6th and 7th sections of this act, although execution may have issued.^(c) *Ibid.* § 13.

A defendant against whose body, by the provisions of this act, an execution cannot be issued by an alderman or justice of the peace, shall be required, in order to obtain an [appeal, stay of execution^(d) or] adjournment, to give a bond or recognisance in the nature of special bail,^(e) conditioned that no part of the property of the defendant which is liable to be taken in execution, shall be removed, secreted, assigned or in any way disposed of, except for the necessary support of himself and family, until the plaintiff's demand shall be satisfied, or until the expiration of ten days after such plaintiff shall be entitled to have an execution issued on the judgment obtained in such cause, if he shall obtain such judgment; and if the condition of such bond or recognisance be broken,^(g) and an execution on such judgment

of 12 July 1842, where the process has not been served personally on the defendant. 1 Phila. 520. *Ibid.* 515. 5 Phila. 468. But though this be so, as to a judgment regularly entered, he may open a judgment by default, which was irregularly entered without service of process on the defendant. 21 Leg. Int. 340. It was decided as early as 1755, that a new trial cannot be granted by an inferior court. Sayer 202. It seems, that even the courts of common pleas have no power to open their judgments, obtained adversely, after the expiration of the term at which they were entered. 2 W. 378-80. 6 W. 513. 9 C. 485.

(a) "Shall be entitled to a rehearing." The justice should be satisfied that the plaintiff has had proper notice of the meeting at which the "rehearing" is to be claimed; that it is not artifice, or a mere pretext for delay on the part of the defendant, but that he has, or thinks he has, a just claim against the plaintiff. The justice, on this, as on every other occasion, must guard the rights and protect the interests of both parties. It is for that purpose he has been selected and commissioned. The time for an appeal is to be computed from the rehearing of the case. 3 Barr 211. 1 Phila. 425. Notice of the rule to open the judgment should be given to the other party. 21 Leg. Int. 4. A motion to open the judgment is not a waiver of the want of a proper service of the original process. 17 Pitts. L. J. 162.

(b) "By a special provision in writing." This is an important section, as the principle it recognises, that of a party waiving a right, has recently been applied to various other purposes than waiving "the stay of execution." And such agreements have been uniformly sustained by the courts, although they

are strictly construed. Thus, the parties may waive the right of appeal. 2 S. & R. 114. 1 Br. 99. 1 Ash. 92. But such agreement must be in writing. 7 S. & R. 366. They may also waive the right to except to an award of arbitrators. 5 B. 387. 5 S. & R. 51. 3 P. R. 99. 2 J. 183. 7 H. 419. 5 C. 283. 9 C. 535. And even to sue out a writ of error, which is a writ of right. 12 S. & R. 416. 3 P. R. 291. 15 N. Y. 587. So, a tenant may by agreement waive the benefit of the exemption law; and it will be binding on him. 6 W. 34.

The statutory privilege of the exemption of a portion of his property from levy and sale under execution, is one which may be waived by the debtor, and when made at the time the debt is created, the waiver is based upon the same consideration as that upon which rests the liability to pay, and is therefore irrevocable. 7 C. 225. 2 P. 279. 11 H. 93. 3 Gr. 132. But he cannot waive his right in favor of a younger lien-creditor, nor can he assign it to a third person. 9 H. 210. 8 C. 160. A verbal agreement to waive the exemption, made without consideration, is not binding on the debtor. 1 Pitts. L. J. 6 January 1855.

(c) It is the province of the justice to determine whether the appeal be regularly taken; and if he allow it, the constable cannot refuse to recognise it on the pretence that the justice committed an error. If he proceed with the execution, he becomes a trespasser. 3 C. 199.

(d) Repealed as to bail on appeal and for stay of execution.

(e) See 9 W. & S. 142.

(g) A sale under a subsequent execution is a breach of such recognisance. 1 H. 86. See 4 Barr 339. So is a general assignment for the benefit of creditors. 5 P. L. J. 154.

be returned unsatisfied in whole or in part, the plaintiff in an action on such bond or recognisance, shall be entitled to recover the value of the property so removed, secreted or assigned. Act 12 July 1842, § 33. Purd. 597.

6. Of Depositions.

Upon the affidavit of either party, or their agent, that the testimony of any material witness is wanted, who resides out of the county, or from his infirmity of body or other causes, cannot be obtained personally, the cause shall be postponed to a certain day, (a) within such reasonable time as the distance of the witness, the season of the year, and the circumstance of the roads, may render it proper, to obtain the deposition of the witness wanted; and whenever a cause is postponed at the instance of the defendant, he shall enter into a recognisance for a sum sufficient to cover the demand in question, together with the costs, with one sufficient surety [for his appearance, (b) on the day fixed as aforesaid;] and whenever a rule for taking the deposition of a witness or witnesses shall be applied for, as aforesaid, the party so applying shall file a copy of the interrogatories or questions intended to be asked the witnesses, and a copy of such interrogatories or questions shall be delivered to the opposite party or his agent, who may also file such additional questions as he may think proper: *Provided*, The same be done within four days after the receipt of such copy: which rule and interrogatories being certified by the justice before whom the cause is depending, shall be sufficient authority for the justice who may be named in said rule, to take the answers of such witnesses as may be therein named; but where the witnesses reside in the county, or in cases where the parties or their agents agree to enter a rule to take depositions, it may be done without filing interrogatories, upon notice given, agreeably to the rule, of the time and place appointed for the examination of the witnesses, and testimony so taken shall be read in evidence on the trial before the justice or referees. (c) Act 20 March 1810, § 8. Purd. 597.

In all cases when a suit shall be pending before a justice of the peace, it shall and may be lawful for either party to obtain testimony out of the state, in the same manner as is directed by the 8th section of the act to which this is a supplement. Act 30 March 1829, § 1. Purd. 597.

In all such cases, where it shall not be convenient to take the testimony of witnesses before a justice of the peace, it shall and may be lawful for the party or parties to name a commissioner, who on receiving a certificate of his appointment, with a copy of the rule and interrogatories, certified by the alderman or justice of the peace, shall have authority to administer oaths and affirmations, and take the answers of witnesses therein named; and depositions so taken shall be as good to all intents and purposes as if the same were taken before a justice of the peace. *Ibid.* § 2.

In all cases where a commission shall be issued from, or a rule be taken in any court of record in this commonwealth, or from any justice of the peace, or alderman, under the act entitled "An act to amend and consolidate with its several supplements, the act entitled 'An act for the recovery of debts and demands not exceeding one hundred dollars before a justice of the peace, and for the election of constables, and for other purposes,'" and of the supplement thereto, passed on the 30th day of March 1829, for the examination of witnesses, it shall be competent for the person or persons named in or authorized by such commission or rule, to issue subpoenas to such witnesses as may be requested by any of the parties concerned, requiring their attendance at a certain day, hour and place therein designated, having regard to the distance of such witnesses, and under a penalty not exceeding one hundred dollars. Act 26 February 1831, § 1. Purd. 423.

In case of the non-attendance of such witnesses, it shall be lawful for such com-

(a) "The cause shall be postponed to a day certain." If the case shall be adjourned without being postponed "to a day certain," it may be considered as finally dismissed. It may, however, by agreement, and the appearance of the parties, be again taken up for consideration.

(b) For condition of recognisance, see *supra*, p. 96.

(c) By act 11 April 1863, so much of this act as requires interrogatories to be filed, is repealed, except where depositions are to be taken without the state. Purd. 1300.

missioner, or person or persons duly authorized as aforesaid, on proof, by oath or affirmation, of the due service of the subpoena, to issue process of attachment against the defaulting witness; whereupon the same proceedings shall be had, as are used and allowed in like cases, in the courts of record of this commonwealth.(a) Ibid. § 2.

The party injured by such non-attendance shall also be entitled to the same remedies at law against the person subpoenaed, as are provided when a subpoena is issued from a court of record. Ibid. § 3.

If the person subpoenaed shall attend, but refuse to testify, he shall be liable to the same proceedings on the part of the commissioners, or persons authorized as aforesaid, as if he had appeared and refused to testify in a court of record.(b) Ibid. § 4.

7. Proceedings before Referees.

No action brought before a justice of the peace, or alderman, shall be referred to referees for trial, unless by agreement, or express consent of both parties to the action, or their agents; which agreement, or assent, shall be noted by such justice, or alderman, upon his docket. Act 26 April 1855, § 1. Purd. 604.

If any referee appointed under the 8d section of the act to which this is a supplement,(c) or under an act regulating the proceedings of justices of the peace and aldermen, in cases of trespass, trover and rent, shall not attend at the time and place fixed for hearing the cause, it shall be the duty of the referee or referees present (where the parties cannot agree on the person or persons to supply the vacancy, or where only one of the parties attends), to appoint proper persons in place of those who may be absent, and the referees thus appointed shall have the same authority as those originally appointed.(d) Act 26 March 1814, § 1. Purd. 596.

The said referees shall be sworn or affirmed by an alderman or justice of the peace, or they may swear or affirm each other, and then any of them shall have power to administer oaths or affirmations to witnesses, in the cause before them; and the said referees, or a majority of them, shall have power to adjourn their meetings to any other time or place, and as often as they may deem proper.(e) Ibid. § 2.

Referees, or arbitrators, as aforesaid, or a majority of them, shall also have power to punish by fine, not exceeding twenty dollars, all persons, whether parties, witnesses or others, who shall be guilty of disorderly conduct in their presence, or who shall insult, disturb or interrupt the said referees or arbitrators, when in business, which fine shall be recovered as follows: Act 16 June 1836, § 43. Purd. 58.

The said referees or arbitrators, or a majority of them, shall make out a certificate in the following form, viz.: Ibid. § 44.

We, the undersigned referees (or arbitrators, as the case may be), do certify that A. B. this day, at —, in the county of —, before us, did conduct himself in a disorderly manner (or as the case may be), tending to insult, disturb and interrupt us in the trial of a certain cause, wherein C. D. is plaintiff and E. F. is defendant, for which offence we have fined him, the said A. B., the sum of — dollars, which sum you are hereby required to collect according to law.
(Signed by the Arbitrators or Referees.)

The certificate aforesaid shall be transmitted to an alderman or justice of the

(a) A defaulting witness, when brought in on an attachment, is called up to purge himself of the alleged contempt, which if he do to the satisfaction of the court, he is dismissed without more; but if he fail to purge himself, the court adjudges him guilty of contempt, and imposes the costs of the attachment, and such additional fine as, in their discretion, the case seems to demand; and in default of payment, he may be committed to jail to compel execution of the sentence. But he cannot be sentenced to imprisonment for such a contempt; this is forbidden by the act of 16 June 1836, Purd. 188, which provides that all contempts except such as shall be committed in open court, shall be punished by fine only. 1 Gr. 456.

(b) A witness who refuses to be sworn, in a court of record, is guilty of a contempt punishable by fine and imprisonment. And the same power is vested in an alderman, or commissioner appointed to take depositions under this act. 4 P. L. J. 126. A commitment for such a contempt is without prescribed limitation, and is determined by the willingness of the party to submit himself to the law. 4 Am. L. R. 17. 2 C. 22-3, 42.

(c) See *supra*, p. 94.

(d) After the referees have all met and been sworn, vacancies cannot be supplied. 7 W. 495. No authority is given to supply a second vacancy. 7 W. 495.

(e) The referees may adjourn before being sworn. 1 S. & R. 231. 6 S. & R. 375.

peace of the proper city or county, who is hereby required to make a record thereof, and issue execution to collect the same, in the manner that judgments under one dollar are by law collected; and the sum, when collected, shall be paid by such alderman or justice to the county treasurer, for the use of the county in which the offence may have been committed. *Ibid.* § 45.

The prothonotary of the court in which the suit shall be depending, or any alderman or justice of the peace, shall have power to issue subpoenas for witnesses to appear before the arbitrators. *Ibid.* § 46.

All fines and forfeitures incurred under any of the provisions of this act, shall, unless it be otherwise provided, be sued for, before an alderman or justice of the peace, in the same manner that debts of equal amount are recoverable. *Ibid.* § 53.

IV. OF THE APPEAL.

The right of appeal from judgments of aldermen and justices of the peace, and from their judgments on awards of referees, is hereby extended to defendants in all cases wherein, by existing laws, the right of appeal is enjoyed by the plaintiffs. (a) Act 20 March 1845, § 3. *Purd.* 599.

If the parties are dismissed before an appeal is made, the justice shall, at the instance of the appellant, notify through a constable, or other fit person, the adverse party to appear before him, on some day certain; and if the parties shall appear on the day appointed, it shall be in the power of the justice, with consent of the parties or their agents, to open his judgment and give them another hearing; but if they will not agree to such rehearing, the party appellant (b) shall be bound with surety (c) [in the nature of special bail], unless such party appellant be an executor or administrator [body corporate or politic]; in all or either of which cases, the party appellant shall be entitled to the appeal, without being bound with surety [in the nature of special bail], whether the appellee shall appear or not. (d) Act 20 March 1810, § 4. *Purd.* 599.

In all cases where the guardian of any minor is or shall be a party to a suit, either before a justice of the peace, or in the common pleas, such guardian shall be allowed to appeal from the judgment of said justice, and from the award of arbitrators, without making the usual affidavit, and without giving surety or paying costs. Act 27 March 1833, § 1. *Purd.* 599.

In lieu of the bail heretofore required by law, in the cases herein mentioned, the bail in cases of appeal (e) from the judgments of aldermen and justices of the peace, and from the awards of arbitrators, shall be bail absolute, in double the probable amount (g) of costs accrued and likely to accrue in such cases, with one or more sufficient sureties, conditioned for the payment of all costs accrued or that may be legally recovered (h) in such cases against the appellants. (i) Act 20 March 1845, § 1. *Purd.* 599.

When any corporation (municipal corporations excepted), being sued, shall

(a) This act makes the right of appeal reciprocal in all cases. 1 J. 410. But it does not extend the plaintiff's right of appeal; and consequently, where previously the plaintiff had no right of appeal, this act does not confer such right on the defendant. 1 C. 340.

(b) The appellant need not join with his surety in the recognisance. 6 B. 52. An appeal by one of two defendants is good as to the one who appeals, though the other come into court and dissent. 1 S. & R. 492.

(c) Until the transcript is actually filed, the justice retains the right to decide on the sufficiency of the bail. 6 Barr 194. 1 Ash. 47. And the defendant cannot defeat the justice's jurisdiction by filing the transcript, after notice that his bail is excepted to. 1 Ash. 80. Where, however, the common pleas is in possession of a case, in the shape of an appeal, although defectively entered, the functions of the justice terminate. 1 Ash. 168.

(d) All recognisances of special bail were abolished by the act 12 July 1842; and the omitted part of the section, providing for the condition of a recognisance on appeal, is supplied by act 20 March 1845.

(e) This does not include municipal corporations. 1 Phila. 402.

(g) The recognisance should be in a sum certain. 1 P. R. 9. 1 J. 293. But a recognisance "in \$20, or such sum as may be necessary to pay all costs that have or may accrue in the case, in prosecuting this appeal," was held sufficient. 2 H. 158. See 7 H. 356. After the defendant has had the benefit of his appeal, an objection that the recognisance contained no penalty will not be allowed to prevail. 10 H. 33. And see 2 Wr. 500.

(h) The bail is not liable for the costs of an unproductive attachment in execution. 2 Luz. Leg. Obs. 332.

(i) If a defect exist in the form of the recognisance, the practice is, to apply to the

appeal or take a writ of error, the bail requisite in that case shall be taken absolute, for the payment of debt, interests and costs on the affirmance of the judgment. (a) Act 15 March 1847, § 1. Purd. 600.

The costs on appeals hereafter entered, from the judgments of the justices of the peace and aldermen, (b) shall abide the event of the suit; (c) and be paid by the unsuccessful party as in other cases: *Provided*, That if the plaintiff be the appellant, he shall pay all costs (d) which may accrue on the appeal, if in the event of the suit he shall not recover a greater sum or a more favorable (e) judgment than was rendered by the justice. *And provided also*, That if the defendant, (g) either on the trial of the cause before the justice or referees, or before an appeal is taken, (h) shall offer to give the plaintiff a judgment (i) for the amount which the defendant shall admit to be due, which offer it shall be the duty of the justice and of the referees to enter on the record, (k) and if the said plaintiff or his agent shall not accept such offer, then and in that case, if the defendant shall appeal, (l) the plaintiff shall pay all the costs, which shall accrue on the appeal, if he shall not, in the event of the suit, recover a greater amount (m) than that for which the defendant offered to give a judgment; and in both cases the defendant's bill shall be taxed and paid by the plaintiff, in the same manner as if a judgment had been rendered in court for the defendant. Act 9 April 1833, § 1. Purd. 600.

All which proceedings so had before the justice, shall be entered at large by him in a docket (n) or book to be kept by him for that purpose, in which he shall

court for a rule upon the appellant to perfect his appeal within a given time, or show cause why it should not be dismissed; it would be error to quash the appeal in the first instance. 16 S. & R. 249. 2 P. R. 431. 1 W. & S. 378. 5 W. & S. 363. And this applies to an appeal granted erroneously on the defendant's own recognisance and plea of freehold. 27 Leg. Int. 70. An objection to the form of the recognisance will be waived by any step taken to prepare the case for trial. 1 J. 336. Where an appeal does not lie, no waiver will give jurisdiction; but where an appeal does lie, the party may, by treating it as regularly in court, waive a defect which would otherwise be fatal. 1 Ash. 168. 4 S. & R. 190. 5 H. 89.

(a) This applies to an appeal from the judgment of a justice of the peace. 9 S. & R. 227.

(b) This applies to appeals in cases of trespass and trover. 7 C. 424.

(c) A plaintiff is entitled to recover full costs, although the amount finally recovered be not so great, either as the judgment of the justice, or the award of arbitrators out of court, from each of which the defendant appealed. 7 W. 235. 5 W. 508. So, if the defendant appeal from the judgment of a justice in his favor, for a sum certain, and on the trial there be a verdict and judgment for him for a less amount, he is, nevertheless, entitled to full costs. 7 W. & S. 313. 4 W. 389. But if the defendant recover judgment, before the justice, for a sum certain, and the plaintiff appeal, and the award of arbitrators in court be "no cause of action," neither party can recover costs. 2 W. & S. 36. And where the justice gave judgment for the defendant for \$17.34, from which the plaintiff appealed, who, on a rule of reference entered by him, obtained an award in his favor for \$5, from which the defendant appealed; and upon a trial in court, there was a general verdict for the defendant: it was held, that the defendant was entitled to judgment for the costs which had accrued prior to the

appeal from the judgment of the justice. 6 Barr 463.

(d) This does not include the counsel fee of \$4, and daily pay, allowed by the act of 1810. 8 W. & S. 274. 7 W. 235. 7 Barr 125.

(e) See 2 Barr 65. 3 P. L. J. 239. 1 P. R. 23. 4 P. L. J. 377.

(g) The offer of a judgment may be made by the defendant's agent, in his absence. 12 Wr. 127.

(h) An offer made afterwards, although before the justice has made out his transcript of the appeal, is too late. 1 Barr 188. But it may be made at any time before the appeal is taken, though the plaintiff be not present. 6 W. 494.

(i) A tender before the justice of a sum of money equal to the amount recovered, is not sufficient. 4 W. 389. Nor is a tender of such sum, together with the costs accrued. 4 Wh. 78.

(k) The record is the only evidence of it. 4 W. 389. 1 Barr 38. It is not sufficient that it appear in the certificate to the justice's transcript. 2 J. 255. But if such offer be entered on the record, it is error to receive evidence that it was in fact conditional in its terms. 3 H. 41.

(l) This proviso has no application where the appeal is taken by the plaintiff. 10 H. 298.

(m) To entitle the plaintiff to costs, in such a case, he must recover a greater sum than that for which the defendant tendered a judgment, with the interest added. 3 Wr. 111.

(n) "All proceedings had before the justice shall be entered at large by him in a docket." The manner of making entries and of keeping the docket is so important to the public as well as to the justice, that it is thought best, in a separate article under the head of "The Docket," to give some general advice as to the manner of keeping the docket. Where a suit before a justice is terminated by any act or agreement of the parties which amounts,

state the kind of evidence upon which the plaintiff's demand may be founded, whether upon bond, note, penal or single bill, writing obligatory, book debt, damages on assumption, or whatever it may be; and the whole proceeding, in case of appeal, shall be certified to the prothonotary of the proper county, who shall enter the same on his docket, and the suit shall from thence take grade with, and be subject to the same rules as other actions (a) where the parties are considered to be in court, and the costs accrued before the justice shall await the event of the suit. Act 20 March 1810, § 4. *Purd.* 600.

Provided always, That if the party appellant shall enter bail to appeal within twenty days after judgment being given as aforesaid, such appeal shall be effectual, in case such party appellant shall file the transcript of the record of the justice, in the prothonotary's office, on or before the first day of the next term (b) of the court of common pleas of the proper county, after entering such bail as aforesaid: (c) *Provided*, That upon any such appeal from the decision, determination or order of [two] justices (d) of the peace to the court of common pleas or court of quarter sessions in any county, the cause shall be decided in such court on its facts and merits only; and no deficiency of form (e) or substance, in the record or proceedings returned, nor any mistake in the form or name of the action, shall prejudice either party in the court to which the appeal shall be made: (g) *Provided further*, If any executor or administrator shall declare before the justice, after judgment against him, that he has not sufficient assets to satisfy such judgment, it shall be the duty of the justice forthwith to transmit the record of his judgment to the prothonotary of the court of common pleas, to be entered on his docket; and the said court shall adjudge and decree thereon, and appoint auditors to ascertain and apportion the assets according to law, as in other cases. *Ibid.*

In all cases where an appeal is taken from a judgment of a justice of the peace or alderman, and the appellant neglects or refuses to file the same in the prothonotary's office of the proper county, according to law, it shall and may be lawful for the justice or alderman before whom the judgment was entered, to issue an execu-

directly or indirectly, to a discontinuance of the action, it is part of the official duty of the justice to enter such act or agreement upon his docket, and the docket-entry is evidence of the same. 9 H. 66.

(a) After the appeal is filed, the proceedings in court are *de novo* as to the declaration, pleadings and evidence; the cause of action must, however, continue the same. 1 B. 219. 3 B. 45. And nothing can be recovered in court which could not have been recovered before the justice, except the intermediate interest. 10 S. & R. 227. See 1 W. & S. 301. 8 P. F. Sm. 463. On appeal, the defendant cannot defalcate a claim beyond the jurisdiction of the justice. 12 Wr. 456. The form of action may be changed on an appeal, provided the cause of action remain the same. 2 W. 14. 1 R. 370. A plaintiff cannot discontinue his own appeal so as to authorize him to proceed on the original judgment. 10 Barr 70. 3 W. 46.

(b) It must be filed to the next term, although the 20 days may not have then expired. 3 P. R. 416. But a defective appeal may be withdrawn, and other bail entered within the 20 days, though a return day has intervened. 2 J. 363. And see 1 Leg. Gaz. 85.

(c) The appeal need not be filed within 20 days after the judgment; it is enough that it be entered in the docket of the court at any time before the next return day. 3 B. 432. A party who makes the justice his agent

for the purpose of filing his appeal, is not entitled to relief if the justice neglect to do so. 2 W. 72.

(d) The word "two" is here inserted by mistake; it applies to appeals from a single justice. 7 W. 180. 3 Wh. 82. 1 H. 64, 174-76.

(e) "No deficiency of form," &c. It is not to be presumed, from the phraseology here used, that the legislature intended to embolden ignorance or give to indolence any encouragement. The object was to prevent "prejudice to either party" to the suit. It is expected, and it is the duty of justices of the peace, to take pains and give time to acquire the knowledge necessary to qualify them faithfully and with ability to discharge the various important, high and honorable duties which appertain to the office they have had conferred upon them. The justices of peace can do more, by their personal conduct, in the discharge of their relation to society, and by their official deportment, to give a wholesome and an honest character and tone to the public morals than any other class of men in the community. But if they can do good by their example and carriage, so also can they diffuse poison to the moral atmosphere around them. There is much responsibility on their shoulders.

(g) See 7 W. 48, 180. 4 W. 329. 2 W. 131, 173. 5 S. & R. 544. 10 S. & R. 121. 12 S. & R. 292. 3 Wh. 419. 8 W. & S. 342. 4 W. & S. 327. 1 H. 60. 2 H. 69. 1 J. 147.

tion for the amount thereof, at the instance and request of the appellee, or proceed by *scire facias* against the bail (a) Act 1 April 1823, § 5. Purd. 601.

In all cases of appeals, by defendants, from the judgments of aldermen, in the city of Philadelphia, (b) in lieu of the affidavit required by the 1st section of the act passed May 1st 1861, the defendant, or some person acting in his behalf, having knowledge of the facts of the case, shall file with the alderman, an affidavit setting forth that the appeal taken is not for the purpose of delay, but that, if the proceedings appealed from are not removed, he, or the defendant, will be required to pay more money, or receive less, than is justly due; which affidavit shall be attached to the transcript, by the alderman, to be filed in the court to which the appeal is taken. Act 27 March 1865, § 1. Purd. 1398.

All appeals from aldermen as aforesaid shall be filed in the court of common pleas of the city and county of Philadelphia, on or before the monthly return day in said court, next ensuing the date of the entry of the judgment before the aldermen, instead of to the first day of the next term as heretofore. (c) Act 1 May 1861, § 2. Purd. 601.

The justices of the peace, in and for the counties of Centre, Blair, Lehigh, Clinton, Schuylkill, Allegheny, Indiana, Northampton, Luzerne, Lebanon, Berks, Perry, Mifflin and York, (d) shall be entitled to demand and receive from the appellant, and from the plaintiff desiring a transcript for entering in the common pleas, or other transcripts, in any case tried before him, before giving a transcript of appeal or other transcript, all costs that may have accrued in the said action: *Provided*, That the payment of the costs, in the first instance, by the appellant or plaintiff, shall not debar him of his right to receive the same from the appellee or defendant, in the same manner and to the same extent as is now provided in an act approved the 9th day of April, Anno Domini 1833, entitled "An act to abolish imprisonment for debt, and other purposes:" *And provided further*, That any party to suits shall have the right to appeal and demand transcripts, without the payment of costs aforesaid, by their making and filing with the said justice an affidavit of their inability to pay such costs. Act 2 March 1868, § 1. Purd. 1510.

V. OF THE CERTIORARI.

The judges of the courts of common pleas shall, within their respective counties, have the like powers with the judges of the supreme court, to issue writs of *certiorari* to the justices of the peace, and to cause their proceedings to be brought

(a) A certificate of the neglect to file an appeal is not necessary to enable the justice to issue an execution; he may do so, at his own risk, if satisfied that the appeal has not been perfected. 1 Phila. 517.

(b) The act 2 March 1868, provides that in all cases in which judgments shall be rendered by any alderman in the city of Lancaster, or justice of the peace in the county of Lancaster, no appeal shall be allowed, unless the appellant, his agent or attorney, shall make oath or affirmation, to be filed in the cause, that he has reason to believe that injustice has been done him, and that the same is not intended for delay merely, and pay all the costs accrued before the said alderman or justice of the peace, unless appellant makes oath that he or she is unable to pay said costs: *Provided*, That this act shall not apply to parties not residents of Lancaster county. Purd. 1510. The act 23 February 1870 makes a similar provision for Dauphin county. P. L. 221. And the act 2 March 1868, provides that no appeal shall be taken or allowed from any judgment of a justice of peace in the county of Cameron, unless the party, his or their agent or attorney

appealing, shall, at the time he or they shall take such appeal, give bail for costs, and comply with all other requirements of law relative thereto; also take and subscribe an oath or affirmation that such appeal is not taken or entered for the purpose of delay, but in good faith, and because he or they verily believe that injustice has been done to him or them (as the case may be), and that he or they (as the case may be) has a just and legal defence to the plaintiff's demand, or is entitled to more than the amount of the judgment rendered by the justice; which said oath or affirmation shall be filed with the justice and entered upon his docket, and also annexed to the transcript and filed therewith. Purd. 1510. This is extended to Venango county by act 11 March 1870. P. L. 397. And see act 28 February 1870 as to Luzerne county. P. L. 269.

(c) See act 9 April 1862, as to the filing of appeals in Delaware county. P. L. 347.

(d) This section is extended to the counties of Cumberland and Cambria, by act 5 February 1869. Purd. 1573. And see act 22 March 1869, as to Westmoreland county. P. L. 478.

before them, and the like right and justice to be done.(a) Const. of Penn. Art. 5, § 8.

No writ of *certiorari* issued by or out of the supreme court, to any justice of the peace,(b) in any civil suit or action,(c) shall be available to remove the proceedings had before such justice of the peace. Act 20 March 1810, § 24. Purd. 412.

In all cases either party shall have the privilege of removing the cause, by a writ of *certiorari*,(d) from before any justice, whose duty it shall be to certify the whole proceeding had before him, by sending the original precepts, a copy of the judgment, and execution or executions, if any be issued: *Provided always*, That the proceedings of a justice of the peace shall not be set aside, or reversed, on *certiorari*, for want of formality(e) in the same, if it shall appear on the face thereof, that the defendant confessed a judgment for any sum within the jurisdiction of a justice of the peace, or that a precept issued in the name of the commonwealth of Pennsylvania, requiring the defendant to appear before the justice, on some day certain,(g) or directing the constable to bring the defendant or defendants forthwith before him, agreeably to the provisions and directions contained in this act, and that the said constable, having served the said precept,(h) judgment was rendered, on the day fixed in the precept.(i) or on some other day, to which the cause was postponed by the justice, with the knowledge of the parties;(k) and

(a) The *certiorari* is a writ of error in everything but form. 1 R. 221. 3 P. R. 24. 9 Barr 216. And to entitle the party suing it out to a *supersedeas*, he must give security. 2 Phila. 68-9. A defendant cannot take both an appeal and *certiorari*. 1 Brewst. 406.

(b) This does not apply to the proceedings of two justices under the landlord and tenant act. 3 S. & R. 95. 4 B. 185.

(c) A proceeding under the stray law is within the prohibition of the act. 2 R. 20. So is an action before the Mayor of Philadelphia to recover a penalty for a breach of ordinance. 5 R. 119.

(d) On the hearing of a *certiorari* to a justice, every reasonable presumption will be made in favor of his proceedings, consistent with the record. 3 P. L. J. 425. If the proceedings appear on the face of the transcript to be regular, and that he has acted within the sphere of his jurisdiction, parol evidence will not in general be admitted. 1 Ash. 51, 64. But the court may, to prevent injustice, make inquiry into the evidence given before the magistrate. 5 B. 29. 1 Y. 49. *Pray v. Reynolds*, 2 Wh. Dig. 133, pl. 250. To establish corruption or partiality, or the refusal to hear testimony, parol evidence is necessarily admissible; and there may be cases in which the absence of jurisdiction can be established in no other way; as where one justice undertakes to re-examine what has already been determined by another: otherwise, the court cannot go out of the record. 1 Ash. 215. 1 P. F. Sm. 48. The parol evidence must relate to the conduct of the justice. 1 P. F. Sm. 48. That want of jurisdiction may be shown by parol, is a matter of every-day practice, essential to the due administration of justice, to prevent frauds, and maintain a subordinate tribunal within its proper sphere of action. 3 Pitts. L. J. 301. 10 W. 123. 3 Y. 479. 17 Pitts. L. J. 162. But the court have no power to direct an issue to try disputed facts arising on a *certiorari*. 10 W. 53. The court will notice a substantial and fatal error in the

proceedings, although the counsel have omitted to make it a special exception, when it is deemed essential for the purposes of justice. 2 P. 265.

(e) If the party be in prison, or under arrest, the court may also issue a *habeas corpus* at common law, to bring up the body of the defendant, at the same time that the cause is removed by the *certiorari*; and may, in a proper case, admit him to bail to appear at the hearing and abide the event; and the form of the recognisance must be adapted to the exigencies of the case. 8 C. 520, 524.

(g) Where the summons did not state any day of appearance, judgment was reversed. A. 272.

(h) Where the defendant did not appear before the justice, it must appear by the record, that the process was served in the manner required by law, otherwise, the judgment will be reversed. 2 P. 232. 1 Phila. 252. 6 Pitts. L. J. 301. See 4 N. Y. 296, 379, 383. Unless process be served before the return-day, the proceedings are *coram non judge*. 8 Barr 410.

(i) A justice may give judgment before the return-day, if the party voluntarily appear and consent to the hearing. 5 B. 29.

(k) "With the knowledge of the parties," This is made by the law a pre-requisite to a valid judgment, a condition essential to protect the judgment on *certiorari*. A judgment given, without strict regard to this injunction, would, on *certiorari*, be "set aside." For example—and it is better to be diffuse than unintelligible—A. sues B., case to be heard 1 May, 8 A. M.; plaintiff appears, defendant does not. Plaintiff asks and the justice grants an adjournment to 8 May, 4 P. M., at which time the plaintiff appears, the justice hears and examines his "proofs and allegations," and renders judgment against the defendant, who had no knowledge whatever of the meeting "at which judgment had been rendered." Such judgment would be erroneous.

no execution issued by a justice shall be set aside for informality, if it shall appear on the face of the same, that it issued in the name of the commonwealth of Pennsylvania, after the expiration of the proper period of time, and for the sum for which judgment had been rendered, together with interest thereon, and costs, and a day mentioned (a) on which return is to be made by the constable, and that the cause of action shall have been cognisable before a justice of the peace: (b) and the judgment of the court of common pleas shall be final on all proceedings removed as aforesaid, by the said court, and no writ of error shall issue thereon. (c) Ibid. § 22.

No judge of any court within this commonwealth, shall allow any writ of *certiorari* to remove the proceeding had in any trial before a justice of the peace, until the party applying for such writ (d) shall declare on oath or affirmation, before such judge, (e) that it is not for the purpose of delay, but that in the opinion of the party applying for the same, the cause of action was not cognisable before a justice, or that the proceedings proposed to be removed, are to the best of his knowledge unjust and illegal, and if not removed, will oblige the said applicant to pay more money, or to receive less from his opponent than is justly due; (g) a copy of which affidavit shall be filed in the prothonotary's office: *Provided*, That no judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days (h) after judgment was rendered, and served within five days thereafter; (i) and no execution shall be set aside in pursuance of the writ aforesaid, unless the said writ is issued and served within twenty days after the execution issued. (k) Ibid. § 21.

(a) "A day mentioned." It was ruled by Judge FRANKLIN, in the court of common pleas for the county of Lancaster, that an execution made returnable "within twenty days," was erroneous, because no day was mentioned on which the return was to be made. 1 Ash. 55. But the court of common pleas for the city and county of Philadelphia decided that such execution would be valid, and that it was not necessary that a day should be mentioned in the execution on which the return is to be made. Ibid. 53. Out of abundant caution it would be advisable for justices to adhere to the former decision.

(b) The court will call in the aid of affidavits, to ascertain whether the justice has exceeded his jurisdiction. 3 Y. 479. 10 W. 123. 6 Pitts. Leg. J. 301. 1 P. F. Sm. 48. This only applies to a judgment on a *certiorari* issued under the act of 1810; when a subsequent act confers jurisdiction on justices of the peace, to proceed in a different manner from that directed in that act, the judgment of the common pleas on *certiorari* may be re-examined by the supreme court. 1 C. 134. 11 H. 521. It does not apply to proceedings under the landlord and tenant law. 4 B. 185. Or to proceedings to obtain possession by a purchaser at sheriff's sale. 1 R. 317. The proper mode of re-examining such judgment of the common pleas is by writ of error. 1 R. 317.

(c) See 2 S. & R. 112. 3 Wh. 12. 1 W. 532. 7 Wr. 111.

(d) Or his agent or attorney; see *infra*.

(e) Or before the prothonotary; see *infra*.

(g) The affidavit must substantially follow the words of the act. See 1 Br. 317. 1 T. & H. Pr. 712. For form of affidavit, see Graydon's Forms 38.

(h) If this provision be not observed, the court will not look into the judgment, even if

it do not appear from the record that the summons was served, if within twenty days the defendant had knowledge of the proceedings, and applied to have the judgment opened. 1 Ash. 135. If, however, it be apparent on the face of the record that the justice had no jurisdiction, or that the summons was not served in the manner directed by the act of 1810, and the defendant did not appear, the court will reverse the proceedings, on *certiorari*, notwithstanding more than twenty days may have elapsed before the issuing of the writ; where there is no legal service of the process on the defendant, he is not in court, and all the subsequent proceedings are erroneous and void. *Offerman v. Downey*, 2 Wh. Dig. 134, pl. 278. *Tryon v. Keller*, Purd. 413, n. 7 H. 495. 3 Am. L. R. 248. 3 Pitts. Leg. J. 301. 2 Luz. Leg. Obs. 38. 21 Leg. Int. 340. But, in such case, the party must satisfy the court that his application was made within twenty days after the fact of the entry of the judgment had come to his knowledge. *Campbell v. Penn District*, Purd. 413, n. 1 Ash. 135. 1 Phila. 439. The fact that notice was not given may be proved by parol. 7 H. 495. A judgment obtained by any trick or fraud ought to be reversed, if the *certiorari* be taken within a reasonable time after it is discovered. 7 H. 498. 3 Phila. 258. Where the defendant does not appear, it becomes the duty of the justice to see that the return be made strictly according to law, and it should be entered on his docket in the very words of the constable making it.

(i) This proviso only applies to civil suits; and an action for a penalty for a breach of ordinance is not included. 12 S. & R. 53.

(k) A *certiorari* was a supersedeas at common law. 7 Wr. 372.

The prothonotaries of the several courts of common pleas are hereby respectively authorized and empowered to administer the oath or affirmation required by the 21st section of the act to which this is a further supplement, to be taken on the issuing of any writ of *certiorari*; which oath or affirmation so administered, shall have the same force and effect as if administered by a judge of any of the said courts.(a) Act 3 February 1817, § 1. Purd. 413.

Whenever an appeal is entered to the supreme court, or a *certiorari* is sued out to remove the proceedings of a justice or alderman to the common pleas or quarter sessions, the party, his agent or attorney, may make and enter into the required affidavit and recognisance. Act 27 March 1833, § 2. Purd. 411.

In cases of appeal, *certiorari* or writ of error by any corporation, the oath or affirmation required by law shall be made by the president or other chief officer of the corporation, or in his absence, by the cashier, treasurer or secretary.(b) Act 22 March 1817, § 4. Purd. 410.

No special allowance of a writ of *certiorari* to a justice of the peace, or alderman, shall be held requisite to the maintenance of such writ. Act 26 April 1855, § 2. P. L. 304.

In all cases where the proceedings of a justice of the peace shall be removed by *certiorari*, at the instance of the plaintiff, and the same be set aside by the court, and on the second trial being had before the same, or any other justice of the peace, if judgment shall not be obtained for a sum equal to, or greater than the original judgment,(c) which was set aside by the court, he shall pay all costs accrued on the second trial before the justice of the peace, as well as those which accrued at the court before whom the proceedings have been set aside, including any fees, which the defendant may have given any attorney, not exceeding four dollars, in such trial, together with fifty cents per day to the said defendant, while attending on the said court in defence of the proceedings of the said justice of the peace; and in cases where the proceedings of any justice of the peace shall be removed at the instance of the defendant, and be set aside by the court, and it shall appear that he attended the trial before the justice, or had legal notice to attend the same, and on a final trial being had as aforesaid, the plaintiff shall obtain judgment for a sum equal to or greater than the original judgment, which was set aside by the court, he shall pay all costs accrued on the second trial before the justice of the peace, as well as those which accrued at the court before whom the proceedings have been set aside, including any fees, which the plaintiff may have given to any attorney, not exceeding four dollars, to defend the proceedings of the justice, together with fifty cents per day while attending at court on the same; which cost shall be recovered before any justice of the peace in the same manner as sums of similar amount are recoverable;(d) and in such cases, the legal stay of execution shall be counted from the date of the original judgment rendered by the justice of the peace. And the court shall, at the term to which the proceedings of the justices of the peace are returnable, in pursuance of writs of *certiorari*, determine and decide thereon. Act 20 March 1810, § 25. Purd. 413.

VI. PROCEEDINGS SUBSEQUENT TO THE JUDGMENT.

1. Of the Stay of Execution.

In all cases where the defendant is a freeholder,(e) or enters [special] bail

(a) The prothonotary is also empowered to take the necessary recognisance of bail in error. 2 Phila. 68.

(b) This provision is not repealed by act 11 June 1832, § 3. 2 H. 442.

(c) This section does not extend to the reversal of an execution on *certiorari*. 4 W. 450.

(d) A judgment of reversal, on *certiorari*, does not carry costs. *Bartram v. Atkinson*, Com. Pleas, Phila. 1858.

(e) The defendant must show a freehold not

merely worth the amount of the judgment, or more than the incumbrances upon it, but clear of all incumbrances. 6 B. 253. But he need not show title, as in ejectment: possession under color of title, is, in general, all that has been required. 1 T. & H. Pr. 250. If the freehold be within the jurisdiction of the court, the defendant need only show its existence and value; it then rests on the plaintiff, if he object, to show an incumbrance; but if the freehold be in another county, the defendant must not only show its existence and value,

[to the action,](a) and the judgment rendered shall be above five dollars and thirty-three cents, and not exceeding twenty dollars, there shall be a stay of execution(b) for three months; and where the judgment shall be above twenty dollars and not exceeding sixty dollars, there shall be a stay of six months; and where the judgment shall be above sixty dollars and not exceeding one hundred, there shall be a stay of execution for nine months. Act 20 March 1810, § 9. Purd. 601.

The bail in all cases where bail is now required for the stay of execution, shall be bail absolute, with one or more sufficient sureties, in double the amount of the debt or damages, interest and costs recovered, conditioned for the payment thereof, in the event that the defendant fail to pay the same at the expiration of the stay of execution. Act 20 March 1845, § 1. Purd. 601.

In all cases where the amount of any judgment rendered before a justice of the peace shall be paid by any person who has entered or shall enter [special] bail for stay of execution or otherwise, such judgment shall remain for the use of such person, and may be prosecuted in the name of the plaintiff for the recovery of the amount. Act 24 April 1829, § 1. Purd. 601.

No defendant shall be entitled to stay of execution upon a judgment obtained against him as bail for stay of execution on any former judgment.(c) Act 25 April 1850, § 28. Purd. 431.

2. Of the Transcript to bind Real Estate.

The prothonotaries of the respective counties shall enter on their dockets transcripts of judgments(d) obtained before justices of the peace of their proper counties,(e)

but must produce evidence, by the usual certificates of search, of its being clear of incumbrances. Ibid. 2 M. 342. On a plea of freehold being entered, the plaintiff may move to dismiss it for insufficiency. 2 M. 342. 1 Phila. 204. 1 T. & H. Pr. 833. One of several defendants who has a sufficient freehold, is entitled to stay of execution. 27 Leg. Int. 135.

(a) For condition of recognisance, see *infra*. Bail for stay of execution may be entered after the expiration of 30 days, if no execution be issued. 2 B. 195.

(b) "There shall be a stay of execution," that is, when a plea of freehold or bail for stay of execution shall have been entered. If the defendant neglect or refuse to enter the bail, by law required, it is the right of the plaintiff to demand, and it is the duty of the justice *forthwith* to issue an execution, and to deliver it to a constable for service. The defendant, by such a proceeding, is subjected to the costs and inconvenience of immediately putting in bail, or of showing the constable property on which to levy. The issuing of the execution and making a levy on his goods, does not, however, deprive him of the right, within twenty days after judgment, to enter bail. The words of this law, in the 6th section, are too plain to admit of a doubt. They are as follows: "But if the defendant, within twenty days after such judgment, shall enter special bail, and pay the costs accrued on the execution, he shall then be entitled to an appeal, or stay of execution, in the same manner as though the bail had been entered at the time of rendering such judgment." In 1 Ash. 407, the court say, that if the defendant "can show that he owns real estate, at any time either before or after execution has issued," yet if he shall neglect "to suggest it, it would justify the issuing of an execution against him, but on the payment of costs accrued on the

execution, the magistrate should supersede it, and give the defendant the privilege reserved by law." In all cases, where individuals, such as freeholders, or persons by special agreement, are entitled to privileges, it is their duty to suggest them. If they do not they should not be surprised, if, from their own neglect, they should be put to inconvenience, and compelled to pay costs. The district court for the city and county have decided that costs of suit may be added to the amount for which judgment is rendered, in regulating the duration of the stay of execution, under the act of June 16th 1836, the terms of which are very similar, in this respect, to those of the act of 1810. (See Purd. 431.) Thus, where the judgment was but for \$495.65, but the costs swelled the amount to more than \$500, a stay for twelve months was held to be regular. 4 P. L. J. 175.

(c) A garnishee in an attachment in execution is not entitled to enter bail for stay of execution. 1 Phila. 284. And no stay of execution can be claimed in an action of debt on a judgment of another state. 2 Am. L. R. 446. Nor in an action at the suit of the commonwealth. 18 Leg. Int. 349.

(d) Such transcript is, as regards real estate, virtually a judgment of the court. 8 S. & R. 479. And may be so recited in a *scire facias*. 3 P. R. 98. 1 P. R. 20. 3 W. 381. 2 W. & S. 170. 4 P. L. J. 144, 325. 5 P. L. J. 429. The court has no authority to strike off such transcript (12 S. & R. 72), or to open the judgment and let the defendant into a defence. 7 H. 495. 2 P. F. Sm. 431. 10 Leg. Int. 46. See 1 P. R. 20. 3 P. R. 98. But it nevertheless remains before the justice for further proceedings. 1 B. 381. 12 S. & R. 72. 7 H. 498. It is not evidence to show a former recovery. 13 S. & R. 54.

(e) A judgment for damages, in summary

without the agency of an attorney, for the fee(a) of fifty cents, which transcripts the justices shall deliver to any person who may apply for the same, and which judgments, from the time of such entries on the prothonotary's docket, shall bind the real estate of the defendants;(b) but no *feri facias* shall be issued by any prothonotary until a certificate(c) shall be first produced to him from the justice before whom the original judgment was entered, stating therein, that an execution had issued to the proper constable as directed by this act, and a return thereon that no goods could be found sufficient to satisfy said demand; and any justice issuing an execution on a judgment removed as aforesaid, shall, on the plaintiff producing a receipt for the delivery of such transcript to the prothonotary of the county, to be entered of record, tax fifty cents upon such execution for the prothonotary's fees as aforesaid. And no judgment, whether obtained before a justice, or in any court of record within this commonwealth, shall deprive any person of his or her right as a freeholder(d) longer or for any greater time than such judgment shall remain unsatisfied,(e) any law, usage or custom, to the contrary notwithstanding. Act 20 March 1810, § 10. Purd. 601.

3. Of the Execution.

Every justice of the peace rendering judgment as aforesaid shall receive the amount of the judgment, if offered by the defendant or his agent before execution,(g) and pay the same over to the plaintiff, or his agent, when required: for which service, he shall, if exceeding five dollars and thirty-three cents, be allowed [twenty-five cents] by the defendant, in addition to his usual fees,(h) and if the

proceedings to obtain possession by a purchaser at a sheriff's sale, cannot be certified to the common pleas, under this act, in order to create a lien on real estate. *Gault v. McKinney*, Purd. 450. Nor will an action of debt lie on such judgment. 14 S. & R. 162. See 2 Phila. 71, *contra*.

(a) By act 2 April 1868, the fee for this service is fixed at 50 cents; in addition to which he is required by act 6 April 1830, to demand for every transcript filed, a state tax of 25 cents; which, by act 6 May 1844, is to be paid by the plaintiff without recourse to the defendant.

(b) It creates no lien, if an appeal be entered within the twenty days. 7 W. 540. And when a judgment has been entered on a justice's transcript, no other judgment can be entered by transcript from the same record. 3 Gr. 259.

(c) A certificate is unnecessary if the transcript show that an execution has been issued and returned "no goods." 6 W. & S. 343. A *scire facias* may issue without certificate. 3 W. 381. And on a judgment on the *scire facias*, execution may issue from the common pleas. *Ibid*.

(d) "His or her right as a freeholder." In strictness, no one is a freeholder if there be any lien, mortgage or ground-rent, against the property on which he or she claims to be a freeholder. In 2 W. 44, it is ruled by the supreme court, that "a freeholder is not entitled to stay of execution unless his land is free from incumbrance." It had been previously ruled by the same authority, in 5 B. 432, that to obtain a stay of execution under the act of March 1806, which was an act giving authority to and regulating proceedings before justices of the peace, that "the defendant must have a freehold in the county where the judgment is entered." In the above

section, the legislature declare that "no judgment shall deprive any person of his or her right as a freeholder longer, or for any greater time, than such judgment shall remain unsatisfied, any law, usage or custom, to the contrary notwithstanding." From the phraseology of this provision, as well as that of an act passed August 21st 1725 (1 Sm. 164), it would seem as if obstructions had been laid in the way of a freeholder's exemption from arrest. If a justice shall be satisfied that a defendant has an ample freehold, even though it be lightly incumbered, or even not situated "in the county," he need not exact bail. He is to exercise a sound discretion in providing for the payment, at a future day, of the judgment he has rendered, and at the same time to respect equally the rights of the defendant, as well as those of the plaintiff.

(e) Where the transcript of the judgment of a justice was filed in the common pleas more than nineteen years after the judgment was rendered, and the justice was not called, nor the docket produced, and there was nothing to show whether an execution had ever been issued by the justice, the jury are at liberty to infer payment, from the lapse of time, and these circumstances. 2 J. 312.

(g) "Before execution." The justice is commanded to "receive the amount of the judgment, if offered by the defendant or his agent before execution, and pay the same over to the plaintiff, or his agent, when required;" and a neglect or refusal so to do "shall be a misdemeanor in office."

(h) By the fee-bill of 1865, the aldermen of Philadelphia are entitled to the following fees for this service, viz.: "Receiving the amount of a judgment, and paying over the same, if not exceeding ten dollars, 25 cents; if above ten and not exceeding thirty dollars, 35 cents; if above thirty dollars, 65 cents.

said justice shall neglect or refuse to pay over on demand the money so received to the plaintiff or his agent, such neglect or refusal shall be a misdemeanor in office. Act 20 March 1810, § 11. *Purd.* 802.

And if the amount of the judgment is not paid to the justice as aforesaid, he shall grant execution, if required by the plaintiff or his agent, thereupon, if for a sum not exceeding five dollars and thirty-three cents, forthwith, *(a)* and for any further sum, after the time limited for the stay of the same; which execution shall be directed to the constable *(b)* of the ward, district or township, where the defendant resides, or the next constable most convenient to the defendant, *(c)* commanding him to levy the debt or demand, and costs, on the defendant's goods and chattels, and by virtue thereof shall, within the space of twenty days next following, expose the same to sale, by public vendue, *(d)* having given due notice of the same, by at least three advertisements, *(e)* put up at the most public places in his township, ward or district, returning the overplus, if any, *(g)* to the defendant, [and for want of sufficient distress, to take the body of such defendant into custody, and him or her convey to the common jail of the county; and the sheriff or keeper of such jail is hereby directed to receive the person or persons so taken in execution, and him, her or them safely keep, until the sum recovered and interest thereon accrued from the date of the judgment, together with costs, be fully paid, and in default of such keeping to be liable to answer the damage to the party injured, as is by law provided in case of escapes;] *(h)* or, in case no goods and chattels can be found, and the defendant be possessed of lands or tenements, the plaintiff may waive imprisoning the defendant, and proceed by a transcript to the prothonotary aforesaid: *Provided*, That executions against executors or administrators shall only be for the assets of the deceased. *Ibid.* § 12.

No execution shall be issued on a judgment rendered before a justice of the peace or alderman, after five years from the rendition of such judgment, unless the

Justices in other parts of the state, by the fee-bill of 1868, shall receive for the same service, where the amount does not exceed ten dollars, 20 cents; if above ten and not exceeding forty dollars, 50 cents; if above forty and not exceeding sixty dollars, 75 cents; if above sixty dollars, one dollar.

(a) "He shall grant execution—forthwith." It is the plaintiff or his agent who has the right to demand, and the justice to issue execution, if the time for its issue has legally arrived. The justice has no right to issue it without being required, nor has he any right to delay or refuse it, when legally required. If he do, it is on his own responsibility.

(b) "Which execution shall be directed to the constable." The direction given to the justice, as well as to the officer to whom the execution "shall be directed," is given with too much exactitude and precision to leave any doubt upon the mind of the justice as to the person to whom he is bound to deliver the process to be served. No express authority is given here, or elsewhere, to the constable to depute any person to serve an execution; and if he were so to deputize another, he, the constable, would be "liable to answer the damages to the party injured," if the injury had been caused by the neglect or misconduct of the person whom he had deputized.

(c) It is the universal practice for justices to issue their executions to any constable within the county; and the sureties of such constable are responsible for their due execution. 7 S. & R. 353-4. The justice is to judge who is the constable most convenient

to the defendant. 13 S. & R. 336. But a sale by a constable of one township, under an execution, directed to a constable of another township, passes no title to the property; he is a mere trespasser. 3 Barr 349.

(d) A sale to the plaintiff, no person but the constable being present, is illegal and void. 3 H. 90.

(e) If he sell any portion of the goods without levy or advertisement, he is liable. 1 Barr 238.

(g) "Returning the overplus, if any." The constable who shall neglect or refuse to perform this duty, would subject himself, not only to much public odium, but he might also expect to be visited with no little severity by any court or jury before whom he might be brought by the defendant. The safest way for the constable in all such cases, is to pay "the overplus" to the justice, who is, by a further supplement to this act, passed 28th March 1820, bound to receive it and to pay it over to the defendant, "without any fee for making such payment."

(h) Since the act to abolish imprisonment for debt, no execution can issue against the body, in cases of contract. In an action for a penalty, which is directed to be recovered "as debts of like amount are by law recoverable," the defendant is not liable to arrest; an execution, in such case, authorizing the imprisonment of the person is void, and the defendant may be discharged on habeas corpus. *Martin's Case*, Com. Pleas, Phila. 15 April 1854. MS. s. p. 1 D. 135. 4 Y. 237, 240.

same shall have been revived by *scire facias* or amicable confession. (a) Act 5 May 1854, § 1. Purd. 601.

No execution issued on any judgment rendered by any alderman or justice of the peace, upon any demand arising upon contract, express or implied, shall contain a clause authorizing an arrest or imprisonment of the person against whom the same shall issue, unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of the alderman or justice of the peace, either that such judgment was for the recovery of money collected by any public officer, or for official misconduct. Act 12 July 1842, § 23. Purd. 602.

On the issuing of any execution under the provisions of the act to which this is a supplement, or of any of the supplements thereto, it shall and may be lawful for the justice or alderman issuing the same to indorse thereon for collection the fees for the return of said execution, as well as for issuing the same. Act 24 April 1829, § 2. Purd. 602.

4. Liability of the Constable.

On the delivery of an execution to any constable, an account shall be stated in the docket (b) of the justice, and also on the back of the execution, of the debt, interest and costs; from which the said constable shall not be discharged, (c) but by producing to the justice, on or before the return day (d) of the execution, the receipt of the plaintiff or such other return as may be sufficient (e) in law; and in case of a false return, or in case he does not produce the plaintiff's receipt, on the return day, or make such other return as may be deemed sufficient by the justice, he shall issue a summons (g) directed for service to a constable, or to some other

(a) The power of issuing a *scire facias* is appurtenant to that of issuing executions, and included in it. 5 B. 58. An execution issued more than five years from the rendition of the judgment, without a *scire facias*, is irregular. 15 Leg. Int. 284.

(b) "An account shall be stated in the docket." Obedience to this injunction will be found of much value to the justice. He will find it frequently happen, that after the issue, and before "the return day of the execution," while that process is in the hands of the constable, the defendant will call at the office to make payment. The account being "stated in the docket," the justice will have nothing to do but turn to the case, ascertain the exact amount, and, if required, satisfy the defendant as to the several items of which it is made up. The account may be stated on the margin of the docket in this manner:

Debt,	\$46.87
Interest,	2.70
Costs,	1.58
	<hr/>
	\$50.65

Whenever the account is paid to the justice, let him, before he closes his docket, write at the foot of the case, "Money paid into office." "Received satisfaction." When he pays the plaintiff, or his agent, he should require him to subscribe his name under the above receipt.

(c) "The constable shall not be discharged." This section contains much matter of especial moment to the constable. Herein he is given to understand that it is only by doing certain things, therein required and detailed, that he can be discharged from his liability to pay "the debt, interest and costs," on the back of the execution. He must, "on or before the return day of the execution,"

which day should always be indorsed on the execution, produce to the justice "the receipt of the plaintiff, or make such other return as may be sufficient in law." He may indorse on the execution, "no goods." But if the constable shall make "a false return," a return unfounded in fact,—for example, if he should return "no goods," and the plaintiff subsequently prove that there were sufficient goods on which the constable might have been levied, in such a case, or any similar case of neglect or misconduct, the constable and his bail would be liable to the plaintiff for the "debt, interest and costs," on the execution, on which he had made such "false return."

(d) The mere omission to return the execution within twenty days will not render the constable liable, if he has sufficient cause for the delay. 6 W. & S. 584.

(e) Of the sufficiency of the return, the justice must judge in the first instance, but his decision is subject to review: and the return must be in writing. 5 W. & S. 457. 8 W. 220. 4 Wh. 56. And see 1 Ash. 160. 1 M. 210.

(g) "He shall issue a summons." That is, in the language of the second section of this act, "upon complaint being made." It is not to be expected, nor does the law require the justice to "issue a summons," or any other process, unless called upon for that purpose by the party, his agent or attorney. This construction of the law is warranted by the language used in this section in relation to the duty of the justice, after he shall have entered judgment against the constable, "on which judgment there shall be no stay of execution." Yet the justice is so far from being expected to issue execution, that he is, by reasonable implication, instructed not to issue it, except

fit person who shall consent to serve the same, and having so consented, by accepting of such process, shall be bound to execute the same, under a penalty of twenty dollars, to be recovered as other fines are recoverable by this act; but should not a constable or other fit person conveniently be found to serve the process as aforesaid, the justice shall direct it to a supervisor of the highways of the township, ward or district where such constable resides, whose duty it shall be to serve the same under the penalty aforesaid; commanding the constable to appear before him on such day as shall be mentioned in the said summons, not exceeding eight days from the date thereof, and then and there show cause why an execution should not issue against him for the amount of the first above-mentioned execution; and if the said constable either neglects to appear on the day mentioned in such summons, or does not show sufficient cause why the execution should not issue against him, then the justice shall enter judgment against such constable for the amount of the first above-mentioned execution, together with costs; on which judgment there shall be no stay of execution, and upon application of the plaintiff or his agent, the said justice shall issue an execution against the constable for the amount of such judgment, which execution may be directed to any constable of the county, or other fit person accepting thereof, or to a supervisor, as aforesaid, whose duty it shall be to execute the same: *Provided always*, That nothing in this act contained shall in any manner impair or alter the proceeding as heretofore established with regard to insolvent debtors, and their discharge on a full surrender of their property. Act 20 March 1810, § 12. Purd. 602.

Where any constable shall refuse or neglect to pay over to the defendant or defendants, his or their agent or legal representatives, the overplus money which he or his deputy may have made or received upon any execution or executions, then and in such case the party or parties aggrieved may apply to the alderman or justice of the peace who issued the process, who shall thereupon proceed against such constable in the manner prescribed by the 12th section of the act to which this is a supplement, in cases where the constable makes a false return or neglects to return the execution; and if upon such proceedings the justice shall receive the overplus money, or if it shall be voluntarily paid to him at any time by the constable, he shall in either case pay over the same to the defendant or defendants, or his or their agent or legal representatives, without any fee for making such payment. Act 28 March 1820, § 2. Purd. 603.

5. Docket Entries and Transcripts.

All which proceedings so had before the justice, shall be entered at large by him in a docket or book to be kept by him for that purpose, (a) in which he shall state the kind of evidence upon which the plaintiff's demand may be founded, whether upon bond, note, penal or single bill, writing obligatory, book debt, damages on assumption, or whatever it may be; (b) and the whole proceeding in case of appeal, shall be certified to the prothonotary of the proper county. Act 20 March 1810, § 4. Purd. 600.

It shall be the duty of the justice, on demand made either by plaintiff or defendant, to make out a copy of his proceedings at large, and deliver the said copy duly certified by him, (c) to the party requiring the same, and if on such demand

"upon application of the plaintiff or his agent." The act of 13 October 1840, allows a constable to appeal from a judgment rendered against him under this section. Purd. 184.

(a) The docket of a justice of the peace is the best evidence to show the cause of action before him; and parol proof is inadmissible to contradict or vary it. 2 W. & S. 877. As justices of peace have not jurisdiction in *all* cases of contract, it ought to appear, from their docket entry, what is the nature of the contract upon which the action is founded. If it does not appear from the record that the justice had jurisdiction, the judgment, on certiorari, will be reversed. 1 Br. 889.

(b) The magistrate is not bound to enter on his docket the evidence on which his judgment is founded—it will be presumed that it was on legal proof. 5 B. 31. He need only state the demand and the kind of evidence produced to support the claim, whether upon bond, note, penal or single bill, writing obligatory, book debt, damages on assumption, or whatever it may be, so as to enable the court to ascertain the grounds of the controversy, and his decision thereon. 1 Br. 209.

(c) The docket is no record. 6 W. & S. 50. But it has the conclusiveness of one. 10 W. 108. And parol evidence is inadmissible to contradict or vary it. 2 W. & S. 877. It can only be proved by a sworn copy. 7 W. 189,

he shall refuse so to do, it shall be deemed a misdemeanor in office.(a) Ibid. § 23.

6. *Transcripts to other Counties.*

If the party defendant shall not reside in the county where a judgment is had against him before a justice of the peace, the person in possession of the docket,(b) in which such judgment may be entered, on application to him made by the plaintiff or his agent, shall make out, certify and deliver to such applicant a transcript (c) thereof, and also deliver all evidence in his possession connected therewith for the fee of twenty-five cents,(d) for the recovery of the amount thereof with costs, before any justice of the peace in any county where the defendant may reside or can be found, as in cases originally brought before him;(e) and the stay of execution shall be counted from the original entry. Ibid. § 17.

7. *Satisfaction of Judgments.*

Any person or persons who shall not within thirty days after written notice to him, her or them given,(g) of the payment of any judgment, together with costs, in his, her or their favor, before any justice of the peace, either by themselves or their agents, enter satisfaction on the docket or execution of the justice, they shall be subject to a penalty of one-fourth of the amount of the debt paid, for the use of the party aggrieved, except where one of the defendants, if there be more than one, shall, by a writing to be filed by him in the office of such justice, within fifteen days after the payment, forbid the plaintiff so to do. Ibid. § 15.

The penalty mentioned in the 15th section of the act to which this is a supplement, passed on the 20th day of March 1810, for not entering satisfaction in any case in said section provided for, shall be sued for and recovered before any alderman or justice of the peace of this commonwealth, as debts of similar amount are sued for and recovered. Act 4 April 1831, § 1. *Purd.* 603.

VII. JUSTICES' DOCKETS.

1. *Transfer of Dockets.*

It shall be the duty of every justice of the peace or alderman, in case of his resignation or removal from office, or removal from his proper district or county, and of his legal representatives, in case of the death or absconding, or voluntary or compulsory absence of a justice of the peace or alderman, from his proper place of abode, to deliver his docket, together with all the notes, bonds and other papers in his or their possession, concerning any judgment or suit entered thereon, to some

192. 1 Phila. 25. 8 C. 539, 4 W. & S. 192. 14 S. & R. 440. 10 Barr 161. 2 H. 413.

(a) The indictment should state a previous tender of the legal fee. 10 S. & R. 373. An averment that the demandant paid to the justice the full amount of money which the justice required is insufficient; nor will proof, upon the trial, that the demandant paid the precise sum fixed by the fee-bill, cure the defect. 5 P. L. J. 426.

(b) The person in possession of the docket may give such transcript, though not himself a justice. 6 H. 120.

(c) "Deliver to such applicant a transcript." The justice to whom a transcript shall be delivered is authorized to proceed on it "as in cases originally brought before him."

(d) In the fee-bill of 1868 the fee for this service is 40 cents. An indictment against a justice under the 23d section of the act of 1810, for refusing, on demand, to make out and deliver to a party in an action pending before him, a certified copy of his proceedings at

large, must aver a tender or payment of the exact fee to which the justice is entitled for such service, by the provisions of the fee-bill. An averment that the demandant paid to the justice the full amount of money which the justice required, is insufficient; nor will proof, upon the trial, that the demandant paid the precise sum fixed by the fee-bill, cure the defect. 5 P. L. J. 426.

(e) A justice of the peace of one county may issue an execution upon a certified transcript of a judgment on the docket of a justice of the peace of another county, in all cases where the latter might legally have issued one. 2 W. 424. And in an action to recover the amount of a judgment rendered by a justice of the peace in another county, such certified transcript is *prima facie* evidence, upon which the plaintiff may recover. 2 P. R. 465.

(g) Such notice is properly served on the plaintiff by leaving a copy thereof with his wife at his dwelling-house. What would be sufficient service of a summons is a good service of a notice to enter satisfaction. 7 C. 469.

neighboring justice or alderman of the district: (a) *Provided*, That if any justice or alderman having resigned or been removed, or the legal representatives of a deceased justice or alderman, shall choose to retain the said docket, he or they shall, on demand, deliver a certified transcript of any judgment or proceedings in any suit therein, on oath or affirmation, to the party or parties interested, under the penalty of one hundred dollars, to be recovered by the party aggrieved, in the same manner as debts of that amount are by law recoverable; and the justice of the peace or alderman to whom said docket or transcript shall be delivered, shall issue process and proceed thereon (b) in the same manner and with like effect as the original justice or alderman might have done: *Provided*, That in case the justice or alderman to whom such docket may be delivered, shall be a party to or interested in any suit or judgment therein, such suit or judgment shall be proceeded in by some other justice of the peace or alderman of the proper county, to whom a transcript

(a) Any justice has jurisdiction under this act, upon the delivery of a transcript to him, to recover the amount of a judgment rendered by another justice who has resigned his office but retains his docket; and he may proceed by summons. 1 W. & S. 414. Or scire facias. 24 Leg. Int. 404. 4 Luz. Leg. Obs. 226. 6 H. 120. The same jurisdiction is given to them by the acts of 21 June 1839 and 27 February 1845; this jurisdiction, however, is taken away by the act 21 April 1846, as to cases in which the original justice's successor in office has been elected and commissioned. 2 P. 297. 13 Wr. 168. 3 Luz. Leg. Obs. 110. And an execution issued by one justice on the transcript of another justice of the same county, who was at the time in commission, and acting in his office, is void; not being allowed by any act of assembly. 4 Barr 339. A justice has no jurisdiction of a cause of action founded on the judgment of another justice, except as prescribed by the statute; he cannot, therefore, set off such judgment against one on his own docket. 10 Wr. 519.

(b) "Shall issue process and proceed thereon." The language of the law is so clear and distinct in its directions to the justice when the "docket or transcript shall be delivered" to him, that explanations may appear wholly unnecessary. As, however, that which is plain and simple to the eye of the experienced, may appear confused to those who have not before seen or examined it, it is thought advisable to use more words than may appear called for, rather than to leave enactments subject to be misunderstood. It must not be forgotten that a large number of magistrates enter upon the discharge of their momentous duties without their minds being familiar with legal proceedings, or even the language of the law. A little assistance to such persons is often as useful as an index or fingerboard to a weary and uncertain traveller. Those who have knowledge, those who are already acquainted with the road, do not consult such guides; but all are not informed, and those who are must bear with us who endeavor to guide those who are willing to put themselves upon us for instruction.

A magistrate who shall receive a "docket or transcript" from another, should read it with attention, regarding it as a record of his own proceedings. When application is made

to him to proceed, he should determine what it would be his duty to do if the case had been so far heard by himself. If the suit had proceeded no further than the issuing of a summons, inasmuch as the defendant would by that summons have been required to appear before another justice than the one before whom the case is now to be heard, if the defendant did not appear at the time appointed and the plaintiff did, it would be proper to send a notice to the defendant, or issue a summons in the usual form, and consider what was thus done as the first step taken in the institution of the suit. If there had been a hearing, and the case stood adjourned, notice to the parties should be given by the justice, if they did not appear at the time to which the case stood adjourned, before he proceeded any further in the suit. If judgment had been entered, the justice before whom the case now lay should apprise the defendant, so that he might have an opportunity, if so disposed, to plead his freehold, or put in special bail, if entitled to a stay of execution, before the execution should be delivered to a constable. It is always better that the justice should take even unnecessary trouble, rather than hazard serious inconvenience to the parties or either of them. If bail should have been entered and the stay of execution is unexpired, nothing is to be done by the justice until it shall expire, and he is called upon by the defendant to pay the money, or by the plaintiff for an execution. In any of which cases, the justice should proceed as if the suit had originally been instituted, and all the proceedings already had, had been had before him. In the clear and emphatic language of the law, "the justice to whom the docket or transcript shall be delivered shall issue process, and proceed thereon, in the same manner and with the like effect, as the justice before whom the proceedings had taken place might have done if he had remained in office." Other enactments on this subject may be found in a further supplement to this act, passed 20 February 1833, particularly in relation to the docket and official papers of any justice who shall "go away without delivering" them, and also in case of "the temporary absence of any justice of the peace from his district."

shall be furnished, as well as the original docket, if required on the trial: *And provided further*, That in case any justice of the peace or alderman shall abscond, or depart from the district without delivering his docket and papers to some justice of the peace or alderman as aforesaid, it shall be the duty of the person in whose possession the same may be left or found to make a delivery thereof as aforesaid, under the penalty of one hundred dollars, to be recovered by any person aggrieved, in the manner aforesaid; and in case the said docket and papers shall not be left in the particular charge or custody of any person, it shall be the duty of any disinterested justice of the peace or alderman of the neighborhood to take possession thereof, wherever found, and the like proceedings shall be had upon the suits and judgments contained in the said docket, in these last-mentioned cases, as is hereinbefore provided for when the docket is delivered by the proper justice of the peace or alderman, as before directed. Act 20 February 1833, § 1. Purd. 605.

In case of the temporary absence of any justice of the peace from his district, it shall be lawful for him, previous to his departure, to deposit his docket, (a) and all papers connected with any judgment rendered by him, with the nearest justice of the peace in the district, who shall be, and hereby is authorized to issue execution on said judgments, in the same form and effect as if such judgment or judgments had been rendered originally by the said nearest justice. Ibid. § 2.

Every justice of the peace or alderman, who is or shall be in commission at the time of the first election under this act, shall, at the expiration of his office, deliver his docket, together with all the notes, bonds, accounts and papers in his possession, touching any judgment or suit entered thereon, to the nearest justice or alderman of the township, borough or ward: [Provided, That if such justice or alderman shall choose to retain his docket, (b) he shall on demand, for the legal fees, deliver a certified transcript of any judgment or proceeding in any suit therein, to the party or parties interested, under the penalty of one hundred dollars, to be recovered by the party aggrieved, in the same manner as debts of that amount are by law recoverable. And the justice of the peace to whom such docket or transcript shall be delivered, shall issue process and proceed thereon in the same manner and with the like effect as the said justice might have done if he had remained in office.] And every justice or alderman elected under this act, shall, on the expiration of his term of office, deliver over his docket and like papers to the person who shall be elected and commissioned to succeed him in said ward, borough or township. (c) Act 21 June 1839, § 10. Purd. 606.

It shall be lawful for any alderman or justice of the peace who was in commission at the time of the first election held under the act to which this is a supplement, and who shall choose to retain his docket and deliver transcripts under the provision of said act, in addition to the fees for said transcript, to demand and receive from the person requiring the same all the fees legally due said alderman or justice in said suit or proceeding, and to retain such transcript until the same shall be delivered. (d) Act 11 April 1840, § 4. Purd. 606.

2. Proceedings to enforce the Delivery of Justices' Dockets.

Every person who has been, is now, or may be a justice of the peace or alderman, who has removed or shall remove out of the district, for which he was, is or may be commissioned, shall, upon demand made by any person, deliver or cause to be delivered his dockets, and all official records connected therewith, to the nearest justice or alderman in his said district; and if any person shall fail, for twenty

(a) In case of the temporary absence of a justice of the peace, no other justice can issue execution on a judgment rendered by him, unless the docket be deposited with such justice, and such execution would be void, and the person acting under it, a trespasser. 2 P. 284.

(b) This is repealed by the act of 1846 as amended, in which the justice's successor in office has been elected and commissioned; he shall deliver his docket and papers to his successor. 2 P. 297. 13 Wr. 168. 3 Luz. Leg.

Obs. 110.

(c) By the act 27 February 1845, the privileges conferred by this act on justices and aldermen who were then in commission were extended to those elected under the act of 1839. Purd. 606. A justice whose time has expired cannot be summarily compelled, by rule of court, to deliver over his docket to his successor in office. 8 Wr. 440.

(d) The like privilege is given to justices elected under the act of 1839, by the act 27 February 1845. Purd. 606.

days, to comply with the provisions of this section, he shall forfeit and pay one hundred dollars, to be recovered by action of debt, for the use of any person who may sue for the same; and shall further be subject to be compelled to deliver such dockets and records, by a decree and attachment against him, which may be made and issued by any court of common pleas, or by any judge thereof in vacation, on application being made therefor by any person; and said court or any judge thereof in vacation, shall have power, in the same manner, to enforce the delivery of such dockets and records, against any person in possession of the same, and being about to remove out of the state, without making the delivery thereof hereby required; and the same proceedings as are herein authorized may be had, to compel the delivery of all justices' dockets in the hand of any other person, who has removed or may remove, or be about to remove out of the proper district, where such dockets belong. Act 21 April 1846, § 4. Purd. 606.

So much of the 10th section of the act of June 21st 1839, entitled "An act providing for the election of aldermen and justices of the peace," as provides for the delivery of the dockets and papers of an alderman or justice of the peace, to his successor in office, shall be, and the same is hereby deemed and construed to extend to all cases of succession in office, whether by death, resignation, removal or otherwise; and in case of the decease of any alderman or justice of the peace, the said delivery shall be made by his legal representative, to the person who is or may be elected, and commissioned to succeed him in said ward, borough or township. Ibid. § 6.

3. *Proceedings to supply lost Dockets.*

In all cases where the docket of any acting alderman or justice of the peace shall have been, or may hereafter be destroyed, or lost, it shall be lawful for any person or persons interested in any action pending, or judgment had, and who may be desirous to have the same supplied, to apply to such alderman or justice by petition, setting forth the proceeding to be supplied, and verified by affidavit; whereupon the said alderman or justice shall issue a precept in the nature of a writ of summons, which shall be served as in other cases, requiring the defendant in such action or judgment, or his representatives, to appear before such alderman or justice on a day certain, to be named in said writ, not less than five nor more than eight days from the issuing thereof, and show cause why the prayer of the petitioner should not be granted; and in all cases where the facts set forth in such petition shall be denied, it shall be the duty of such alderman or justice to hear the parties and receive testimony as in other cases, as well his own testimony upon affidavit, as the testimony of others, and upon the hearing thereof, if the said alderman or justice shall be of the opinion that the facts alleged in such petition are true, or in case such facts be not denied, he shall order that the said proceedings be supplied; and shall thereupon enter the same upon his docket, which said entries shall have the same force and effect as if the original record had not been lost or destroyed; and either party may have his remedy by appeal or *certiorari*, as in other cases. Act 30 April 1850, § 1. Purd. 606.

VIII. SPECIAL JURISDICTION.

The justices of the peace of the county of Erie (a) shall have jurisdiction of all causes of action arising from contract, either express or implied, in all cases where the sum demanded is not above three hundred dollars, as fully, to all intents and purposes, as they now have jurisdiction in cases where the sum demanded does not exceed the sum of one hundred dollars; and in case any suit or action shall be commenced in the court of common pleas of Erie county upon any such contract, and the plaintiff shall obtain a judgment for a less sum than three hundred dollars, he or they shall not be allowed to recover any costs from the defendant or defendants, unless the plaintiff shall have filed with the precipe an affidavit of himself, or some other person who knows the facts, that there is justly due the said plaintiff or plaintiffs (and which he expects to recover in said action) more than the sum of three hundred dollars. Act 18 February 1869, § 1. Purd. 1573.

(a) Extended to Venango county, by act 18 February 1870. P. L. 188. To Lawrence county, by act 25 February 1870. P. L. 254. And to Crawford county, by act 28 March 1870. P. L. 586. And see act 6 April 1870 as to Mercer county. P. L. 987.

The said justices of the peace of said county of Erie shall have jurisdiction of actions of trover and conversion, and of actions of trespass in all cases where the value of the property claimed or the damages alleged to have been sustained shall not exceed three hundred dollars, as fully, to all intents and purposes, as they now have jurisdiction in cases where the value of the property claimed or the damages alleged to have been sustained does not exceed the sum of one hundred dollars. Ibid. § 2.

In all actions arising before justices of the peace in said county, where the sum demanded by the plaintiff shall exceed fifty dollars, either the plaintiff or defendant may demand a jury trial; in which case the justice shall proceed to impanel a jury of six, in the manner provided by the act of the 1st day of May, Anno Domini 1861, (a) entitled "An act to change the mode of criminal proceedings in Erie and Union counties," and the several supplements thereto; and the mode of procedure shall be the same as in said act provided, so far as may be applicable to civil proceedings, and the successful party shall be entitled to recover full costs: *Provided*, That before the defendant shall be permitted to demand a jury trial, he shall make and file an affidavit with said justice, that he has a just and legal defence to the whole or a part of the plaintiff's claim, and if to a part, he shall state how much the plaintiff is justly entitled to recover; and if the plaintiff shall not accept the offer of the defendant, he shall not recover costs in the event that he shall not obtain a judgment for a larger sum than the amount admitted by the defendant. Ibid. § 3.

Before any party shall be entitled to an appeal from the judgment of a justice entered upon the verdict of a jury under the provisions of this act, he shall pay all legal costs that have accrued, and enter into recognisance, with one or more good and sufficient sureties, in a sum sufficient to cover all the costs that may thereafter accrue thereon. Ibid. § 4.

In case of a jury trial, under the provisions of this act, the justice shall be entitled to the sum of one dollar per day, in addition to the other fees allowed by law to justices of the peace. Ibid. § 5.

In all actions founded upon contract, express or implied, brought before a justice of the peace of the county of Erie, in which the defendant shall claim a set-off or payment, exceeding fifty dollars, either party may demand a trial by jury of six, to be chosen in the manner provided by the act to which this is a supplement. Act 28 March 1870, § 1. Purd. 1610.

In all such actions, brought before a justice of said county of Erie, a defendant who shall neglect or refuse to set off his demand, whether founded upon bond, note, penal or single bill, writing obligatory, book account or damages on assumption, against the plaintiff, which shall not exceed the sum of three hundred dollars, shall be and is hereby for ever barred from recovering the same against the plaintiff by any after suit. Ibid. § 2.

On all judgments founded upon contract, if the amount exceed one hundred dollars, and the defendant be a freeholder, and such freehold shall, in the opinion of the justice entering the judgment, be sufficient to pay the judgment, interest and costs, over and above all liens, incumbrances and rights to exemption, or if the defendant shall, within twenty days after judgment, give bail absolute, there shall be a stay of execution for nine months and no longer. Ibid. § 3.

The jurors may be selected from the township, borough or ward in which the justice trying the cause may hold his office, and the adjoining townships, boroughs and wards, in the discretion of the justice; and either party shall have the right to challenge any of the jury for cause, at any time before they are sworn. Ibid. § 4.

(a) See post p. 510. The constitutionality of these acts is more than doubtful. The constitution provides that "trial by jury shall be as heretofore, and the right thereof remain inviolate." These acts provide for the trial of civil and criminal cases, by a jury composed of six persons only. The terms "jury" and "jury trial" are, and for ages have been, well known in the language of the law. At the time of the adoption of the constitution, a jury for the trial of a cause was a body of

"twelve men," who were required to return their unanimous verdict upon the issue submitted to them. And a "trial by jury" is a trial by such a body. At the date of the framing of the constitution no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known, or ever been the subject of discussion in any country of the common law. 23 Law Rep. 458. 1 Chicago Leg. News 437.

All vacancies in the number of jurors that may happen by absence, challenge or other cause, shall be supplied by the justice writing down three names for each vacancy, and the parties shall proceed to strike out until the requisite numbers to fill the vacancies are left. *Ibid.* § 5.

In all cases of the selection of a jury, or filling vacancies in their number, if either party shall refuse or neglect to strike out the names as directed, the justice shall act for such party in striking out the names. If any jury shall be unable to agree upon a verdict, and the justice shall be fully satisfied of that fact, he shall have power to discharge them, after giving notice to the parties, their agents or attorneys, of his intention to do so; and the said justice shall then fix a time, not more than three days thereafter, at which another jury shall be chosen; and after such new jury are chosen they shall be immediately summoned by the constable, upon a new *venire*, to be issued by the justice for that purpose, and the new trial shall proceed forthwith, unless the same shall be adjourned for some cause shown. *Ibid.* § 6.

The only remedy which the party aggrieved by any act of the justice or the jury, done under the provisions of this act, or the act to which this is a supplement, shall be by an appeal to the court of common pleas of Erie county, within twenty days after final judgment: *Provided*, That if the defendant shall prove to the satisfaction of a judge of said court that he had no knowledge of the proceedings before the justice until the twenty days for appeal had expired, and that no summons was legally served upon him, said judge may order a writ of *certiorari* to be issued, and upon the defendant entering into recognisance, with sufficient surety, to pay the debt and costs in case the proceedings before the justice shall be affirmed, all proceedings before the justice shall be stayed until the determination of the court on the writ of *certiorari*. *Ibid.* § 7.

The jury shall be the judges of both the law and the facts of the case: *Provided*, That the justice shall have power to exclude such evidence from the jury as has no relation to the matter trying; and the said jury may ask the opinion of said justice upon the law of the case, in the presence of the parties or their counsel, at any time before rendering their verdict. *Ibid.* § 8.

VIII. OUTLINE OF PROCEEDINGS, IN A CIVIL SUIT, BEFORE A JUSTICE OF THE PEACE, OR ALDERMAN.

In giving an outline of the proceedings which generally occur in a suit before a justice or alderman, an example will be given, in the first place, of a case of ordinary occurrence. Afterwards examples will be given of suits in which objections and difficulties of law or fact arise.

James Thompson holds a promissory note, and the protest thereof. The note is as follows:

"\$73 ⁷⁷/₁₀₀."

Philadelphia, June 12th 1853.

Three months after date, I promise to pay to Joseph Parker, or order, seventy-three ⁷⁷/₁₀₀ dollars, without defalcation, for value received.

(Signed,) WM. JACK.

(Indorsed.) "JOSEPH PARKER."

In September 1859, Thompson, the holder of the note, finding that six years was about to expire since the protest of the note, and, consequently, that the statute of limitations would bar his remedy against the parties whose names are on it, unless suit were brought before the 15th September 1859, determines to bring suit against the maker, William Jack, who has some property; Parker, the indorser, being insolvent.

He goes, therefore, to Alderman Ash, of the city of Philadelphia, and informs him he wishes to bring suit against William Jack. The alderman inquires for the residence of Jack, and finds it to be No. 30 North Eighth street, in the city of Philadelphia, whereupon he issues a summons, returnable on the 16th, between the hours of 10 and 11 o'clock, A. M.

[The form of the summons will be found under the title "SUMMONS."]

This summons is put into the hands of G. R., the constable, who having been told the residence of the defendant, calls at his house, and finding him, gives him an exact copy of the original summons. The constable then writes on the back of it these words: "Served personally on the defendant, by producing to him the original summons, and informing him of the contents thereof, September 10th 1859. G. R., Constable."

The constable then hands the original summons to the alderman, who administers an oath to him, verifying the truth of the return. The alderman makes this memorandum on the back of the summons, and under the constable's return, viz.: "Sworn to the truth of this return, this 12th day of September 1859. G. W. A., *Ald.*"

The alderman then files the summons.

DOCKET ENTRY IN THIS CASE.

On ———, 16th September 1859, at 10 o'clock, defendant appears in the alderman's office, and the plaintiff not appearing, defendant asks for a nonsuit. The alderman informs him that the parties are allowed until the expiration of the last hour named in the summons, to appear, which time has not yet elapsed; but that if plaintiff, or his attorney, or agent, should not appear at the expiration of the time so allowed, a nonsuit would be entered. At 11 o'clock, plaintiff appears with his witnesses.

The plaintiff, Thompson, produces the promissory note, and calls John Carr to prove the signature of Wm. Jack, the maker and defendant. The witness is sworn.

Alderman.—Are you acquainted with the handwriting of William Jack? *Carr*, (the witness.)—Yes, I am.

Alderman.—How did you become acquainted with it? *Witness.*—I have seen him write.

Alderman.—Look at the signature to this paper, (handing him the promissory note,) and say if you know that handwriting. *Witness.*—(After examining the signature.) I believe it to be the handwriting of Wm. Jack, the defendant.

Alderman, (to defendant.)—Do you wish to cross-examine the witness?

Defendant, (to witness.)—When and where did you see me write? *Witness.*—I saw you write a receipt, about three years ago, in your own house, for money I paid you. At another time, about a year ago, you came to my store, and wrote an order for several articles of groceries, which you wished me to send to your house. Some months after, you gave me your note for the amount of the groceries, which was paid when it fell due; and I have seen your writing and signature at other times.

Defendant.—Can you swear that that (pointing to the signature on the note on which the suit is brought) is my handwriting? *Witness.*—I believe that to be your signature.

Defendant submits to the alderman that witness cannot swear that to be his signature, but only swears as to his belief, and that the signature is not sufficiently proved.

Alderman.—The witness having shown that he is acquainted with your handwriting, his belief that this is your signature is sufficient.

Alderman, (to plaintiff.)—You must also prove the signature of the indorser, Joseph Parker.

Plaintiff calls James Hall.

Alderman, (to witness.)—Take the book, (handing him a Bible.) *Witness.*—I affirm.

Defendant.—Are you conscientiously scrupulous about taking an oath? *Witness.*—Yes.

Alderman, (to witness.)—You do solemnly, sincerely, and truly, declare and affirm that the testimony you will give in the matter now pending before me, shall be the truth, the whole truth, and nothing but the truth: so you affirm. *Witness* bows assent.

Alderman.—Are you acquainted with the handwriting of Joseph Parker? *Witness.*—Yes.

Alderman.—How did you become acquainted with it? *Witness.*—By receiving letters from him, and having a bill of exchange on him, which, after accepting, was paid by him to me.

Alderman.—Can you say that from these circumstances you are acquainted with his handwriting? *Witness.*—Yes, I can.

Defendant.—I submit that inasmuch as the witness has never seen Joseph Parker write, he is incompetent to prove his signature.

Alderman, (to defendant.)—You may cross-examine the witness farther as to how he became acquainted with Parker's handwriting.

Defendant, (to witness.)—How do you know that the letters you received from Parker, came from him? *Witness.*—I received them in the course of correspondence with

Defendant.—How many letters did you receive from him? *Witness.*—The exact number I cannot tell, but as many as six or seven, I should say.

Defendant.—Where are these letters? *Witness.*—Some of them, I suppose, are lost or burned; others are among my papers at my store.

Defendant.—At what time did you receive the letters? *Witness.*—I received them during several months, about a year to eighteen months ago.

Defendant.—You spoke of a bill of exchange. Who were the parties to that bill, and what was the amount of it? *Witness.*—It was drawn by John Neal, on Parker, in my name, payable, I think, at ninety days, for something over \$300. I enclosed it in a letter

to Parker, who then resided in New York, for his acceptance. He returned it with an answer in a few days, having the acceptance and his signature written on it.

Defendant.—Did you ever see Parker write? *Witness.*—No.

Defendant. (to alderman.)—I submit that, never having seen Parker write, the witness is incompetent to prove his handwriting.

Alderman.—In order to become acquainted with handwriting, it is not essential to have seen the party write, if the witness has had other sufficient means of knowing it. This witness appears to have had sufficient means of becoming acquainted with the handwriting of Parker, though he never saw him write. I consider him, therefore, a competent witness.

Alderman. (to witness.)—Look at the name on the back of the note, and say if you know whose signature it is. *Witness* (after examining the name).—I believe that to be the signature of Joseph Parker.

Alderman. (to defendant.)—Do you wish to cross-examine the witness farther? *Defendant.*—No.

Alderman. (to defendant.)—Have you any witnesses? *Defendant.*—No.

Alderman.—Do you wish to say anything by way of defence? *Defendant.*—It appears to be more than six years since the note fell due, and the claim is barred by the statute of limitation.

Alderman.—It is true, that it is more than six years, counting from to-day, but it was less than six years counting from the day on which suit was brought, which is the legal time to count from. (To plaintiff.)—Have you a bill of your claim? *Plaintiff.*—Yes (handing in a bill), of which this is a copy:

	Wm. Jack to James Thompson,	Dr.
1853.	To amount of his promissory note, due this day, and protested for	
Sept. 15.	non-payment,	\$73.27
1859.	Interest for six years, say	25.28
Sept. 16.	Cost of protest,	1.38
		<hr/> \$99.93

Alderman enters judgment for plaintiff for ninety-nine dollars and $\frac{93}{100}$.

Plaintiff.—When can I have execution? *Alderman.*—Immediately, if you wish; but if an appeal be taken by the defendant, or bail for stay of execution be entered within twenty days from this time, the execution must be stayed.

Plaintiff.—I shall wait until the expiration of twenty days, before I ask for an execution.

Plaintiff then pays the alderman the costs of suit, and the parties retire.

At the expiration of twenty days after judgment, plaintiff calls on the alderman and desires that execution may issue. The alderman turns to his docket, and ascertains that no appeal has been taken, nor any bail entered for stay of execution. He therefore fills up an execution. [For a copy, see the title "EXECUTION."]

The execution is put into the hands of a constable, who proceeds forthwith to the house of the defendant, No. 30 Eighth street, and informs him he has an execution against him at the suit of James Thompson, for \$101.25, and requests it may be paid. Defendant says he has no money, and cannot pay the amount. The constable then makes a levy on so much of the goods or furniture of defendant as will, in his opinion, produce, at moderate auction prices, fully the amount called for by his execution. The defendant claims the benefit of the \$300 exemption law, and having selected such articles as he wishes to retain, they are appraised, and \$300 set apart for his use. The constable should be careful not to make an *excessive* levy, that is, to levy on so great a quantity of goods as is beyond all reasonable proportion to the amount of the claim. The constable having made his levy, should note on the back of the execution the time when he makes it, and indorse thereon, or on a schedule to be thereto annexed, a list of the articles levied on.

In strictness, the constable might at once remove the articles levied on, to be safely kept, in order that they may be sold, but it is customary to leave the goods on the premises, with or without a watchman, or security, at the discretion of the constable, until the day of sale. If the goods levied on are not forthcoming on the day of sale, the constable is liable to the defendant for the amount called for by his execution.

The constable should make out an advertisement in the following form, viz.:

CONSTABLE'S SALE.

To be sold, at Public Vendue, on Monday the 20th day of October 1859, at 10 o'clock in the forenoon, at the house of John Bob, No. 10 N. Sixth street, ten mahogany chairs, two arm-chairs, a mahogany bureau, and an eight-day clock. Seized and taken in execution, as the property of James Thompson, and to be sold, by

Philadelphia, October 13th 1859.

MASON NATLER, Constable.

Three of these advertisements at least, should be put up at the most public places of the district, and the sale should be made within twenty days after the time when the execution came into the constable's hand. The sale must be by public auction, a private sale

would be void, and would be set aside on application. The notice or advertisement of sale should be made at least six days before the sale. The terms of sale should be cash on delivery of the goods. Should the proceeds of sale exceed the amount of the judgment, interest, costs and expenses, the overplus should be promptly handed over by the constable to the defendant. If not, the defendant should apply to the justice, who should order the constable to pay the proceeds into his office, and he will pay over the surplus to defendant.

The constable should also without delay pay into the justice's office, or to the plaintiff, the amount of the judgment, interest, and costs incurred by the plaintiff, taking plaintiff's receipt. He should then make return to the justice, produce the receipt of the plaintiff, and pay to the justice the fees, if any there be, to which he is entitled.

Satisfaction may be entered on the justice's docket by the plaintiff, thus:

Received satisfaction, November 12th 1859.

(Signed)

JAMES THOMPSON.

Or plaintiff may sign a receipt on the docket for the debt, interest and costs, specifying the amount, and the case is determined.

A CONTESTED CIVIL CASE BEFORE A JUSTICE OR ALDERMAN.

FREDERICK HAKE, to the use of CHARLES HELFRICK, }
v. } Alderman, JOHN JONES.
JAMES O'CONNELL.

September 18th 1859. Summons issued in the above case. Returnable 24th September 1859, between the hours of 3 and 4 o'clock, P. M.

Plaintiff appeared, by his attorney, L.

Defendant appeared, by his attorney, S. H.

Plaintiff's attorney stated that the suit was brought to recover \$38, due by defendant to plaintiff, on a contract of guaranty, whereby defendant agreed with plaintiff, Hake, to guaranty the payment to Hake, of the rent of the house No. 79 Queen street, belonging to Hake, and occupied by Patrick Ward; that Ward was in arrear \$38, and suit was therefore brought against his surety, the defendant, to recover that amount.

Defendant's attorney stated that at this stage it was proper he should interpose certain objections to the regularity of the proceedings. He moved that the writ of summons be quashed, because no legal service of it had been made four days before the return of it, and called the constable as a witness.

Plaintiff's attorney objects.—The constable has already made his return under oath, and indorsement on the back of the writ, which shows that the service was made on the 18th September, more than four days before the return; this is conclusive:—if the constable has made a false return, defendant has his remedy against him.

Alderman.—If the constable has made a mistake in regard to the return the return may be amended on his application. *Constable.*—I served the summons on the 18th, on defendant, by leaving a true copy, as I then thought, at his dwelling-house with one of the family, but after making the return, I found that the copy I then left was not a true copy, and this morning I served the defendant with a true copy.

Alderman.—That will not do. You had better apply for leave to amend your return.

Constable.—I do so, according to the facts as I have stated them.

Alderman.—Which is, that you served the summons on defendant on the 24th September 1859, by leaving a true copy thereof at his dwelling-house with one of the family?

Constable.—Yes.

Alderman indorses the amendment on the back of the writ, and swears constable to the truth thereof.

Defendant's attorney.—I now move to quash the writ of summons, on the grounds already laid.

Plaintiff's attorney.—I suppose, if insisted on, it must be done.

Alderman.—The writ is quashed.

Plaintiff's attorney, the costs being paid, orders a new summons as before.

FREDERICK HAKE, to the use of CHARLES HELFRICK, }
v. } Alderman, JOHN JONES.
JAMES O'CONNELL.

September 24th 1859. Summons issued in the above case. Returnable September 30th 1859, between the hours of 3 and 4 o'clock, P. M., when plaintiff and defendant appeared with their attorneys.

Defendant *in person* asked the alderman to file a plea in abatement in the case, which was done, and a note thereof made on the docket, viz. "September 30th, defendant, in person, files a plea in abatement that defendant's name is James McConnell, and not

James O'Connell, and verifies it on oath." This plea of misnomer as filed was in the following form, viz.:

JAMES MCCONNELL, sued by the
name of JAMES O'CONNELL,
ats.

FREDERICK HAKE, to the use of
CHARLES HELFRICK.

} Before John Jones, Alderman of the 3d ward in the
city of Philadelphia.

And the said James McConnell, whom the said Frederick Hake, to the use of Charles Helfrick, has sued by the name of James O'Connell, in his own person comes and says that he is named and called by the name of James McConnell, and by the said surname of McConnell hath always hitherto been called and known, without this that he, the said James McConnell, now is, or ever was, named or called or known by the surname of O'Connell, as by the writ of summons in the said case is supposed. And this he, the said James McConnell, is ready to verify. Wherefore he prays judgment of the said writ, and that the same be quashed.

James McConnell, sued by the name of James O'Connell, of the city of Philadelphia, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and matter of fact.

JAMES MCCONNELL.

Sworn and subscribed before me, the 30th September 1859. JOHN JONES, Alderman.

[NOTE.—A plea in abatement is put in by the party, who pleads it in person, and he may swear to its truth, as in the foregoing plea, before the alderman, at the time of putting it in. Such pleas must be pleaded before the alderman or justice, otherwise they cannot afterwards be pleaded when the case is taken to the common pleas on appeal. It may be well doubted whether, in putting in a plea in abatement before a justice, it is necessary for the party to do more than state the subject-matter of his plea to the justice, requesting him to enter the same on his docket, and offering to prove it by witnesses.]

Plaintiff's attorney asks the alderman to enter a replication to said plea of misnomer, and note the same on his docket, which is done thus:

"Sept. 30th 1859, plaintiff's attorney files replication that defendant was and is called and known by the name of James O'Connell, as well as by that of James McConnell."

Alderman, (to defendant.)—Call your witnesses to prove that your name is James McConnell.

Defendant's attorney calls John Smith, who is sworn by the alderman.

Defendant's attorney.—Do you know the defendant here, and how long have you known him? Witness.—I know James McConnell, the defendant, and have known him for ten years.

Defendant's attorney.—By what name is he generally known? Witness.—By the name of James McConnell.

Cross-examined by plaintiff's attorney.—Do you know by what name he is generally known? Witness.—Yes; I have been well acquainted with him, and those who know him, for ten years.

Plaintiff's attorney.—Do you not know that he is sometimes called James O'Connell, as well as James McConnell? Witness.—No; I never heard him called by any other name than James McConnell.

Alderman, (to plaintiff's attorney.)—Have you any more questions to ask the witness? Plaintiff's attorney.—No.

Alderman.—Have you any witness to examine as to defendant's name? Plaintiff's attorney.—Yes; James Todd.

James Todd being sworn:

Plaintiff's attorney.—Do you know defendant? Witness.—I know him to see him, but am not acquainted with him.

Plaintiff's attorney.—By what name is he called? Witness.—James McConnell; but I have heard him called by the name of James O'Connell.

Cross-examined by defendant's attorney.—How often have you heard him called by the name of O'Connell? Witness.—Once or twice.

Defendant's attorney.—Who called him so? Witness.—Joseph Horn.

Defendant's attorney.—What did he say? Witness.—He said that there was a man living at No. 79 Queen street, called O'Connell, or McConnell, who had voted the democratic ticket at the last election.

Defendant's attorney.—Did he say he was well acquainted with him? Witness.—No.

Defendant's attorney.—Who else did you hear call defendant by the name of O'Connell? Witness.—I do not remember any one else.

Alderman, (to plaintiff's attorney.)—Have you any more witnesses on this point? Plaintiff's attorney.—No.

Alderman.—That is not sufficient.

Plaintiff's attorney.—I move to amend the record by altering the name of James O'Connell to James McConnell, under the act of 4 May 1852.

Alderman.—Have you any evidence of mistake?

Plaintiff's attorney calls Charles Helfrick, the equitable plaintiff, who, having been sworn, says that he was informed by Frederick Hake that the defendant's name was James O'Connell, and that he so instructed his attorney.

Alderman.—That is enough—the amendment is allowed. The record is amended accordingly.

Plaintiff's attorney states the cause of action as in the first suit; and offers in evidence a deed for the house and lot No. 79 Queen street, dated 24th August 1841, from James Jackson and Maria, his wife, to Frederick Hake, duly acknowledged and recorded. The defendant's attorney examines the deed, and, making no objection, it is given in evidence.

Plaintiff's attorney next offers in evidence a certain assignment, whereof this is a copy, viz.:

For and in consideration of ten dollars, to me in hand paid by Charles Helfrick, before and at the time of the execution hereof, I hereby assign, transfer and make over, to the said Charles, all my right title and interest in and to a certain claim of thirty-eight dollars, or thereabout, which I have against James O'Connell or McConnell, on a guaranty, wherein he, the said O'Connell, or McConnell, guaranteed the payment to me, by Patrick Ward, of certain rent, but in the payment whereof the said Ward is now in arrear to the amount aforesaid, or thereabout. Witness my hand and seal, this 10th July 1859.

(Signed,) FRED'K HAKE. [SEAL.]

Signed, sealed and delivered,
in the presence of us,
JAMES JACKSON,
WM. DODD.

Plaintiff's attorney hands the assignment to defendant's attorney, who examines it, and asks proof of its execution.

James Jackson affirmed.

Plaintiff's attorney, (handing witness the assignment, and calling his attention to the name James Jackson, thereon.)—Is that your handwriting? *Witness.*—Yes.

Plaintiff's attorney.—Were you present at the execution of that instrument? *Witness.*

—Yes. I saw Fred. Hake sign his name to it.

Plaintiff's attorney.—Who were present besides Hake and you? *Witness.*—Wm. Dodd, who witnessed the execution, and Charles Helfrick.

Plaintiff's attorney.—What became of the paper after its execution? *Witness.*—Hake gave it to Helfrick.

Cross-examined by defendant's attorney.—What else took place at the execution? *Witness.*—I do not recollect anything else.

Defendant's attorney.—Then there was no money paid. *Witness.*—Yes, I do recollect that Helfrick paid Hake some money, but how much I do not know.

William Dodd sworn. The testimony of this witness was the same as the last.

Plaintiff's attorney offers James Humphreys as a witness, who is sworn.

Plaintiff's attorney.—State whether you were present at a conversation or agreement between Hake and McConnell, the defendant, as to the payment of rent that was to become due by Patrick Ward. *Witness.*—Defendant occupied the house No. 79 Queen street, for a year and a half, when he left it. Before leaving, I called on him in company with Hake, and found that Patrick Ward occupied one of the rooms. Hake inquired whether Ward was not leaving the house at the same time with himself. He said he believed not, that he had let the room to him about 6 weeks ago at \$5 per month, and the 2d month was not yet expired—that he was a good tenant and would pay punctually—that he would go his security that he would pay his rent. On this Hake let Ward remain in the room. He stayed there for 12 months and only paid me \$22 of rent during that time, and there is \$38 now in arrear. I was Hake's agent to collect the rent.

Cross-examined by defendant's attorney.—Did defendant say anything else on the subject at that, or any other, time? *Witness.*—Not that I can recollect.

Defendant's attorney.—What reply did Hake make to McConnell when he said he would go Ward's security? *Witness.*—I don't know that he made any reply.

Defendant's attorney.—Did you ever speak to McConnell afterwards on the subject? *Witness.*—Yes, before bringing suit. I asked him to pay the arrears due by Ward.

Defendant's attorney.—What reply did he make? *Witness.*—That he would not pay a cent—that he never guaranteed the payment of rent.

Defendant's attorney.—Then I understand you to say, that until after the rent fell into arrear, the amount of which is now claimed, Hake never told or notified defendant that he accepted him as security for Ward. *Witness.*—No, but we thought that letting Ward remain in the room amounted to the same thing.

Alderman, (to plaintiff's attorney.)—Have you any other witness? *Plaintiff's attorney.*—No, I consider Humphreys' testimony sufficient to make out the case for plaintiff.

Defendant's attorney contends that the testimony made out no case against defendant; that in order to bind a person on a contract of guaranty there must be a mutual assent between the guarantor and guarantee that it shall operate; the latter must accept the guaranty—a mere offer to guaranty is not binding unless duly accepted. Citing *Adams v. Jones*, 12 Pet. 207; *Lee v. Dick*, 10 Ibid. 482; *Chitty on Cont.* 500, &c. Besides the act of assembly of 1855 requires a contract of guaranty to be in writing. *Purd. Dig.* 497.

Plaintiff's attorney replied, that the permitting Ward to remain on the premises after the guaranty by defendant was a sufficient assent and acceptance on the part of the plaintiff; that a bare offer to guaranty without any express assent or notice had been held in several cases sufficient to charge the guarantor. Citing *Caton v. Shaw*, 2 Har. & Gil. 13; *Norton v. Eastman*, 4 Greenl. R. 521; *Tuckerman v. French*, 7 Ibid. 115; *Seaver v. Bradley*, 6 Ibid. 60; *Train v. Jones*, 11 Verm. 444.

Alderman.—I will deliver my opinion and give judgment in this case on the 8th inst. at 4 o'clock p. m.

October 8th 1859, parties present. *Alderman*.—It does not appear that Hake ever assented to or accepted the offer of guaranty made by the defendant, or ever gave him any notice that he would look to him for the rent, if it fell in arrear. I do not think the fact that plaintiff left Ward on the premises any sufficient evidence that he assented to or accepted defendant's offer, since he never informed him that he did so on account of his guaranty. It is unnecessary to determine whether this case falls within the act of 1855 or not. Judgment is therefore entered for the defendant.

Acts of Assembly or Statutes.

I. Revival of acts in force before the revolution.

II. Statutes to be strictly pursued.

III. Construction of statutes.

IV. Constitutionality of statutes.

I. REVIVAL OF ACTS IN FORCE BEFORE THE REVOLUTION.

The first legislature, under the commonwealth, enacted by act of 28th January 1777, that each and every one of the laws or acts of general assembly that were in force and binding on the inhabitants of the province on the 14th May 1776, should be in force and binding on the inhabitants of this state, from and after the 10th February 1777, as fully and effectually to all intents and purposes, as if the said laws, and each of them, had been made or enacted by that general assembly. And also the common law, and such of the statute laws of England, as had heretofore been in force within the province, except such as were repugnant to or inconsistent with the constitution of the commonwealth. Purd. 40.

Statutes made in Great Britain *before* the settlement of Pennsylvania have no force here, unless they are convenient and adapted to the circumstances of this country. And English statutes made *since* the settlement of Pennsylvania have no force here, *unless the colonies are particularly named*. The common law of England has always been enforced in Pennsylvania. 1 D. 67. 2 Binn. 581.

The first legislature, under the *commonwealth*, has clearly fixed the rule respecting the extension of *British* statutes, by enacting that "such of the statutes as have been enforced in the late province of Pennsylvania should remain in force, till altered by the legislature. 1 D. 74.

By the charter from Charles II. to William Penn, the laws of England relating to property were to be the laws of Pennsylvania, until altered by the legislature. 1 D. 287.

British Statutes may be in force in Pennsylvania, by usage. 1 D. 67. McKean, C. J.

The statute of 18 Edw. 1, c. 18, [Westminster 2,] has never been in force in Pennsylvania. 1 Wh. 337.

The statute of 28 Edw. 3, c. 13, is in force in Pennsylvania. 1 D. 73. Oyer and Terminer, Philadelphia, May 1822. MS.

The statute 23 Hen. 6, c. 9, though not reported by the judges, has been considered in force in Pennsylvania. 8 W. 389. SERGEANT, J.

The statute of limitations, 32 Hen. 8, c. 2, extended to Pennsylvania. 1 D. 15 1 D. 64.

The statute of *quia emptores*, 18 Edw. st. 1, c. 1, never was in force in Pennsylvania. 1 Wh. 337.

The statute of 32 Hen. 8, c. 9, is not in force in Pennsylvania. 1 D. 69.

The statute of 43 Eliz. c. 4, relating to charitable uses, has not been extended to this state, but its principles have been adopted by the courts. 17 S. & R. 88.

The statute 17 Car. 2, c. 7, regulating proceedings upon distresses and avowries for rent, was recognised as in force in Pennsylvania. 4 Y. 264. 1 Ash. 58.

The statutes of frauds and perjuries, 29 Car. 2, c. 3, do not extend to Pennsylvania. 1 D. 1.

The statute of limitations, 21 Jac. 1, c. 16, extended to Pennsylvania. 1 D. 20. 1 D. 67.

The statute 8 & 9 W. 3, c. 81, does not extend to Pennsylvania. 2 Binn. 1.

There is no trace of the extension of the statute 4 & 5 Anne, c. 16, to Pennsylvania by legislative authority or judicial practice. 4 D. 168. 2 Y. 509.

The statute 4 Geo. 2, c. 28, sect. 2, providing that, where land is vacant, fixing a declaration in ejectment in some notorious place on the land shall stand in the place of a demand and re-entry, does not extend to Pennsylvania. 6 S. & R. 151.

The statute of 21 Hen. 8, has no relation to the computation of time where a rule or a statute fixes a certain number of days. 4 Barr 517.

II. STATUTES TO BE STRICTLY PURSUED.

In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect. Act 21 March 1806, § 13. *Purd.* 41. Act 31 March 1860, § 183. *Purd.* 248.

The act was formerly held to extend only to penal actions and indictable offences. 6 S. & R. 289. But recent decisions have enlarged the sphere of its operation, and it now applies both to civil and criminal proceedings. 2 M. 63. 1 R. 290.

An indictment for nuisance is not within its provisions, although a statutory remedy be provided. 11 S. & R. 845. *Bright. R.* 69. Yet, where the erection of a dam in a navigable stream beyond a certain height, was prohibited by act of assembly, and the erection of the dam itself was not a nuisance, but the excess beyond the limit prescribed by the statute, rendered it illegal, it was held, that the remedy was under the act of assembly, and that the party could not be prosecuted at common law for an entire abatement of the structure. 3 W. 330. 3 P. R. 180. 5 R. 645. 5 Wh. 357. 3 W. & S. 540.

The act only applies where a new, or perhaps specific, method of procedure is directed by statute; for if only a new penalty be attached to a common law offence, then the indictment may still be at common law, though in case of conviction, no other than the statutory punishment can be inflicted. 2 P. 351. 6 B. 179.

But an indictment for extortion in taking illegal fees, is not sustainable. 13 S. & R. 426. 1 R. 457. Nor against a tax collector for embezzlement. 5 R. 64. Nor can a person be held to surety of the peace, except in the cases mentioned in the act of assembly. 1 Ash. 46.

The performance of worldly employment on Sunday, can only be punished by the infliction of the penalty prescribed by the act of 1794. 1 S. & R. 347. 9 C. 86. Unless it amount to a breach of the public peace. *Bright. R.* 44. 1 Phila. R. 460. But if there be an actual disturbance of the public peace, the offender may be bound over to keep the peace and be of good behavior. 7 Am. L. R. 620. 8 Phila. R. 509.

A party cannot be indicted for the offence of establishing an unlawful bank; the prosecution must be under the statute to recover the penalty. 2 Ash. 252.

And an action of debt is not maintainable on a judgment for damages on summary proceedings to obtain possession by a purchaser at sheriff's sale. The statutory remedy must be strictly pursued. 14 S. & R. 162. But see 2 Phila. R. 71, *contra*.

III. CONSTRUCTION OF STATUTES.

The whole of the civil jurisdiction of the justices of the peace, and the greater part of the proceedings before them, being given and regulated by statute law—acts of assembly—the following observations on the “interpretation and exposition of statutes,” will be found of essential service to magistrates, in enabling them correctly to ascertain, and thus fully carry out, the intentions of the acts of our legislatures.

There are several descriptions of acts of congress and of the general assembly. These are public general acts—public local acts—private acts—and resolutions, which are sometimes of a public and general nature, sometimes local and private.

A general or public act regards the whole community; a special or private act relates only to particular persons or to private concerns.

The courts of justice are bound *ex officio* to notice public acts, without their being formally set forth, but not so with regard to private acts, unless formally shown and pleaded.

Statutes are declaratory, remedial and penal. Declaratory acts are made where the old custom of the country is almost fallen into disuse, or become disputable, in which case the legislature has thought proper, for avoiding all doubts and difficulties, to declare what the common law is and ever hath been.

Remedial acts are made from time to time, to supply the defects discovered in the common law, whether they arise from the general imperfection of all human laws, from change of time and circumstances, from mistakes and unadvised determinations, or from any other cause.

Penal statutes are such whereby a forfeiture is inflicted for transgressing the provision therein contained; and a penal statute may also be a remedial law, and a statute may be penal in one part and remedial in another part.

All statutes ought to be *plainly and clearly*, and not *cunningly and darkly* penned, especially in penal matters; they should be *shortly and artificially* penned, so as to *comprehend much matter in few words*, and so as to leave as little to construction as possible.

The parts of a statute, in a popular, though not in a legal sense, are the *title*, the *preamble*, the *purview* or *body* of the act, the *clauses*, *provisoes*, *exceptions*, the *date* or *day* of receiving the assent of the chief magistrate.

The title of a statute is no part of it; it is but a mere usage, and the title is *not* the law, but the name and description given to it by its makers.

The preamble of an act usually contains the motives and inducements to the making of it, but it has been held to be no part of the act.

In doubtful cases, recourse may be had to the preamble, in order to discover the inducements of the legislature in making the statute, but where the terms of the enacting clauses are clear and positive, the preamble cannot be resorted to.

Public acts are binding upon every citizen; the judges are bound to take judicial notice of them; every citizen is, in judgment of law, privy to the making of them, and supposed to know them; the passing of an act of assembly is a public proceeding in all its stages, and when the act is passed, it is, in contemplation of law, the act of the whole community. (a)

The true meaning of the statute is generally and properly to be sought from the *purview* or *body of the act*. The preamble of a statute is no more than a recital of some inconveniences, which by no means excludes any other, for which a remedy is given by the enacting part of the statute.

It is an established rule in the exposition of the statutes, that the intention of the legislature is to be deduced from a view of the *whole* of the statute, taken and compared together.

In construing acts of the legislature, the courts are not to look only at the language of the preamble, or of any particular clause. If they find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, it is their duty to give effect to the larger expressions.

A statute ought, upon the whole, to be construed so that, if it can be prevented, no clause, sentence or word, should be superfluous, void or insignificant.

The *purview* or *body* of an act may be qualified or restrained by a saving clause in the statute.

But a saving clause, where it is directly repugnant to the *purview* of the act, and cannot stand without rendering the act inconsistent and destructive of itself, is to be rejected.

A proviso in an act is something engrafted upon a preceding enactment; and where the proviso is clearly repugnant to the *purview* of it, the proviso shall stand, and be held a repeal of the *purview*, because it speaks the last intention of the legislature. It is to be compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it.

There is a known distinction in the law between an exception in the *purview* of an act, and the proviso. If there is an exception in the enacting clause of a statute, it must be negated by pleading; a separate proviso need not.

In a criminal case, what comes by way of proviso in a statute, must be insisted on for the purposes of defence, by the party accused; but where exceptions are in

(a) "The act of the whole community." This assumption is more emphatically true of the laws enacted in the United States, and in the several states, than it is of those passed under any other known form of government. In no existing government, is the voice of the people so imperative as in these United States. Hence the *right of instruction* by the constituent is universally acknowledged, and almost as generally regarded as binding on the representative. Thus it is, as it were, the democracy, the whole people, speaking through the mouths of the individuals whom they have sent to represent them, and who thus, and thus only, can faithfully represent those by whom they were elected.

the enacting part, it must in the indictment charge that the indictment is not within any of them.

The indorsement on an act, by the clerk of the legislature, of the *day, month and year* when it received the assent of the chief magistrate, is the date of the act, and shall be taken to be part of *the act*.

The qualities and incidents of a statute are :

1. An act of the legislature binds all persons but such as are specially saved by it.
2. A statute which gives corporal punishment, does not bind an infant; *contra* of other statutes, if they do not except infants.

3. Every statute made against an injury gives a remedy by action, expressly or impliedly.

4. An act of the legislature cannot alter by reason of time, but the common law may, since *cessante ratione, cessat et ipsa lex* [when the reason of law ceases, the law itself ceases with it].

5. When the statutes are made, there are some things which are exempted and *foreprized* out of the provisions thereof, by the law of reason, though not expressly mentioned; thus things for necessity's sake, or to prevent the failure of justice, are excepted out of statutes.

6. Whenever an act gives anything generally and without any special intention declared, or rationally to be inferred, it gives it always subject to the general control and order of the common law.

7. Whenever a statute gives or provides anything, the common law provides all remedies and requisites.

8. In statutes, incidents are always supplied by intendment; in other words, whenever a power is given by a statute, everything necessary to the making of it effectual is given by implication; for the maxim is, *quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud* [when the law permits anything, it seems also to permit that by which the end is obtained].

9. *Quando aliquid prohibetur, et omne per quod devenitur ad illud* [when anything is forbidden, everything else is also forbidden that induces that end], by which every oppressionary law by color of any usurped authority is forbidden, and all things by all manner of means tending to destruction are prohibited.

10. Whenever the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law.

11. If an offence is made felony by a statute, such statute does by necessary consequence subject the offender to the like attainder and forfeiture, and does not require the like construction, as to those who shall be accounted accessories before or after the fact, and to all other intents and purposes as a felony, as the common law does.

A misrecital of the day on which the legislature was held, or of the sessions, or of the place of making the statute, or a repugnancy in reciting the day of its making, will be fatal, and so if any material part is omitted or misrecited.

Trifling variations, which do not alter the sense of the material parts of a statute, would not be considered fatal.

Every statute, for the continuance of which no time is limited, is perpetual, although it is not expressly declared to be so. A temporary statute continues in force (unless it is sooner repealed) until the time for which it is made to expire; a perpetual statute until it is repealed.

If an expired statute be afterwards revived by another statute, the law derives its force from the first, which is to be considered as in operation by means of this revival.

No proceedings can be pursued under a repealed statute, though commenced before the repeal, unless by special exception.

A statute cannot be repealed by *nonuser*.

But though *nonuser* can never repeal the words of an act of the legislature, where they are plain, yet a series of practice without any exception goes a great way to explain them where there is any ambiguity.

Where one statute is repealed by another statute, acts done in the mean time, while it was in force, shall endure and stand, and be good and effectual, but not so if the former statute be declared *null and void*.

By the repeal of a repealing statute, the new law containing nothing in it that manifests the intention of the former act shall continue repealed, the original statute is revived; but if a statute be repealed by several acts, a repeal of one or two, and not of all, does not revive the first statute.

If a repealing statute, and part of the original statute, be repealed by a subsequent act, the residue of the original statute is revived.

And if an act of the legislature is revived, all acts explanatory of that act so revived, are revived also.

When an act of the legislature is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed.

When a statute commands or prohibits a thing of public concern, the person guilty of disobedience to the statute, besides being answerable in an action to the party injured, is likewise liable to be indicted for the disobedience.

Wherever the statute forbids the doing of a thing, the doing is wilful, although without any corrupt motive, and indictable.

If a statute enjoins an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature.

Where a statute only enacts that the doing any act not punishable *before*, shall for the future be punishable in such and such a particular manner, there the particular method prescribed by the act must be specifically pursued, and not the common law method of indictment.

The mention of other methods of proceeding impliedly excludes that of indictment, as where a statute appoints a particular manner of proceeding against an offender, viz. by commitment, or action of debt, or information, without mentioning an indictment, no indictment lies.

The construction of a statute, like the operation of a devise, depends upon the apparent intention of the maker, to be collected either from the particular provision, or the general context. Acts of the legislature ought to be construed according to the intention of the parties that make them.

The great object of the rules and maxims of interpretation is to discover the true intention of the law; and whenever that intention can be indubitably ascertained, the courts are bound to give it effect, whatever may be their opinion of its wisdom or feeling.

A thing which is within the letter of the statute is not within the statute, unless it is within the intention of the makers.

Great regard ought, in construing a statute, to be paid to the construction which the sages of the law put upon it, because they are the best able to judge of the intention of the makers when the law was made.

In the exposition of a statute, the leading clue to the construction to be made, is the intention of the legislature, and that may be discovered from different signs.

As a primary rule, it is to be collected from the words; when the words are not explicit, it is to be gathered from the occasion and necessity of the law, being the causes which moved the legislature to enact it.

For the sure and true interpretation of all statutes in general, whether penal or beneficial, restrictive or enlarging of the common law, three things are to be considered:

1. What was the common law before the making of the act?
2. What was the mischief and defect against which the common law did not provide?
3. What remedy the legislature hath resolved and appointed to cure the disease of the common law?

The best interpretation of a statute is to construe it as near to the rule and reason of the common law as may be.

When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of public utility, when the end of the act appears to be larger than the enacting words.

If a statute makes use of a word, the meaning of which is well known, and has a certain definite sense at the common law, the word shall be expounded and received in the same sense in which it is understood at the common law.

It is the most natural and genuine exposition of a statute, to examine one part

by another part of the same statute, for that best expresses the meaning of the makers, and such construction is *ex visceribus actus*.

If any part of a statute is intricate, obscure or doubtful, the proper way to discover the intent is to consider the other parts of the act; for the words and meaning of one part of a statute frequently lead to the sense of another, and in the construction of one part of a statute every other part ought to be taken into consideration.

And another rule of interpretation is, that one part of a statute must be so construed by another that the whole may, if possible, stand.

The words of a statute are to be taken in their ordinary and familiar acceptation, and regard is to be had to their general and popular use.

And though where the words of a statute are doubtful, general usage may be called in to explain them, such usages that can control the words of a statute must be universal, and not the usage of any particular place.

If words of art are used, they are to be taken in their technical sense.

Where the object of the legislator is plain and unequivocal, the courts ought to adopt such a construction as will best effectuate the intention of the lawgiver.

Where the legislature has used words of a plain and definite import, it would be dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it has expressed.

In all cases where the intention of the legislature is brought into question, it is best to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the act.

The courts are not to *presume* the intentions of the legislature, but to *collect them* from the words of the act; and they have nothing to do with the policy of the law. They are not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, and according to reason and grammatical correctness.

It is a safe method, in interpreting statutes, to give effect to the particular words of the enacting clauses.

If the words of a statute go beyond the intention, it rests with the legislature to make an alteration; the duty of the court is only to construe and give effect to the provisions.

A *casus omissus*, that is, something omitted and not provided for by the statute, can in no wise be supplied by a court of law, for that would be to make laws. Judges are bound to take the act of the legislature as the legislature has made it.

A remedial statute should be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy; and as a general rule a remedial statute ought to be construed liberally.

A statute for the public good should be construed in such a manner as it may, as far as possible, attain the end proposed.

The true intent and meaning of a statute is always to be regarded; and to such purpose only ought the words to be construed. Constructions of statutes are to be made according to the intent of the framers, and not by any strict or strained interpretations.

Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.

Penal statutes are taken strictly and literally only in the point of defining and setting down the *fact* and *punishment*, and not generally.

A penal law shall not be extended by construction. The law of Pennsylvania does not allow of constructive offences or of arbitrary punishments. No man incurs a penalty, unless the act which subjects him to it is clearly within both the spirit and the letter of the statute imposing the penalty.

Where a statute creates a penalty, and says one moiety shall be to the use of the state, county, &c., and the other to a common informer, the state, county, &c., may sue for the whole, unless a common informer has commenced a *qui tam* suit for the penalty.

Where an offence, created or made fraud by statute, is in its nature single, one single penalty only can be recovered, though several join in committing it; but if

the offence is in its nature several, each offender is separately liable to the penalty.

Statutes which give costs are to be taken strictly as being a kind of penalty.

Costs are only due by act of assembly, none being recoverable at common law.

Whenever a statute imposes terms, and prescribes a thing to be done within a certain time, the lapse of even a day is fatal, even in the penal statute, because no inferior court can admit of any terms but such as directly and precisely satisfy the law.

Acts of the legislature which take away the trial by jury, and abridge the liberty of the citizen, ought to receive the strictest construction.

It is a settled rule of law, that every charge upon the citizen must be imposed by clear and unambiguous language.

Statutes against frauds are a satisfactory exception to the rule that penal statutes are to be taken strictly.

Where the meaning of a statute is doubtful, the consequences may be considered in the construction; but where the meaning is plain, no consequences are to be regarded in the interpretation, for this would be assuming a legislative authority.

Words are to be taken in a lawful and rightful sense.

Where a statute will bear two interpretations, one contrary to plain sense, the other agreeable to it, the latter shall prevail.

Any absurd consequences, manifestly contradictory to common reason, are void.

Words and phrases, the meaning of which, in a statute, has been ascertained, are, when used in a subsequent statute, to be understood in the same sense.

Where an act of the legislature gives authority to *one* person expressly, all others are excluded, and a special power is ever to be strictly pursued.

Where an act of the legislature gives power to *two justices finally to hear and determine an offence*, it is necessarily supposed that they shall be together, or which is the same thing, that they shall hold a special sessions for that purpose; for it is unknown to the laws that two persons shall act as judges in the same cause, when at the same time one of them is in one part of the country, and the other in another.

Where a statute gives power to the justices to require any person *to take the oaths*, or do any other thing, the law by necessary implication gives them power to issue their precept to convene the parties.

Where a statute appoints a conviction to be *on the oath of one witness*, this ought not to be by the single oath of the informer.

When an act of the legislature empowers justices of the peace to *bind a person over*, or cause him to do a certain thing, and such person, being in his presence, shall refuse to be bound, or to do such a thing, a power of commitment is implied, and the justice may commit him to the jail, to remain there till he shall comply.

Where a statute appoints *imprisonment*, but limits no time how long, the prisoner, in such a case, must remain at the discretion of the court.

Where an act of the legislature gives power to justices of the peace to take order in any matter, *according to their discretion*, this shall be understood according to the rules of reason, law and justice, and not governed by private opinion.

Where the amount of security to be taken is left in the *discretion* of any court, it will be good to follow the precedents of former times.

Where an act directs that the justices shall commit an offender to prison for *twelve months*, the justices may not alter the words and commit him for a *year*; for in this respect twelve months and one year are not the same, but the month must be computed at *twenty-eight days* to the month, and not as a calendar month, unless it be so expressed in the act.

A *fit* person to execute an office, is one apt and fit to execute his office, who has three things—honesty, knowledge and ability; honesty to execute it without malice, affection or partiality; knowledge to know what he ought duly to do; and ability, as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not from impotency or poverty neglect it.

IV. CONSTITUTIONALITY OF STATUTES.

It is a principle in the English law, that an act of parliament, delivered in clear

and intelligible terms, cannot be questioned, or its authority controlled in any court of justice. 1 Kent's Com. 446.

But this principle in the English government, that the parliament is omnipotent, does not prevail in the United States. In this, as in all other countries where there is a written constitution, designating the powers and duties of the legislature, as well as of the other departments of the government, an act of the legislature may be void as being against the constitution. It must conform in the first place to the constitution of the United States, and then to the subordinate constitution of its own state, and if it infringes the provisions of either, it is so far void. Ibid. 448.

The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. To contend that the courts of justice must obey the requisitions of an act of the legislature, when it appears to them to have been passed in violation of the constitution, would be to contend, that the law was superior to the constitution, and that the judges had no right to look into it, and to regard it as the paramount law. Ibid. 449.

It has accordingly become a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and of duty, to declare every act of the legislature made in violation of the constitution, or of any provision of it, null and void. Ibid. 450. 8 Wheat. 11.

A statute, when duly made, takes effect from its date when no time is fixed, and this is now the settled rule. A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect. Ibid. 454-55.

The legislature, provided it does not violate the constitutional prohibition, may pass retrospective laws, such as in their operation may affect suits pending and give to a party a remedy, or remove an impediment in the way of recovering redress by legal proceedings. 4 W. & S. 218. 10 Barr 280.

Until the judiciary has fixed the meaning of a doubtful law, upon which rights have become vested, it may be explained by legislative enactment. 4 W. & S. 223.

The bill of rights requires that the law relating to a transaction in controversy, at the time when it is complete, shall be an inherent element in the case and shall guide the decision, and that the case shall not be altered in its substance, by any subsequent law. 9 C. 495. 7 C. 288. 8 Phila. R. 494.

An act is passed only when it has gone through all the forms made necessary by the constitution to give it force and validity as a binding rule of conduct for the citizen; and it cannot impair a contract made after it has passed both houses of the legislature, but before its approval by the governor. 9 C. 202.

Adulteration

And Sale of Unwholesome Provisions.

ACT 31 MARCH 1860. Purd. 229.

SECT. 69. If any person shall sell, or expose for sale, the flesh of any diseased animal, or any other unwholesome flesh, knowing the same to be diseased or unwholesome, or sell or expose for sale unwholesome bread, drink or liquor, knowing the same to be unwholesome; or shall adulterate for the purpose of sale, or sell any flour, meal or other article of food, any wine, beer, spirits of any kind, or other liquor intended for drinking, knowing the same to be adulterated; or shall adulterate for sale, or shall sell, knowing them to be so adulterated, any drugs or medicines; such person so offending shall be guilty of a misdemeanor, and upon conviction be sentenced to pay a fine not exceeding one hundred dollars, or undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court.

The sale of unwholesome flesh meat is indictable, although the taint be imperceptible to the senses, and the eating of it produced no apparent injury. 19 New York 574.

Guilty knowledge that a cow which has a running sore on the head, is unfit for food, may be inferred, without proving that the accused had any scientific skill in determining such questions. Ibid.

ACT 29 MARCH 1860. Purd. 669.

SECT. 1. In all actions for the sale of any spirituous, vinous or malt liquors, or any admixtures thereof, it shall be competent for the defendant, in every such case, to prove that said liquors or admixtures thereof were impure, vitiated or adulterated, and proof thereof being made, shall amount to a good and legal defence to the whole of the plaintiff's demand.

ACT 14 APRIL 1863. Purd. 1301.

SECT. 1. It shall be unlawful for any person or persons to make use of any active poison, or other deleterious drugs, in any quantity or quantities, in the manufacture or preparation, by process of rectifying or otherwise, of any intoxicating malt or alcoholic liquors, or for any person or persons to knowingly sell such poisoned or drugged liquors in any quantity or quantities; and any person or persons so offending shall be deemed guilty of a misdemeanor.

SECT. 2. It shall be the duty of any person or persons engaged in the manufacture and sale of intoxicating malt or alcoholic liquors, or in rectifying or preparing the same in any way, to brand on each barrel, cask or other vessel containing the same, the name or names of the person or persons manufacturing, rectifying or preparing the same, and also these words, "containing no deleterious drugs or added poison;" and shall also certify the same fact or facts to the purchaser, over his, her or their own proper signature.

SECT. 3. If any barrel, cask or other vessel, containing any such drugged or poisoned liquor, shall be found in the possession of any person or persons designated in sections one and two, it shall be deemed *prima facie* evidence of a violation of the provisions of this act.

SECT. 4. Any suspected article or specimen of intoxicating, malt or alcoholic liquor, shall be subjected to analysis by some competent person to perform the same, under the direction of the court before which the case is tried; and such analysis, duly certified under oath, shall be deemed legal evidence in any court in this state: *Provided*, That upon any preliminary examination, before any justice of the peace, mayor or other magistrate or competent authority, for the purpose of binding over, such officer may order the inspection aforesaid to be made, and make such order as may be necessary to preserve the evidence of the offence until the trial of the offender.

SECT. 5. Any person offending against any of the provisions of this act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding twelve months, or both, or either, in the discretion of the court.

Adultery.

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|--------------------------------------------|-------------------------------|
| I. Adultery, the sin of, defined. | IV. Warrant for adultery. |
| II. Acts of assembly relating to adultery. | V. A commitment for adultery. |
| III. Judicial decisions. | VI. A docket entry. |

I. ADULTERY is the sin of incontinence between two married persons, and if but one of the parties be married, it is nevertheless adultery; but in this last case it is called single adultery, to distinguish it from the other which is double. Cowell, Blount, Bracton.

The offence of adultery consists in sexual intercourse by a married person with any one not his or her wife or husband; and therefore a married man may be guilty of adultery by carnal intercourse with a single woman. 9 C. 68.

II. ACT 31 MARCH 1860. Purd. 223.

SECT. 86. If any married man shall have carnal connection with any woman not his lawful wife, or any married woman have carnal connection with any man not her lawful husband, he or she so offending shall be deemed guilty of adultery, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.

III. An unmarried defendant cannot be convicted of adultery, although the other party should be married. The offence of the defendant is mere fornication. 2 D. 124.

The solicitation of another to commit adultery is a high misdemeanor, punishable by indictment. 7 Conn. 267.

The oath of a married woman is not sufficient to sustain a warrant for the arrest of her husband for adultery. 1 Gr. 218.

The fact of adultery may be proved by circumstantial evidence. 2 Greenl. Ev. § 40.

In an indictment charging a father with living in adultery with his daughter, his confessions that she is so, are admissible in evidence. 6 Penn. L. J. 236. 11 Ala. 289.

In an indictment for adultery, it is sufficient to state that the defendant having a wife, M. A. H., in full life, did commit adultery with one M. M.; without otherwise alleging carnal knowledge, and without averring that M. M. was not his wife. 9 C. 68.

In an indictment for incestuous adultery, it is unnecessary to charge a common knowledge of the relationship, if the charge of knowing the relationship be made against the party indicted. 11 Ala. 289.

On a conviction for adultery, the defendant was sentenced to pay a fine and be imprisoned at *hard labor*. The sentence being contrary to the act of assembly, the judgment was reversed. 2 Binn. 79. s. p. 3 Barr 223.

One who elopes, and lives in adultery with a married woman, may be convicted of the larceny of her wearing apparel, where he assisted her in carrying it off, and subsequently pledged some of the articles and applied the money to his own purposes. 1 Eng. L. & Eq. R. 542. 2 Am. L. R. 695.

A wife's insanity is not a bar to a divorce for adultery committed by her when she was insane, although it would not be punishable by indictment. 6 Barr 337.

IV. WARRANT FOR ADULTERY.

DELAWARE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Delaware, greeting:

WHEREAS, J. L., of H—, in the said county, cordwainer, hath made oath before J. P., one of our Justices of the Peace, in and for the county aforesaid, that S. B. of S— town—

hip, in the said county, yeoman, on the nineteenth day of March last past, at H—, aforesaid (being a married man and having a wife in full life), did commit adultery with a certain R. W., the wife of D. W., of H—, aforesaid, laborer. These are, therefore, to command you forthwith to take the said S. B., and bring him before the said J. P., to answer unto the said complaint, and further to be dealt with according to law. Witness the said J. P., at H—, aforesaid, the third day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

J. P., Justice of the Peace.

V. A COMMITMENT FOR ADULTERY.

DELAWARE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of H—, in the County of Delaware, and to the Keeper of the Common Jail of the said County, greeting:

WHEREAS, R. W., the wife of D. W., of H—, in the said county, laborer, hath been charged, on the oath of J. L., before J. P., one of the Justices of the Peace in and for the said county, with committing adultery with a certain S. B., of S— township, in the said county, yeoman: These are, therefore, to command you, the said constable, forthwith to convey the said R. W. to the common jail of the said county, and deliver her into the custody of the keeper thereof: and you the said keeper are hereby commanded to receive the said R. W. into your custody, in the said jail, and her there safely keep, until she be thence delivered by due course of law. Witness the said J. P., of H— aforesaid, the tenth day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

C. D., Justice of the Peace. [SEAL.]

VI. DOCKET ENTRY, IN CASE OF ADULTERY.

COMMONWEALTH

ss.

G. B.

COSTS.

\$1.50
74

June 3d 1869, warrant issued, X. Y., constable, on the oath of J. L., charging the defendant with having, on the 19th of March last, at H., in the county of H. (he being a married man, and his wife living), committed adultery, with a certain R. W. June 10th, defendant brought up. J. W., sw.; C. F., sw.

Bail required, \$300, to appear next Court of Quarter Sessions, for the county of D.

J. L., cordwainer, of H. township, bound in \$100, to testify at the next Court of Quarter Sessions, &c.

G. B., yeoman, of D. township, } Each tent in \$300, that de-
G. L., currier, of T. township, } fendant shall appear at the
next Court of Quarter Sessions, for the county of D., &c., &c.

Advice; how it should be given.

A MAGISTRATE is very frequently called upon for information and advice, in matters civil and criminal. He will on such, as on every other occasion, feel the advantages of having his mind stored with legal information, to the end that he may not lead those who rely upon him, into difficulties, by giving erroneous opinions and advice. He should *never* give advice upon any agreement, &c., which has been reduced to writing, without having the writing itself before him. If he has reasonable doubts, as to his ability to give the advice asked, let him not scruple to say so, and advise the party to go where he can be correctly informed. If the first step taken shall be in the right direction, every future one may be expected to carry the party nearer to the object he desires to attain. But if, from a want of correct advice, he shall set out in a wrong direction, every step will, in all probability, take him further from the object of which he is in pursuit.

When called upon for advice, the justice considers how great a trust and confidence is reposed in him, and seeks to discharge it with becoming fidelity. Having, as best he can, informed himself fully of the facts, he looks at them in every point of view, not omitting to weigh well the claims of natural justice, and to observe whether he who asks his advice be careful to fulfil its obligations. If he find that natural and positive justice unite in giving right to the party who seeks his advice, he acquaints him with the strength of his case—advises (if with prudence it may be done) that it be laid open to his opponent, and restitution be demanded; which if he refuses to make, then, and not till then, he advises an appeal to the tribunals of justice. If, on the contrary, positive law alone, according to the letter, reluctantly yield to the party an advantage which the law of God peremptorily forbids him to seize, the justice dissuades him from further prosecution of it, in such manner, that either he must bring new matter to show that his case is other than at first it appeared, or must seek another instrument whereby to prosecute his work of injustice. If, upon a consideration of the whole matter, the case appears to the justice to be one of doubt, he states plainly his reasons for so considering it, and recommends, if the claim be small, that it be abandoned, or that, at all events, means of amicably terminating it be first tried.

In criminal matters, it is especially becoming in a justice to weigh carefully, and consider well, whatever may be submitted to him for consideration, before he shall venture upon an opinion; always taking care to make drawbacks upon whatever statements may be made under the influence of strong feelings. In relation to disputes and misunderstandings, among families, or former friends, let every possible means be taken to effect a good understanding; let the cup of conciliation be drained to the dregs, before any hostile measure be advised, or any process whatever be issued.

A justice ought, before giving an opinion in a criminal case, to be especially careful to ascertain all the facts, and everything within the knowledge of the complainant, inasmuch as it has been decided by the District Court for the City and County of Philadelphia, that a magistrate's advice, (though erroneous) to commence a criminal prosecution, given after a fair and full disclosure to him of all the circumstances, is a complete defence to a subsequent action for malicious prosecution, in case the alleged offender should be discharged or acquitted. And this, on the ground, that where the party acts on the advice of the officer of the law, there can be no malice in his action.

The justice should carefully guard against giving a decided opinion, upon any matter, or thing, which, it is probable, may come before him for decision. Persons making statements are apt to be biassed by their feelings and interests; in the statements which they make, they often, insensibly even to themselves, give to the facts a coloring, which so disguises the real state of the case, that the most penetrating eye can scarcely discern what is true from what is false. By the exercise of patience, and the devotion of some time, the magistrate may be able to get such a view of the subject as shall enable him to give advice which may be essentially useful to the

party who has called upon him, and aid him to do justice between the parties, if called upon.

If the justice shall be induced to give a decided opinion, on the representation made by the party, and, relying on that opinion, the party shall determine to institute a suit, the justice should decline to issue process, and send the party—if determined to sue—to some other justice. If the justice who has given the opinion, upon which the suit is about to be instituted, shall yield to the solicitations of the complaining party, and issue process, there is danger that the opinion he has given may bias his judgment, so that he will not be that impartial judge which law and justice require him to be, in deciding upon the interests of his fellow-citizens. Again, the case, when it comes to be heard, may, and very often does, exhibit a very different state of things from what the justice had been led to expect, and he may feel bound to give judgment *against* the plaintiff, who had been induced to bring suit, upon the faith of the opinion which had, by misrepresentation, been extorted from the justice. The plaintiff is, in such a case, apt to become angry, because the justice has given judgment against him. He never *excuses* the justice, and *blames himself*; nor will he admit, that in his statement he had discolored the facts. The best and only honest course for the justice, who gives a decided opinion upon a case stated, is to refuse to issue process in relation to it. It is well for every magistrate to avoid, as much as he can, hearing anything about the cause of action or complaint, until the parties meet to submit their "proofs and allegations."

A magistrate is frequently called upon for advice, in relation to cases, in which he has issued process, and, of course, where it is known that he is the justice who is to give judgment in the case. The party, who thus inquires, is often wholly unacquainted with the manner of doing business in a magistrate's office. He is altogether at a loss; he does not know what he ought to do, however small the matter in controversy, in order to have his case brought, fully and fairly, before the justice. Whether such applications be from the party plaintiff, or the party defendant, the magistrate should feel equally at liberty, and equally bound, to give the information required. His ear and his mind should be as open and accessible to the one party as to the other. He is not the counsel of either party, but appointed as an impartial umpire to decide between them. In him, it is in no wise unbecoming, to give to either party such advice as shall enable them to bring all the facts before him, so that he may give judgment, "as to right and justice shall belong." The advice here spoken of is not, in any wise, to trench upon the facts or merits of the case; but, simply, to give instruction and advice to assist the uninformed how to do himself justice, and put his case, honestly, before the magistrate. All this may be accomplished without much trouble; and much good will follow from advice thus given with single-heartedness and an honest desire that the truth may be made manifest.

How much good may be done, or how much evil averted, by the advice of magistrates, it is not in the power of any human being to estimate, whatever may have been his opportunities, or how great soever the reach of his understanding. Let, therefore, every justice of the peace, before he gives advice, feel his own responsibility, not only to the person who applies, but to his country and his God; and the advice, which he gives, will be what it ought to be, and it will bring peace to his own mind, and descend, as the gentle dew from heaven, on the heads of his fellow-beings.

Affray.

I. An affray defined.
II. An affray, judicial decisions on.

III. Warrant and return of constable.
IV. Docket entry in case of an affray

I. AN AFFRAY is the fighting of two or more persons, in some public place, to the terror of his majesty's subjects [of the people of the commonwealth]; for, if the fighting be in private, it is no *affray*, but an assault. 1 Hawk. P. C. c. 63. 4 Bl. Com. 145. And there must be a stroke given, or offered, or a weapon drawn, otherwise it is no affray. 3 Inst. 158.

II. Affrays may be suppressed by any private person present, who is justifiable in endeavoring to part the combatants, whatever consequences may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace: and for that purpose may break open doors to suppress an affray or apprehend the affrayer; and may either carry them before a justice, or imprison them, by his own authority, for a convenient space, till the heat is over; and may then, perhaps, also, make them find sureties for the peace. 4 Bl. Com. 145. 1 Cr. C. C. 310.

A justice of the peace cannot without a warrant authorize the arrest of any person for an affray out of his view, yet, it is clear that in such a case he may make his warrant to bring the offender before him in order to compel him to find sureties for the peace. 1 Hawk. P. C. c. 63, § 18.

A private person cannot, of his own authority, arrest a person who has been engaged in an affray or a breach of the peace. But *during the affray* any person may, without a warrant from a magistrate, restrain any of the offenders, in order to preserve the peace. 2 Johns. 486.

The revised penal code provides that if any person shall be concerned in an affray, and shall be thereof convicted, he shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars, or undergo an imprisonment not exceeding two years, or both, or either, at the discretion of the court. Purd. 220.

Affrays receive aggravations from the persons against whom, or the place where, they are committed. As where the officers of justice are violently disturbed in the due execution of their office, as by the *rescous* of a person legally arrested or the bare attempt to make such a *rescous*, for all the ministers of the law are under its more immediate protection. 1 Hawk. P. C. c. 63, § 22. Bright. R. 46.

III. WARRANT FOR AN AFFRAY.

DELAWARE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of D—, in the County of Delaware, greeting:

WHEREAS, J. L., of the township of D—, in the county of Delaware, yeoman, hath this day made oath before J. P., one of our Justices of the Peace, in and for the said county, that on the thirtieth day of September, last past, R. S. and S. B., both of the township of L—, in the said county, yeomen, at D— township, aforesaid, in a tumultuous manner, made an affray, wherein the person of the said J. L. was beaten and abused by them, the said R. S. and S. B.: These are, therefore, to command you, forthwith, to apprehend the said R. S. and S. B., and bring them before the said J. P., to answer the said complaint, and to be further dealt with according to law. Witness the said J. P., at D— township aforesaid, the third day of October, in the year of our Lord one thousand eight hundred and fifty-nine.

J. P., Justice of the Peace. [SEAL.]

Return of the Constable.—I have taken the within named S. B., whose body I have ready, as within I am commanded; but the within named R. S. is not found in my bailwick.

X. Y., Constable of D— township, October 4th 1859.

IV. DOCKET ENTRY ON A CHARGE OF AN AFFRAY.

COMMONWEALTH vs. S. B.	October 3d 1869, warrant issued, X. Y., constable, on the oath of J. L., charging the defendant with having been engaged in an affray wherein deponent was beaten.
COSTS.	October 4th, defendant brought up; J. L. sw.; C. P. aff.; G. L., sw. Bail required from defendant in \$200.
Justice : : : : \$2.10	J. L., of the township of D., farmer, } Each tent in \$100, to
Constable : : : : 74	C. P., _____ C., currier, } testify, &c., at the next
	Court of Quarter Sessions, of the county of D., and not depart the Court without leave, &c.
	S. B., of the township of G., farmer, } Each tent in \$200,
	T. C., of _____, storekeeper, } that the defendant
	shall appear at the next Court of Quarter Sessions, of the county of D., and not depart the Court, &c., and in the mean
	time keep the peace, &c.

Returned to December Sessions.

Agents.

ACT 12 APRIL 1851. Purd. 1004.

SECT. 9. It shall not be lawful for any person or persons to sell, within the city or county of Philadelphia, (a) by sample, card or other specimen, (b) any goods or merchandise of any kind or description whatsoever, for or on account of any merchant, manufacturer or other persons, not having his principal place of business within this state, (c) and to whom a license has not been granted under the laws of this commonwealth; and if any person shall sell or exhibit for sale, either by sample, card or otherwise, in the city or county of Philadelphia, any goods or merchandise, in violation of the provisions of this act, such person or persons so offending shall be liable to a fine of three hundred dollars for every such offence, which may be recovered by a suit in the name of the commonwealth before any alderman or justice of the peace of the city or county of Philadelphia, one-half to the use of the informer, who shall be a competent witness in such case, and the other half to be paid to the treasurer of the city of Philadelphia for the use of the commonwealth.

SECT. 10. A license to sell goods and merchandise within the county of Philadelphia, by sample, card or otherwise, shall be granted by the treasurer of the city of Philadelphia to any person who may not have his principal place of business within this state, on payment to the said treasurer for the use of the state three hundred dollars; but no license so granted shall authorize such person to vend goods or merchandise in the manner aforesaid for a longer period than one year from the day on which it may be issued. (d)

(a) Extended to Allegheny county, by act 15 March 1859, P. L. 134. And see act 27 February 1860, as to Dauphin county, P. L. 90; and act of 1860, *infra*, as to Lancaster county.

(b) Sales by agents of foreign factors, by card or sample, the order being received here, and transmitted to the principal abroad for ratification or rejection, when accepted, the goods being sent to the purchaser, who takes them from the custom-house, and pays the sum agreed upon, to the agent to whom he gave the order, is a sale by sample, card or specimen, within the act. It is immaterial whether the cards, samples or specimens are carried about from place to place by the agent, or kept at a given place for exhibition, with a view of soliciting orders or making sales. 10 Leg. Int. 122.

(c) To sustain an action for the penalty imposed by this act, it must appear that the goods were sold on account of the foreign manufacturer. 2 Phila. 215.

(d) These acts have been decided to be constitutional. 2 Balt. L. Trans. 863. The act of 6 April 1852, provides that the act of 1851 shall not be construed to apply to a citizen or permanent resident of Pennsylvania, or whose principal place of business is within the state, and who pays, in accordance with existing laws, a license of not less than \$100 per annum, or to any resident agent or agents as aforesaid, for the sale of hardware, by card, sample or other specimen. Purd. 1005.

This does not apply to those who are agents exclusively for the sale of the merchandise of non-residents, by card or sample; but to those whose chief place of business is within the

ACT 2 APRIL 1860. Purd. 1005.

SECT. 1. It shall not be lawful for any merchant, or his travelling agent, not residing within said county, to sell by sample, order or otherwise, in the said city and county of Lancaster, any goods, wares or merchandise, by wholesale or retail, without having first obtained from the treasurer of said county of Lancaster, a license for that purpose.

SECT. 2. Any such sale made as aforesaid, by any merchant, or his travelling agent, without license obtained as aforesaid, within the limits of the county aforesaid, shall be held and deemed a misdemeanor, punishable by fine or imprisonment, at the discretion of the court; and it shall be lawful for any constable, residing in any of the townships, wards or boroughs of said city or county, either upon his own knowledge, or the complaint of any citizen of said city or county, to arrest any person or persons engaged in making sales as aforesaid, by sample or order, and convey him or them before any alderman or justice of the peace residing in said city or county of Lancaster; and unless the said person or persons, selling as aforesaid, shall be able to exhibit his, her or their license from the said treasurer of the said county of Lancaster, said alderman or justice of the peace to require such person or persons so arrested, to enter into bonds, with approved security, for his, her or their appearance at the next court of quarter sessions, to answer, and in default thereof, to be committed to the proper jail in said county.

ACT 9 APRIL 1864. Purd. 1381.

SECT. 1. If any person not residing within this state, and paying under the laws thereof a license now required by law, shall, within the city and county of Philadelphia, sell or exhibit for sale, by sample, specimen, card or otherwise, any goods, wares or merchandise for or on account of any merchant, manufacturer or other person not having his principal place of business within the said state, and not having a license under the laws of this commonwealth, for the sale of such goods, wares or merchandise, such person so offending shall be guilty of a misdemeanor, and on conviction, shall be sentenced to an imprisonment not exceeding thirty days, and to pay a fine not exceeding three hundred dollars, or both or either, in the discretion of the court. (a)

state, who pay a tax of \$100 or upwards on their general mercantile business, and combine therewith the sale of merchandise of non-residents by sample. 1 Phila. 449. The act of 1851 is not repealed by that of 1864, except so far as non-resident venders are concerned. 1 Brewst. 399. If the principal be licensed under our laws, his place of business may be outside the state, and no penalty is incurred; a citizen vender cannot be fined if he is a permanent resident and pays \$100; an alien vender cannot be fined if his principal place of business is within the state and he

pays \$100; nor can a resident agent for the sale of hardware be fined, if he is a citizen and permanent resident (or if his principal place of business is within the state) and he pays \$100. 1 Brewst. 399.

(a) Non-resident venders can only be prosecuted under this act. 1 Brewst. 399. An information under these acts should follow the words of the statute: the commonwealth is not bound to prove the want of a license: the record of the conviction need not give the names of the alien principals; stating them to be unknown is sufficient. 1 Brewst. 399.

Amendment.

At any time before judgment the proceedings may be amended by the justice, on application, and calling on the opposite party to show cause why the applicant should not have leave to amend. Amendments are liberally admitted, where the justice of the case requires them, and no injury is thereby inflicted on the adverse party. 2 T. & H. Pr. 719.

The writer, as a justice of the peace, has always allowed the plaintiff to amend his claim, and the defendant his set-off, when, in the progress of a suit, they have thought it proper and for their interest so to do. If, on a second hearing, the plaintiff or defendant brings an attorney to the office of the justice, and he sees cause to object to the manner or amount of the claim, as made by his client and entered on the docket, the writer has always allowed the attorney to amend the claim, and has made the docket entry to conform to the amended claim.

The act of 1806 gives to either of the parties to a suit in a court of record the right to amend, at any time on or before the trial, any informality which will affect the merits of the cause in controversy. And although the provisions of this act are applicable only to actions in courts of record, yet the proceedings of justices of the peace are clearly within its spirit; and the decisions of the courts in reference to it, should guide the justice in allowing or refusing amendments in analogous cases.

Where an amendment is asked for with a view to some unfair advantage, such as throwing on the plaintiff the burden of proving a fact not previously in issue, &c., it ought to be refused. In strictness, leave to amend ought never to be granted, unless the application be supported by affidavit that it will affect the merits, and is not desired for any other reason. 9 H. 474.

An amendment must not introduce a new cause of action. 5 B. 51. 2 S. & R. 1, 358. 6 Ibid. 293. 8 Ibid. 268. 11 Ibid. 98. 1 Wh. 11. 2 R. 337. 12 H. 326.

A mistake in the form of action is not amendable, either at common law, or under the statute. 9 C. 409.

A party may amend as often as is necessary, the statute having fixed no limits to the number of amendments. 16 S. & R. 117.

All amendments made, either by consent, or by leave of the justice, should appear on the record. 1 Dev. & Bat. 4.

The question of making amendments in the names of the parties to a suit has already been treated of, under the title "Abatement" V. And to this the reader is referred for the statutes and decisions upon the subject.

Of Appeals

From Magistrates to the Court of Common Pleas.

An essay on the right of appeal, and the manner in which that right may be waived, defeated or enforced.

EITHER party to a civil action, if dissatisfied with the judgment of an alderman or justice of the peace against him to an amount exceeding five dollars and thirty-three cents, or on the award of referees to an amount exceeding twenty dollars, has the right to have it reviewed by the court of common pleas of the proper county by APPEAL, a mode by which the facts and merits of the case, as well as the law, may be re-examined by another tribunal. (a)

The first point to be determined by the dissatisfied suitor is, whether his case entitles him to an appeal. And here it may be proper to consider from what judgments an appeal will lie. An appeal lies from a judgment on a *scire facias*. 2 S. & R. 93. And from a judgment by confession. 1 C. 409. But no appeal lies from a regular judgment of nonsuit. 1 Phila. R. 580. If, however, the justice enter a compulsory nonsuit, which he has no power to do, or dismiss the case in any other irregular manner, the plaintiff may appeal; for such disposition of the case is equivalent to a judgment that he has no cause of action. 2 Barr 89. 5 H. 75. No appeal lies by either party unless the judgment operate directly against him to a greater amount than the sum to which the right of appeal is limited. 2 Penn. Bl. 213. 3 P. L. J. 386. And accordingly, the court of common pleas of Philadelphia county have decided, that in an action before a justice to recover a penalty, not exceeding five dollars and thirty-three cents, for the breach of a municipal ordinance, no appeal lies: under the seventh section of the act of 15th April 1835, Purd. 593, a judgment for a less amount is final, as in an action on a contract. *Northern Liberties v. Powers*, MS. If the parties agree that there shall be no appeal, the court will enforce that agreement by dismissing an appeal if made. 2 S. & R. 114. 2 Br. 99. 1 Ash. 92. 8 W. 372. Such agreements, however, must be in writing. 7 S. & R. 366. The right of the parties to appeal from the judgments of justices, in actions of trespass and trover, under the act of 22d March 1814, is the same as in other cases. 4 S. & R. 72.

If the plaintiff's demand do not exceed five dollars and thirty-three cents, the judgment of the justice is final as to him, and no appeal lies; and so if the case has been submitted to referees, and the plaintiff's demand do not exceed twenty dollars, he can have no appeal. 2 S. & R. 463. 3 P. R. 174. 12 S. & R. 385. If, however, the sum sued for by the plaintiff, and set forth in the docket of the justice is reduced by the judgment more than five dollars and thirty-three cents (or on an award of referees, more than twenty dollars), an appeal lies for the plaintiff, although the judgment is for a less sum than five dollars and thirty-three cents. 12 S. & R. 388. 3 Barr 454. The amount actually passed upon by the justice regulates the plaintiff's right of appeal. 1 J. 410. 4 S. & R. 72. 12 Ibid. 385. 9 W. 17. If the justice decide in favor of a set-off claimed by the defendant, exceeding five dollars and thirty-three cents, the plaintiff can appeal, without regard to the amount of his demand.

The defendant's right of appeal depends on the amount adjudicated against him. It is the sum in controversy and not the amount of the judgment, that regulates the right of appeal, 2 W. 304; and therefore if the defendant demand or offer to set off a sum, exceeding five dollars and thirty-three cents, and the decision of the justice be against the defendant on the set-off, he is entitled to an appeal, 3 P. R. 120; 2 W. 304; but it must be a *bona fide* claim to set-off. 6 H. 78-9. By the third section of the act of March 20th 1845, Purd. 599, "the right of appeal from judgments of aldermen and justices of the peace, and from their judgments of

(a) A defendant, who is a mere stakeholder, is not bound to appeal from the judgment of a justice, but must allow a party interested to use his name for that purpose, upon security

to indemnify him against costs being given or tendered to him within the time allowed for an appeal. 6 P. L. J. 289.

swards of referees, is extended to defendants in all cases wherein, by existing laws, the right of appeal is enjoyed by plaintiffs." Under this act, if the plaintiff be entitled to an appeal in consequence of his demand being reduced more than five dollars and thirty-three cents, the defendant has the same privilege, although the judgment actually rendered be for less than five dollars. 1 J. 410. This act gives to the defendant an appeal where the plaintiff may have one, but it does not extend the plaintiff's right; and consequently, where previously the plaintiff had no right of appeal, this act does not confer such right on the defendant. Thus, where the plaintiff's claim before the justice was for twenty-five dollars, and referees awarded him eleven dollars, it was held that the defendant had no right of appeal under this act. 1 C. 840.

The right to an appeal having been ascertained, the appellant, or person dissatisfied with the judgment, must take with him, or send to the magistrate, a competent person to serve as bail, and claim his appeal. This must be done within twenty days from the day on which the judgment was entered. In computing the twenty days, the day of judgment is to be excluded. 8 S. & R. 496. 3 Phila. R. 425. 5 C. 525(a). And if the twentieth day fall on Sunday, the appeal may be entered on the next day. 3 P. R. 201. 4 Barr 515.

Where an appeal does not lie, no waiver will give jurisdiction; but where an appeal does lie, the party may, by treating it as regularly in court, waive a defect that would otherwise be fatal. 4 S. & R. 190. 5 H. 89. 1 Ash. 168. Therefore, where a defendant appealed from a judgment against him, for five dollars, the court dismissed the appeal, although more than two years had elapsed, and the plaintiff had filed a declaration and entered a rule to plead. *Northern Liberties v. Crocks*, Com. Pleas, Phila., Dec. T. 1848. MS. And see 3 Am. L. J. 861. 8 H. 469.

If the justice, by mistake, refuses an appeal, (b) it may be subsequently entered, after the twenty days. 16 S. & R. 421. 2 Ash. 224. But it is too late to enter an appeal after the money is made on an execution, although within the twenty days.

The entry of a rule to show cause why the judgment should not be opened after the expiration of the twenty days, does not give the right of appeal, on the discharge of the rule. 1 Phila. R. 425. But if such rule be entered within the twenty days, it extends the time for entering an appeal. 2 Ash. 224. 3 Barr 211. And where, after the final hearing of a case before a justice, he postpones his decision without fixing any day, the judgment entered by him afterwards can only be regarded as a judgment from the day notice thereof shall be given to the party against whom judgment is rendered, and he has twenty days after the receipt of such notice to enter his appeal. 4 P. L. J. 105.

Where bail was entered on the twentieth day after the judgment, which was accepted to after the twenty days, and new bail was given on the day after the acceptance, the appeal was held to be good. 1 Ash. 47. If the party be prevented from complying with the requisitions to obtain an appeal, by the conduct or default of the magistrate, the court will permit the appeal to be made after the expiration of the twenty days, and the transcript to be filed after the first day of the term. 1 Ash. 380. If the magistrate erroneously reject an appeal offered within the twenty days, he may, after their expiration, correct his mistake, and the appeal will be good. 16 S. & R. 421. But if one of the parties makes the magistrate his agent, and intrusts it to him to enter the appeal for him, he is barred by the magistrate's neglect, and loses his appeal. (c) 2 W. 72.

(a) See contra 4 H. 14. 2 Phila. 340.

(b) A magistrate refusing to permit bail to be entered for an appeal from a judgment rendered by him, denies the appeal itself. 1 C. 210. But he is not liable to an action for damages for refusing an appeal; the remedy is by application to the court to allow an appeal. 2 Lex. Leg. Obs. 321.

(c) A magistrate, in no possible case, should act as the agent of either party. How can he receive such an appointment, such a mark of confidence, without his mind being influenced in favor of the person who bestows it? It is said to be no uncommon thing for justices to undertake the collection of debts for

others, and to bring suits and enter judgments, on their own dockets, in favor of the persons by whom they have been appointed agents. The report is mentioned in order to accompany it with the information that the Supreme Court has determined that such conduct in an alderman or justice of the peace is a misdemeanor in office. 14 S. & R. 158. In *Wistar v. Conroy*, at June Term 1869, the court of common pleas of Philadelphia, reversed the decision of an alderman, in a landlord and tenant case, on the ground that the magistrate had signed the notice to quit as the plaintiff's agent.

The first section of the act of 20th March 1845, Purd. 599, regulates the bail which shall be taken: it provides that it "shall be bail absolute in double the probable amount of costs accrued and likely to accrue, with one or more sufficient sureties, conditioned for the payment of all costs accrued or that may be legally recovered against the appellants." The act of 15th March 1847, Purd. 600, directs that "when any corporation (municipal corporations excepted,) being sued, shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of debt, interest and costs, on the affirmation of the judgment." The act of 21st March 1849, Purd. 199, provides "that in all suits or actions hereafter to be brought in any court of record of this commonwealth, against any *foreign* corporation or body corporate not holding its charter under the laws of this commonwealth, every judgment, verdict and award rendered against such corporations, shall be final and conclusive, unless the said defendants, in addition to the usual proceedings in cases of appeal, shall give good and sufficient bail, in the nature of bail absolute, for the payment of such sum or sums as shall finally be adjudged to be due to the plaintiff or plaintiffs, together with interest and costs thereon." And by act of 15th April 1851, Purd. 81, this provision is extended to stage companies, and to all joint stock companies not incorporated, when the members of said companies do not reside within the commonwealth.

The act of 20th March 1845, does not include municipal corporations. 1 Phila. R. 402. They are entitled to an appeal without the entry of bail. 6 W. & S. 16. So also, executors and administrators, by the fourth section of the act of 1810, Purd. 599, and guardians, by the act of 27th March 1838, Purd. 599, may appeal without security. But since the passage of the act of 12th July 1842, which supplies the acts which exempted females from imprisonment for debt, it is necessary that a female should give the bail required by the act of 1845 to obtain an appeal. 3 P. L. J. 190.

When a party desires to appeal, the magistrate prepares the recognisance briefly on his docket, under the entries of the previous proceedings in the case. It is sufficient to state that A. B. is held to the plaintiff in a certain sum, "conditioned that the appellant shall appear at the next court of common pleas and prosecute his appeal with effect, &c.," which recognisance the court will consider as if it had been drawn at length, under the act of March 20th 1845. 7 H. 858. 5 W. 333. Or, it may state that A. B. is held to the appellee in a *certain* sum, double the probable amount of costs accrued and likely to accrue, "conditioned that the appellant shall pay all costs accrued, or that may be legally recovered against him." If the recognisance be not drawn by the justice, and returned to the court *substantially* like the forms above given, the appeal may be dismissed.

A penalty and a condition are indispensable to constitute a recognisance; 11 C. 276; hence, where one was taken thus—"A. B. enters special bail, &c., for stay of execution, &c., according to law," it was adjudged to be void: the sum could not be supplied by reference to the debt and costs at the date of the recognisance, because it ought to have been large enough to cover future costs; nor for that purpose could the court assume that it had been taken in double the amount. 1 J. 293. And the bail is not liable beyond the amount of the penalty. 1 P. R. 9. 1 Phila. R. 527. But a recognisance on appeal, where the recognisor was "bound as absolute bail in the sum of twenty dollars, or such sum as may be necessary to pay all costs that have or may accrue in this case, in prosecuting this appeal," was held sufficient. 2 H. 158.(a) After the defendant has had the benefit of his appeal, an objection that the recognisance contained no penalty, will not be allowed to prevail. 10 H. 33. Whenever a defect exists in the form of the recognisance, the practice is, to apply to the court for a rule upon the appellant to perfect his appeal within a given time, or show cause why it should not be dismissed. It would be error to

(a) In an action against a constable for a false return, a recognisance in the following words, "defendant gives bail which is entered on the docket, for the sum of \$100, J. W. B., bail," cannot be supported as a recognisance of bail for an appeal. 11 C. 276. But if the docket entries, though slovenly made up,

fairly show that an appeal was entered, the recognisance will be binding. 2 Wr. 500. 1 P. F. Sm. 85. A recognisance, though informal, is sufficient, if it undertake that the appellant shall prosecute his appeal with such effect, as that no costs shall be recoverable by the appellee. 1 P. F. Sm. 85.

quash the appeal in the first instance. 2 P. R. 481. 5 W. & S. 363. 27 Leg. Int. 70. An objection to the form of the recognisance will be waived by any step taken to prepare the case for trial. 1 J. 836.

When bail is offered, it is the magistrate's duty to inquire into its sufficiency, either on oath or affirmation, or by other means. If satisfied of the insufficiency of the bail, notwithstanding his oath, he ought to be rejected. If the appellee, or successful party, be dissatisfied with the bail he may except or object to him, and insist on an inquiry into his circumstances, and may bring evidence to rebut his allegations, and to prove (as is often the case) that he is not sufficient bail. New bail may, however, be put in after such successful opposition; and in a case where the bail was entered on the twentieth day after the judgment, which was excepted to after the twenty days, and new bail was given on the day after the exception, the appeal was sustained. 1 Ash. 47. Until the transcript is actually filed in the office of the prothonotary, the magistrate retains the right to investigate and decide on the sufficiency of the bail. 6 Barr 194. And a defendant cannot defeat the justice's jurisdiction by filing the transcript, after notice given to him that his bail is excepted to. 1 Ash. 80. Where, however, the common pleas is in possession of a case in the shape of an appeal, although defectively entered, the functions of the justice terminate. Ibid. 168.

It is not necessary that the appellant should join with his surety in the recognisance. 6 Binn. 52. But the security must be given in a sufficient amount, as required by the act of assembly, 1 S. & R. 491; and it must appear from the record that the security was given according to law. 3 S. & R. 98. An appeal by one of two defendants is good as to the one who appeals, although the other comes into court and dissents. 1 S. & R. 192.

If execution has been issued before the entry of bail, the perfecting of an appeal will entitle the appellant to a *supersedeas*; 1 Ash. 408; which it will be the duty of the justice to issue, on being satisfied that the appeal has been filed in court. At the entry of bail for an appeal, though it may stay the immediate execution of the process, will not avoid all that has been done under it; in order fully to supersede the execution it is necessary to perfect the appeal by bringing it into court. *Ex v. Farrell*, Purd. 596, n. 5 C. 240. It is the province of the justice to determine whether the appeal be regularly taken; and if he allow it, and grant a *supersedeas*, the constable cannot refuse to recognise it on the pretence that the justice committed an error; if he persist in proceeding in the execution he is as much a trespasser as if he had no process in his hands; and a purchaser under such superseded execution will take no title to the goods sold. 3 C. 199.

In Philadelphia, where the defendant is the appellant, it is required by the act of 27th March 1865, that he, or some person acting in his behalf, having knowledge of the facts of the case, should, in addition to the entry of bail, make oath or affirmation, to be filed with the alderman, that his appeal is not intended merely for the purpose of delay, but that if the proceedings appealed from are not removed, or the defendant, will be required to pay more money, or receive less than is lawfully due; which affidavit must be attached to the transcript, by the alderman, to be filed in the court to which the appeal is taken. Purd. 1398. (a)

Attention is requisite in ascertaining to what term the appeal must be filed or entered. Appeals have been quashed in consequence of ignorance or inadvertence on the part of the appellant; and common prudence requires either the employment of counsel at this point of the case, or the procuring of information from the magistrate on this point. It may be thus explained: there are, for example, four terms in the year, to some of which the appeal must be entered. The first Monday of the months of March, May, August, and December, and the third Monday of September are, in Philadelphia, the return days of those terms. In calculating the twenty days allowed for an appeal, the return day must be taken lest one of those return days should intervene. If the bail have been entered previously to such return day, the transcript must be filed on or before the return day, or the appeal will be lost. For, though the law gives twenty days for entering the bail for an appeal, and the appellant may take it on the twentieth

(a) The affidavit must be made at the time of entering the appeal. 27 Leg. Int. 205. For conditions of appeal in Lancaster, Dauphin, Berks, York, and Luzerne counties, see ante, p. 102. And see act 4 April 1870, as to Juniata county, P. L. 928; and act 5th April 1870, as to Venango county. P. L. 931.

day, notwithstanding the beginning of a term hath intervened since the judgment; yet, if the appeal be actually completed on the magistrate's docket, and ready for return, the appellant is bound by law to file it on or before the first or return day of the next term after the entry of bail, though the twenty days may not have then expired. 3 P. R. 416. If, therefore, the appellant finds that a return day intervenes within the twenty days, his safest course is to delay the entry of bail, and defer the filing of the transcript in the prothonotary's office until the then next ensuing term, a period of three months. But a defective appeal may be withdrawn, and other bail entered within the twenty days, though a return day has intervened. 2 J. 363.(a) By the act of 1st May 1861, it has been provided, that appeals by defendants, in Philadelphia, shall be filed on or before the next monthly return day ensuing the entry of the alderman's judgment. Purd. 601.(b)

The act of 1810 provides that the whole proceeding in case of appeal, shall be certified to the prothonotary of the proper county, who shall enter the same in his docket; and the suit shall from thence take grade with, and be subject to the same rules as other actions where the parties are considered to be in court." Purd. 600. After the appeal is filed the proceedings in court are *de novo*, or new, only as to the declaration, pleadings and evidence, all of which are matters not within the scope of this work. The cause of action must, however, continue the same as before the magistrate. 1 B. 219. 3 B. 45. And nothing can be recovered before the court which could not have been recovered before the justice, except the intermediate interest. 10 S. & R. 227. The form of action may be changed on an appeal, provided the cause of action remain the same. 2 W. 14. 1 R. 870. Where a plaintiff appeals from the decision of a justice, he cannot discontinue the appeal, so as to authorize him to proceed on the original judgment before the magistrate; such discontinuance is a disclaimer of his right to sue, and an absolute bar to further proceedings in the cause. 3 W. 46. 10 Barr 70.

As to the costs on an appeal, they abide the event of the suit, and are paid by the unsuccessful party, "as in other cases," subject to these exceptions. If the plaintiff appeals, he pays all the costs on the appeal, if he recovers no greater sum, or no more favorable judgment in court than had been rendered by the magistrate. 7 W. & S. 313. If a defendant recover judgment before the justice for a sum certain, and the plaintiff appeal, and the award of arbitrators in court be "no cause of action," neither party is entitled to recover costs. 2 W. & S. 36. And so also, if in such case there be an award in court in favor of the plaintiff, from which the defendant appeals, and afterwards obtains a general verdict, judgment must be entered for the defendant, with the costs of suit only which accrued before the appeal from the justice. 6 Barr 463. In each of these cases the plaintiff obtains a more favorable judgment by relieving himself from the payment of the sum adjudged against him by the justice, and is therefore not liable to pay the costs of the appeal; but being unsuccessful in the result of the suit, he is not entitled to recover them.

With regard to a defendant, if, either on the trial before the magistrate, or before referees, or before appeal taken, he offers to the plaintiff a judgment for the amount admitted to be due, which offer "it shall be the duty of the justice or of the referees to enter on the record," and the plaintiff rejects the offer; then the plaintiff shall pay all the costs which accrue on the defendant's appeal, if the plaintiff shall not recover eventually "a greater amount than that for which the defendant offered to give a judgment." In both cases the defendant's bill shall be taxed and paid by the plaintiff in the same manner as if a judgment had been rendered in court for the defendant. Purd. 600. This proviso has no application where the appeal is taken by the plaintiff. 10 H. 298.

To exempt a defendant from the payment of costs, and to entitle him to recover them from the plaintiff, where the plaintiff is the successful party, it is necessary that the defendant should have offered, either at the trial of the cause before the justice,

(a) And see 1 Leg. Gaz. 85. In New York, it has been held, that where the time prescribed by statute for the allowance of an appeal, has elapsed, the court has no power to order it to be allowed as of the preceding term. 22 N. Y. 319. And Judge Conyngham has decided that where the time within which an appeal is

required to be entered, is fixed by statute, the court has no power to lengthen the period. 2 Lux. Leg. Obs. 194.

(b) See act 9 April 1862, as to the filing of appeals in Delaware county. P. L. 347. And act 5 April 1870, as to Venango county. P. L. 931. Digitized by Google

or before the appeal was taken, to give the plaintiff a judgment for a sum equal to, or greater than that which the plaintiff, in the event of his suit, recovered; and it is the duty of the justice to enter such offer on the record. 1 Barr 38. If the justice neglect to enter such offer upon his docket, he may be answerable to the defendant for any loss or injury he may sustain by reason thereof. Ibid. 3 H. 43. His certificate that such offer was made is not sufficient; it must be made a part of the record. 2 J. 255. The offer to confess judgment, in order to have the effect of exempting the defendant from the costs of an appeal, must be made before the appeal is taken; an offer made afterwards, although before the justice has made out his transcript, is too late. 1 Barr 188. It may be made at any time before the appeal is taken, although the plaintiff is not present; but he should have notice to accept or refuse the amount tendered. 6 W. 494. And it may be made by the defendant's agent, in his absence. 12 Wr. 127.

A tender before the justice of a sum of money equal to the amount recovered, is not equivalent to the tender of a judgment, and consequently will not exempt the defendant from the payment of the costs on the appeal. 4 W. 389. Neither will a tender of a sum equal to that ultimately recovered, together with the costs which have accrued before the justice, avail the defendant; nothing but an offer to give a judgment for the amount will be sufficient. 4 Wh. 78. But to entitle the plaintiff to recover costs, where a judgment has been tendered, he must recover a greater sum than that tendered, with the interest added. 3 Wr. 111.

In the counties of Centre, Blair, Lehigh, Clinton, Schuylkill, Allegheny, Indiana, Northampton, Luzerne, Lebanon, Berks, Perry, Mifflin, York, Cumberland, Cambria and Lancaster, the appellant is required, by statute, to pay all the costs that have accrued before the justice, at the time of getting his transcript of appeal; unless he make affidavit, to be filed with the justice, of his inability to do so. This however does not debar him of his right to recover them back from the appellee, if otherwise entitled to do so. (a)

(a) See ante 102. And see act 22 March L. 269; act 14 April 1870 as to Juniata county, P. L. 478; act 14 April 1870 as to Westmoreland county, P. L. 928; and act 6 April 1870 as to February 1870 as to Luzerne county, P. L. 987.

Apprentices.

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|-------------------------------------------------|-----------------------------------------------------------------------------------------------|
| I. Of the contract of apprenticeship. | XI. Form of a warrant against a master. |
| II. Of the indenture. | XII. Warrant for an apprentice. |
| III. Of the authority and duties of the master. | XIII. Recognisance to be taken of the master to answer to a complaint made by his apprentice. |
| IV. Of the remedies for misconduct. | XIV. Recognisance of an apprentice to give evidence. |
| V. Of absconding apprentices. | XV. Docket entry in case of master and apprentice. |
| VI. Of the assignment of an indenture. | XVI. Assignment of an apprentice to be written on the back of the indenture. |
| VII. Of the binding of poor children. | |
| VIII. Of apprentices generally. | |
| IX. Complaint of an apprentice. | |
| X. Notice to the master. | |

I. OF THE CONTRACT OF APPRENTICESHIP.

APPRENTICES are a species of servants, and are usually bound for a term of years by deed indented, or indentures, to serve their masters, and be maintained and instructed by them. 1 Bl. Com. 426.

Apprenticeship is a contract entered into between a person who understands some art, trade or business, called the *master*, and another person, during his or her minority, who is called the *apprentice*, with the consent of his or her parent or next friend, by which the former undertakes to teach such minor his art, trade or business, and to fulfil such other covenants as may be agreed upon; and the latter agrees to serve the master during a definite period of time, in such art, trade or business. The time during which the apprentice is to serve is also called his *apprenticeship*. 1 Bouv. Inst. 158-9.

But the apprentice is not only a species of servant; he is also a species of relation. The law of England, as well as that of Pennsylvania, considers the master as standing in the place of the parent, who, for a certain length of time, has devolved many of his duties upon the master, from whom the law, if called upon, will exact their discharge. It will also exact from the apprentice, in all places, and at all times, during his apprenticeship, that obedience and respect, to his master, which it exacts from a son to a father.

The obligations which exist between master and apprentice are various and of great importance, not only to the parties, but to the public. "Apprenticeships," says Blackstone, "are useful to the commonwealth by the employing of youth, and learning them to be early industrious." As well, he might have added, as by the instruction given to him while he is an apprentice, so that he shall, when free—that is, when the period for which he shall have been bound apprentice shall have expired—be found not only in habits of industry, but thoroughly instructed, and skilful in executing the various branches of the trade or mystery to learn which he had been bound apprentice. "Indentures of apprenticeship," says Judge REED, "are *personal* contracts, authorized by law, in which the conditions and terms are expressed. Any violation of these terms renders the aggressor liable, either to a suit at law or to a summary process provided in our acts of assembly." 1 Penn. Bl. 207.

II. OF THE INDENTURE.

The act of 27th March 1713 provides that "the justices of the orphans' courts in the respective counties, shall have full power and authority, at the instance and request of executors, administrators or guardians, to order and direct the binding or putting out of minors, apprentices to trades, husbandry or other employments, as shall be thought fit; (a) provided that the said courts shall not have power to bind such minors, apprentices to any person or persons, whose religious persuasion shall be different from what the parents of such minor professed, at the time of their decease, or against the minor's own mind or inclination, so far as he or she has discretion or capacity to express or signify the same; or to persons that are not of good repute, so as others of good credit, and of the same persuasion, may or can be found." Purd. 47.

(a) This power is expressly reserved to the orphans' courts by the act of 29th September 1770, § 5. 1 Sm. 311.

The act of 29th September 1770 provides that "all and every person or persons that shall be bound by indenture to serve as an apprentice in any art, mystery, occupation or labor, with the assent of his, or her parent, guardian or next friend, or with the assent of the overseers of the poor, and approbation of any two justices, although such persons, or any of them, were or shall be within the age of twenty-one years, at the time of making their several indentures, shall be bound to serve the time in their respective indentures contained, so as such time or term of years of such apprentice, *if a female*, do expire at or before the age of *eighteen* years, and, *if a male*, at or before the age of *twenty-one* years, as fully to all intents and purposes, as if the same apprentices were of full age at the time of making the said indentures, (a) any law, usage or custom to the contrary notwithstanding." Purd. 47.

A writing without *seal* is not an indenture of apprenticeship, within the meaning of the act of assembly, even though signed by the parties. 10 S. & R. 416. The indenture must be executed by the minor, as well as by the master and parent or next friend, and if executed by the minor alone, it is not binding. 4 W. 80. 1 Ash. 123. An indenture by the master and parent but not by the infant, will render the master liable to the apprentice, on the covenants therein, if he have complied with the terms of service on his part. 5 Barr 269. A minor in the service of another, under a parol contract of apprenticeship, has a right to leave such service during his minority, and thereby terminate the relation. 18 Conn. 337. An indenture of apprenticeship made in another state is not obligatory in Pennsylvania. 6 S. & R. 526. Parol evidence of an indenture not produced is not in general admissible. Burr. S. C. 735. Unless under particular circumstances. Ibid. 151.

An indenture to *serve* merely, but without learning any art, trade, occupation or labor, is not valid, either at common law or under the statute. 2 D. 197. 1 Y. 233. The intention of the law is to place the apprentice in a position in which he may make a livelihood; and that while he works to increase the wealth of his master, he shall gather that stock of knowledge which may be useful to him in after life. A minor must therefore be bound to some useful employment, at which he may in after life make his living. 1 Bouv. Inst. 160-1. The terms *servant* and *apprentice* are not synonymous. 3 R. 307. And the courts have always frowned upon every attempt to bind them out as servants. 1 Ash. 268. 3 Am. L. J. 18. But a binding as a waiter is good. 1 S. & R. 262. And a girl may be bound to learn the art, trade and mystery of a housewife. 1 Br. 197. So, a father may bind out his son to serve three years as a sweep. Ibid. 275. A written agreement "to remain with A. B. two years, for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument, by A. B., to teach. 3 C. & P. 289. An infant under seven years may be bound apprentice under the statute. 5 Wh. 128.

A mother, although married to a second husband, is a parent within the meaning of the act, and may as such, independently of her husband, give assent to an indenture. 6 S. & R. 340. 1 R. 195. An indenture of apprenticeship is not necessarily invalid, because the father of the child is in full life, and the binding made without his consent; a mother may bind the children of an habitual drunkard, found so by inquest. 1 Ash. 71. But the assent of the mother is not sufficient, where the father is living with her at the time of the binding. 8 W. & S. 389. If, however, the father, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his children, the mother of such children is authorized by the act of 4th May 1855 to bind them apprentices, without the interference of her husband, and to exercise all the rights, and to be entitled to claim, and be subject to all the duties reciprocally due between a father and his children; but if the mother be of unsuitable character to be so intrusted, the proper court may appoint a guardian to perform such duties. Purd. 701.

Where the parent of a child lives at a distance, and has long relinquished its protection, a binding by the next friend is good. 1 S. & R. 366. It is not necessary that the person who acts as *next friend* to the minor, should receive an appoint-

(a) By the common law, after arriving at full age, a man may bind himself apprentice, as he may enter into any other legal covenant, and be bound for its fulfilment. But a person of full age, binding himself to learn

a trade, is not subject to the provisions of the act of assembly giving summary jurisdiction in disputes between master and apprentice. 1 Br. 374. 2 Br. 205. 1 Bouv. Inst. 162.

ment as such from legal authority. 1 Ash. 27. A sister may act as next friend though a *feme covert*, and the binding be to her own husband. 1 R. 191. And may a half-sister. 1 Ash. 27. But a minor sister is incompetent. Bright. R. 189. The person who acts as next friend need not be a relative, but must be some one who knows and acts for the best interest of the minor, and this may be shown by the terms of the indenture; therefore, an indenture executed by one, as next friend, who had but a casual acquaintance with the minor, did not consult him as to the binding, or make the contract, but executed it at the request of the master, and which contained no provision for schooling, was held invalid. *Com. v. Schwartz*, Com. Pleas, Phila. 19 August 1848. The master to whom the child was formerly bound, is not a proper next friend within the meaning of the act. 1 S. & R. 360. Where a stranger, having no authority over the minor, undertakes to bind him as an apprentice, the contract is not valid at common law, as to either of the parties. 5 Pick. 250.

The general practice is, for the next friend of a minor to express his assent, by sealing the indenture; but it has never been supposed that he thereby renders himself liable on the covenants of the indenture. 1 R. 191. 2 R. 269. 7 Barr 211 H. 90.

And A binding to a *feme covert* is void, although the husband may have given his assent to it; for, not being a party to the indenture, he is not responsible on the covenants. *Com. ex rel. Kelley v. Medwinter*, Com. Pleas, Phila., per RANDALL, 2 Chitty's R. 284. 1 Bouv. Inst. 159. An indenture executed by one of two partners on behalf of the firm, is invalid. 1 Br. 73, app'x. And so is an indenture which does not contain a covenant to give the apprentice a reasonable education. Bright. R. 189. Unless it should appear that the education of the apprentice had been sufficiently attended to before. 1 R. 191.

An indenture of apprenticeship binding a boy for a term of years, during which the master, in lieu of the common covenants for boarding, &c., agreed to pay him a certain sum per week, during at least nine months in each year, was held valid. Barr 402. And where by the terms of an indenture, the master covenanted to pay to the father of the apprentice, a certain weekly sum "towards the support of said apprentice," it was held, that the master was bound to make the weekly payments to the father, during the sickness of the apprentice, and whilst he was unable to work for the master. *Corfield v. Fitler*, Com. Pleas, Phila. 10 December 1845. The master stands *in loco parentis*, and is bound by his contract to support the apprentice in sickness. Phila. Q. S. 18 October 1848. PARSONS, J. Str. 99. 1 Bott 574. Chitty on Apprentices 73, 104. 1 Bouv. Inst. 164. 1 Parsons on Contracts 534. An agreement by an apprentice, indorsed on the indenture that the wages shall be paid to the mother, cannot be enforced, where there is no correlative obligation on her part for his maintenance. 7 Barr 21.

An indenture binding the apprentice to learn the trade, art and mystery of steam moulding, wherein the masters covenanted, "at such times as their foundries should be in blast," to give the apprentice employment, and to pay him \$3.50 per week for the time he shall be so at work, for the first three months; for the first eleven months thereafter, one-half of journeyman's prices by the piece; for the next fourteen months, five-eighths of journeyman's prices by the piece; and for the balance of his term, at the rate of three-fourths of journeyman's prices by the piece; with a proviso, that the master should not be responsible for any acts done or committed by the apprentice, during such times as he was not at work, and were they to be under any expense for medicines or medical attendance, it being fully understood that the said apprentice was under the guardianship of his mother and containing no provision for schooling, was held to be void as an indenture of apprenticeship. *Com. v. Bowen*, Phila. Q. S. Oct. 1863.

The act 17th March 1865, however, provides that in the city of Philadelphia and the county of Allegheny, no indenture of apprenticeship shall hereafter be cancelled, or deemed void, by reason of the want of any covenant on the part of the master, to assume the guardianship of, or to school or educate the apprentice. *Provided*, It shall appear on the face of the indenture of apprenticeship, that the apprentice had arrived at the age of seventeen years, at or before the execution

roof; or in case said apprentice should not have reached said age, that satisfactory proof was given to the magistrate, at the time of binding, that the apprentice has received such an education, in reading, writing and arithmetic, as to render further schooling unnecessary; nor shall any such indenture be deemed void, by reason of covenant, on the part of the master, to pay a certain sum, from time to time, to the father, mother, guardian or next friend, of said apprentice, or to said apprentice alone, in case of the decease of the father or mother, in lieu of the maintenance, clothing and medical expenses of said minor, or that the care, guardianship or maintenance of said minor, was committed to the father, mother, guardian or next friend, some near relation of said minor, when not employed by his or her master, in and about his work. Purd. 1833.

III. OF THE AUTHORITY AND DUTIES OF THE MASTER.

To enable the master to compel the apprentice, if necessary, to do his work in a proper manner, and in sufficient quantity, and to perform his other duties, he is, by the law of assembly, by common law, and by the general custom of trade, armed with considerable authority. The apprentice and his interests are also specially guarded, and in the same way provided for.

By the indenture the master is vested with the authority, and during the apprenticeship assumes the responsibility and takes the place of the parent. This view of the relationship between a master and his apprentice is of more importance than ours are in the habit of considering it, and would, if properly regarded, give rise to the cultivation of the kindest feelings, and the promotion of the best interests of the parties.

The master should never forget, that besides being bound to teach the apprentice trade, he has taken upon himself, for a time, the obligations of a father, and the apprentice should always regard him in that character. Such recollections and feelings would be of incalculable value to them both. Magistrates are frequently called upon to give advice to both masters and apprentices. It is a good rule *always* to require to see the indenture between the parties before any advice shall be given, either to the one or to the other.

A master may, by law, correct and chastise his apprentice for neglect, or other bad behavior, so that it be done with moderation. Finch 57. 1 Bl. Com. 1 Bouv. 165. But he cannot depute another to give such correction. 2 Bache 134. Green's Blackstone 361. If death ensue in consequence of such reasonable correction, without fault on the part of the master, it will be no more than accidental. But if the correction exceeded the bounds of due moderation, either in the nature of it, or in the instrument made use of for that purpose, it will be either murder in the second degree or manslaughter, according to the circumstances of the case. Forster 262. 1 Russ. 670. Thus, where a master struck a child, who was his apprentice, with a great staff, it was ruled to be murder. 1 Hale P. C. 474. And where a master had employed his apprentice to do some work in his absence, and on his return found it had been neglected, and thereupon threatened to send the apprentice to the House of Correction, to which the apprentice replied, "I may as well work there, as for such a master;" upon which the master struck the apprentice on the head with a bar of iron, which he had in his hand, and the apprentice died of the blow; it was held murder: for if a father, master or school-master, correct his child, servant or scholar, it must be with such things as are fit for correction, and not with such instruments as may probably kill them; and a bar of iron is not an instrument of correction. 1 Russ. 671. The master is not liable for an accidental punishment, arising from an error of judgment; but if he inflicts punishment for the purpose of gratifying a cruel and revengeful disposition, and not for the correction and reformation of the apprentice, it is an abuse of his power, and in such case, if he be indicted for an assault and battery, his authority, as master, will afford no protection. Lewis' C. L. 103. It is the duty of the master, at all times, to see to the deportment of the apprentice and to restrain him from vicious courses; and if that were otherwise, the authority of the parent or guardian would supervene. Barr 402.

A master has no right to require menial services from his apprentice; and if he

forcibly compel the apprentice to render such menial services, it will be a sufficient ground for annulling the indenture: he is not, however, liable to indictment for every mistaken exercise of his authority. 3 Am. L. J. 17. Neither parent, guardian nor master, have the right to exercise any arbitrary control over an infant, as to his religious principles. But if a master, while his apprentice is of tender age, send him to the church himself and family attend, he "discharges his duty towards his apprentice," within the meaning of the act of assembly. 4 P. L. J. 396. The master cannot take the apprentice out of the state where the indenture was executed unless the indenture gives such power, or it follows from the nature of the mystery which the apprentice is to learn. 6 B. 202. 1 Bouv. Inst. 165.

Where an apprentice is bound to a master to learn a trade, the master is bound to teach him the whole of that trade in *all its branches*; and the keeping of an apprentice to a subordinate branch, however such division of labor might expedite and perfect the whole work when completed, is a violation of the master's covenant and a sufficient cause for cancelling the indenture. *Com. v. Aitken*, Com. Pleas, Phila., 22 December 1845, JONES, J. Thus, if the master ceases to carry on a part of the trade which he covenanted to teach the apprentice, he by his own act makes it impossible for the minor to serve him after the manner of an apprentice; and he cannot be heard to complain that the apprentice has not done that which he has wilfully made it impossible that he should do. 4 Eng. L. & Eq. R. 412, 418. The master, however, is not bound to disclose to the apprentice secrets which are peculiar to himself, and which are his exclusive property, unless by his covenant in the indenture he has agreed to do so, or such agreement may be presumed from the circumstances. 1 Bouv. Inst. 163.

IV. OF THE REMEDIES FOR MISCONDUCT.

If any master or mistress shall misuse, abuse or evilly treat, or shall not discharge his or her duty towards his or her apprentice, according to the covenants in the indentures between them made; or if the said apprentice shall abscond or abscond him or herself from his or her master's or mistress's service without leave, or shall not do and discharge his or her duty to his or her master or mistress, according to his or her covenants aforesaid, the said master, or mistress, or apprentice, being aggrieved in the premises, shall or may apply to any one justice of the peace of any county or city where the said master or mistress shall reside, who, after giving notice to such master, or mistress, or apprentice, if he or she shall refuse or neglect to appear, shall thereupon issue his warrant, for bringing him or her, the said master, mistress or apprentice, before him, and take such order and direction between the said master or mistress, and apprentice, as the equity and justice of the case shall require; and if the said justice shall not be able to settle and accommodate the difference and dispute between the said master or mistress, and apprentice, through a want of conformity in the master or mistress, then the said justice shall take a recognisance of the said master or mistress, and bind him or her over to appear and answer the complaint of his or her said apprentice at the next county court of quarter session to be held for the said county or city [and mayor's courts for the cities of Lancaster and Pittsburgh], and take such order with respect to such apprentice as to him shall seem just; and if, through want of conformity in the said apprentice, he shall, if the master, or mistress, or apprentice, request it, take a recognisance of him or her with one sufficient surety, for his or her appearance at the said sessions, and to answer the complaint of his or her said master or mistress, or commit such apprentice, for want of such surety, to the common jail or workhouse of the said county or city respectively; and upon such appearance of the parties, and hearing of their respective proofs and allegations, the said court shall, and they are hereby authorized and empowered, if they see cause, to discharge the said apprentice of and from his or her apprenticeship, and of and from all and every the articles, covenants and agreements in his or her said indenture contained, the said indenture of his or her said apprenticeship, or any law or custom to the contrary notwithstanding; but if default shall be found in the said apprentice, then the said court is hereby authorized and empowered to cause, if they see sufficient occasion, such punishment by imprisonment of the body and confinement at hard labor, to be inflicted on him or her, as to

them, in their discretion, they shall think his or her offence or offences shall deserve. Act 29 September 1770, § 3. Purd. 48.

It is evident from the wording of this section, that on complaint being made, "due notice" must be given by the magistrate, to the party against whom the complaint shall have been made. In the notice to be sent by the justice, the complaint made should be stated, that the parties may come prepared; and a time and place should be appointed *when* and *where* the parties shall appear. As such inquiries usually make known some of the domestic concerns of the master's family as well as develop the feelings of those interested, and as the magistrate has the appointment of the *time*, it is recommended that it should always be that time when the least possible number of uninterested persons may be expected to be present. The office of the justice is doubtless the proper *place* of inquiry. If the party notified shall neglect or refuse to appear, at the time and place stated in the notice, and the service of the notice shall be proved to the satisfaction of the magistrate, then, but not till then, he shall "issue his warrant."

Where it is shown that the apprentice has been severely beaten, or ill-treated, and the magistrate binds the master to appear "at the next county court of quarter sessions, to be held for the said county or city," in which he shall reside; application is usually made to the justice, that in the mean time—between the binding over and the meeting of the court—the apprentice shall be delivered over to, and remain with, and in the care of his parents, &c.—not to be returned to his master until the court shall have heard the case and taken order on it. For many, and obvious reasons, such applications should be discountenanced and refused, unless the beating shall have been inflicted with an unlawful and dangerous weapon, or where from habits of intemperance, or the violence and indulgence of his passion, the master cannot, with safety, be intrusted with the apprentice.

As a general principle, it is improper to bind an infant in a recognisance, but in this case the act makes it imperative on the magistrate to include the apprentice in the recognisance with the surety for his appearance. The justice will observe another peculiarity in the provisions of this section of the act of assembly in reference to the recognisance to be taken under it. "The master or mistress" is not required to give any security for his or her appearance at court, except his or her own recognisance.

All other means should be tried before the apprentice shall be committed to prison; and when the necessity of the case closes every other door, care should be taken to write on the commitment a request that he shall be kept by himself, and not put in company with any other prisoner. Imprisonment, however, is by all possible means to be avoided. It is, and it should be, regarded as the last resort. It stigmatizes the boy; it sinks him in the opinion of others; and, what is still worse, it sinks him in his own estimation.

The only punishment which the court is authorized to inflict, imprisonment of the body, bears, in many cases, as heavily upon the master as upon the apprentice. The innocent is punished nearly as much as the guilty. It is when the indenture is about to expire, that complaints multiply and assume a more serious character. The apprentice has acquired, or thinks he has acquired, a complete knowledge of his trade; his desire to become free becomes more and more ardent, as he calculates, from week to week, how much money he earns, or presumes he earns, for his master; all of which, he thinks, would be his own if the indenture were at an end. These thoughts, unjust and ungenerous as they are, are frequently fostered by others, and beget a restlessness and dissatisfaction, which give birth to complaints and inquiries before the courts. The result of such inquiries, however they may affect the interests of the master, fall but lightly on the apprentice. If default shall be found in him, the *only* punishment by law to be inflicted is "imprisonment," by which the master loses all the money which the apprentice would have earned, during the term of the imprisonment; and the law provides no remuneration whatever.

The court will discharge an apprentice for acts of the master injurious to his mind and morals. 1 Br. 24. In many indentures, provision is made that the master shall pay to the apprentice, his "parent, guardian or next friend," a certain

sum of money periodically, for clothing, &c. And it has been repeatedly ruled that the refusal or neglect of the master to make the payments required at the times stipulated, is such a breach of the covenants of the indenture as warrants the discharge of the apprentice.

After the acquiescence of the parents for several years in the binding of a child, there must appear to be a *palpable violation of the law*, to induce the court to annul the indentures. 4 P. L. J. 396. The court will not cancel an indenture, upon the application of the master, on the ground that the apprentice's health is so bad, that he is unable to work, and consequently, an expensive burden upon the master. The master stands *in loco parentis*, and is bound by his contract to support the apprentice in sickness. Otherwise, if the apprentice join in the application. Phila. Q. S., 13 October 1848, PARSONS, J. 1 Str. 99. 1 Bott 574. Chitty on Apprentices 73, 104. 1 Bouv. Inst. 164. 1 Parsons on Contracts 534. But if the boy plainly appear to be an idiot, incapable of learning his trade, the court will discharge the indenture. Skin. 114. Chitty on Apprentices 105. And the court will discharge the apprentice, if the indentures have been procured by fraud or collusion. 1 R. 191.

An appeal does not lie from an order of the court, discharging an apprentice, pursuant to statute. 11 Mass. 24. 1 Bailey 209.

V. OF ABSCONDING APPRENTICES.

If any apprentice of any of the arts, trades, mysteries, occupations or labor aforesaid, shall depart and abscond from his or her master's or mistress's service into any other county of this province, or into the city of Philadelphia, it shall and may be lawful to and for any justice of the peace of such county or city, to issue his warrant to any constable within his county or city, to apprehend, take and have the body of such apprentice before him, or some other justice of his county; and upon such appearance, and hearing of the complaint and defence of the parties, if default be found in the said apprentice, then, and in such case, the said justice of the peace before whom such warrant shall be returned, shall commit him or her to the common jail of the county, where his or her said master or mistress shall reside, unless he or she will consent to return home, or shall find sufficient surety to appear at the next sessions, to be held for the county where such master or mistress shall reside, and answer the complaint of the said master or mistress, and not to depart the same without leave. (a) Act 29 September 1770, § 3. Purd. 49.

This section of the act, if construed strictly and to the letter, would appear to give no authority to a justice of the peace "to issue his warrant" for any absconding apprentice, so long as he continued "in the county or city" where his master or mistress may reside. Time and long practice, however, have given a different construction to the section, and the magistrates in every part of the state, on the oath of the master or mistress that his or her apprentice has absconded from their service, issue a warrant for his apprehension, without inquiring whether the apprentice has or has not "gone into any other county or city." Any other construction than this would give facilities to runaway apprentices, which would be greatly injurious to the public interests as well as to those of the master or mistress, and consequently to those of the apprentice.

If any apprentice shall absent himself or herself from the service of his or her master or mistress, before the time of his or her apprenticeship shall be expired, without leave first obtained, every such apprentice, at any time after he or she arrives to the age of twenty-one years, shall be liable to, and the master or mistress, their heirs, executors, or administrators, are hereby enabled to sustain all such actions and other remedies against him or her, as if the said apprentice had been of full age at the time of executing his or her indenture of apprenticeship. (b) Act 11 April 1799, § 1. Purd. 49.

(a) In a proceeding against an absconding apprentice, a petition and answer are irregular; the case is to be heard, at the bar of the court, on the justice's transcript. Com. v. Bowen, Phila. Q. S. Oct. 1863.

(b) The law will not sustain an apprentice in absconding whenever he may fancy he is ill-treated, or that his master has not complied with his part of the contract. 27 Leg. Int. 54.

If any person or persons whatsoever shall harbor, conceal or entertain any such apprentice, knowing him to be such, during the space of twenty-four hours, without his or her master's or mistress's consent, and shall not give notice thereof to his or her said master or mistress, every such person or persons offending in the premises, shall pay to the said master or mistress the sum of twenty shillings, for every day he shall so harbor, conceal or entertain such apprentice, to be recovered in a summary way, as debts under five pounds are by law directed to be recovered, if the same shall not exceed five pounds; if otherwise, to be recovered by action of debt, to be brought at the suit of the party injured, in any court of common pleas within this province. Act 29 September 1770, § 4. Purd. 49.

The gist of the offence in this case, is the knowledge of the party who shall "conceal or entertain" the apprentice of another. It is, therefore, indispensable to the party who shall bring suit to recover damages, to be able to prove that the person who concealed or entertained the runaway apprentice knew him to be such. This act does not intend to make common charity a crime, or treat that man as guilty of an offence against his neighbor, who merely furnishes food, lodging or shelter to the hungry, weary or naked wanderer though he be an apprentice. The harboring made penal by this act requires some other ingredient besides a mere kindness or charity rendered to the fugitive. The intention or purpose which accompanies the act, must be to encourage him in his desertion of his master, to further his escape, and impede and frustrate his reclamation. The meaning of the words *harbor* and *conceal* are not synonymous; there may be a harboring without concealment. 7 P. L. J. 115. 8 Am. L. J. 168. 1 Am. L. R. 142. 2 Wall. Jr. 311. If the amount claimed shall exceed five pounds, suit must be brought in the common pleas.

In an action for enticing away an apprentice, it should *seem* the apprentice or his father, or party entering into the indenture, would be a *competent* witness for either party, though sometimes a dangerous one. 1 Saund. Pl. 92.

If an apprentice enlist in the army, the court will not, upon a *habeas corpus*, issued at the relation of the master, remand the apprentice to his custody, if he be unwilling to return, but will leave the master to his suit against the officer who enlisted the apprentice. The *habeas corpus* act is intended to secure personal liberty, not to decide disputes about property. 1 S. & R. 353. 7 P. L. J. 283. 1 R. 745.

If an apprentice abscond into another state, he may be sent back to his master under the provisions of the acts of congress, relating to fugitives from labor. 1 Am. L. R. 654.

No innkeeper or tavern-keeper shall receive, harbor, entertain or trust any person under the age of twenty-one years, or any apprentice or servant, knowing him to be such, or after being warned to the contrary by the parent, guardian, master or mistress of such minor, apprentice or servant, under penalty, for the first or second offence, of three dollars, over and above the forfeiture of any debt contracted by such minor, apprentice or servant, for liquors or entertainments; and for the third offence, under penalty of fifteen dollars, and the forfeiture of his license, and being forever incapable of receiving a license to keep a public inn within this commonwealth. Act 11 March 1834, § 21. Purd. 49.

VI. OF THE ASSIGNMENT OF AN INDENTURE.

When any master or mistress shall die before the term of apprenticeship shall be expired, the executors or administrators of such master or mistress, provided the term of the indenture extend to executors and administrators, shall and may have a right to assign over the remainder of the term of such apprenticeship to such suitable person, of the same trade or calling, mentioned in the indenture, as shall be approved of by the court of quarter sessions of the county where the master or mistress lived, and the assignee to have the same right to the service of such apprentice as the master or mistress had at the time of his or her death; and also, when any master or mistress shall assign over his or her apprentice to any person of the same trade or calling mentioned in the indenture, the said assignment shall be legal, provided the terms of the indenture extended to assigns, and provided the apprentice, his or her parent or parents, or guardian or guardians, shall give his, her or their

consent to such assignment before some justice of the peace of the county where the master or mistress shall live. Act 11 April 1799, § 2. Purd. 49.

The consent of the parent or guardian, as well as that of the apprentice, is necessary to an assignment of an indenture. 1 S. & R. 248. It must be certified by the justice, or expressed in writing before him, and attached to the instrument at the time of the assignment. 3 S. & R. 158.

An indenture binding an apprentice to a man, his heirs and assigns, without naming executors, cannot be assigned by his executors. 4 S. & R. 109. 1 Bouv. Inst. 162. And where an apprentice was bound to two copartners, or the survivor of them, and in case of dissolution, he was to have the right to elect which of the partners he would serve; and on a dissolution, one of the partners assigned to the other all his interest in the indentures, the court held, that to make the election of the apprentice valid, it must be done with the consent of the parent or guardian, and that the dissolution abrogated the indenture, the parent not consenting to the election. 1 Ash. 405. 1 Bouv. Inst. 162.

VII. OF THE BINDING OF POOR CHILDREN.

It shall be lawful for the overseers of every district, with the approbation and consent of two or more magistrates of the same county, to put out as apprentices all poor children whose parents are dead, or, by the said magistrates, found to be unable to maintain them, (a) so as that the time or term of years of such apprenticeship, if a male, do expire at or before the age of twenty-one years; and, if a female, at or before the age of eighteen years. Act 13 June 1836, § 8. Purd. 47.

The word "district," in this act, shall be construed to mean "township," and "borough, and every other territorial or municipal division, in and for which officers charged with the relief and support of the poor are directed or authorized by law to be chosen; but nothing in this act contained shall be taken to repeal or otherwise interfere with any special provision made by law for any city, county, township, borough or other territorial or municipal divisions." Ibid. § 45. Purd. 796.

Aldermen have the same power as justices of the peace under this act. 1 S. & R. 248. In the binding of an infant as an apprentice by the overseers of the poor, it is not necessary that the infant should join in the indenture. 3 S. & R. 158.

In Philadelphia, under the 15th section of the act of 15th March 1828, the guardians of the poor have authority to bind out a child who has received public assistance from the out-door officers of the guardians, but who has not received such support in the almshouse or children's asylum. 4 P. L. J. 396.

By act 27th February 1847, orphans admitted into the Girard College are directed to be bound to the corporation of the city of Philadelphia, who are authorized to bind them out as apprentices, on their arrival at the age of fourteen years. P. L. 178.

VIII. OF APPRENTICES GENERALLY.

The relation of master and apprentice, until dissolved by the quarter sessions, cannot be questioned in a suit by the master for harboring his apprentice, under the act of 1770. 3 W. & S. 178. An apprentice cannot maintain an action against his master for extra work done by him for the latter, during the term of apprenticeship, although the work was done upon the express promise of the master to pay for it. 1 Wh. 113. But an apprentice is an *operative* within the meaning of the 5th section of the bankrupt law of 1841; and where a master, before his bankruptcy, made an express promise to pay his apprentice for all over-work, the court directed the assignee to pay him accordingly. 1 P. L. J. 368.

An indenture of apprenticeship may be vacated by the consent of all parties to it. 1 S. & R. 330. 1 Bouv. Inst. 166. An apprenticeship is determined by the death of the master: Burr. S. C. 782: unless the indenture be to executors and administrators. See 1 B. 178. 4 S. & R. 109. And it may be put an end to, by the master telling his apprentice "he might go where he pleased," and giving up his indentures. Burr. S. C. 629.

IX. COMPLAINT OF AN APPRENTICE.

A. B., the apprentice of C. D., of the county of E., carpenter, personally appears this

(a) They cannot bind out a child that has relatives liable for its support and of ability to maintain it. 16 Pitts. L. J. 272.

day, July 5th 1859, and makes complaint—that his master has severely beaten him with a large stick of wood—(or that his master does not furnish him with necessary food and clothing)—(or that G. H., a journeyman in the employ of the said C. D., is in the habit of kicking and cuffing him)—or that G. H., a journeyman in the employ of the said C. D., is in the habit of getting drunk and profanely swearing)—(or that he has otherwise refused or neglected to fulfil the covenant of the indenture between them.)

(Signed,) A. B.

Before J. B., Justice of the Peace, July 5th 1859.

Any of which complaints being made, the justice should send a notice to the master requiring his attendance at the office of the justice.

X. NOTICE TO THE MASTER.

To C. D., of the County of Erie.

Sir,—Your apprentice A. B. has this day, July 5th 1859, called at my office in F. township, in the said county, and made complaint that you have severely beaten him with a large stick of wood—(or that you have neglected or refused to have him furnished with sufficient wholesome food or clothing)—(or that G. H., a journeyman in your employ, is in the habit of kicking and cuffing the said apprentice)—(or that G. H., a journeyman in your employ, is in the habit of getting drunk and profanely swearing, whereby the life and morals of your said apprentice are endangered)—(or that you have neglected to fulfil the covenants of the indenture between you.) I appoint to-morrow, Tuesday, the 6th of July, at 3 o'clock in the afternoon, to inquire into this complaint, at my office, in the township of F., in the said county, at which time and place I request you will attend, bringing with you the said A. B., and any other persons you may think proper, that this complaint may be fully inquired into.

Witness my hand and seal, at F. township, county of Erie, July 5th 1859.

J. R., Justice of the Peace.

If such notice be neglected, and the master do not appear, the justice shall thereupon issue his warrant against the person or persons on whom it may have been served, taking care to be well satisfied, on oath or affirmation, that the notice has been served, before any other process shall issue.

XI. FORM OF A WARRANT AGAINST A MASTER.

COUNTY OF CAMBRIA, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said county, greeting:

You are hereby commanded to take the body of [C. D.] if he be found in the said county, and bring him before J. R., one of our justices in and for the said county, to answer the commonwealth upon a charge, founded on the oath [or affirmation] of A. B., having severely beaten the deponent, his apprentice, with a large stick of wood, and to be dealt with according to law. And for so doing this shall be your warrant.

Witness the said J. R., at E. township, in the said county, who hath hereunto set his hand and seal, the [sixth] day of [July,] in the year of our Lord one thousand eight hundred and fifty-nine.

J. R., Justice of the Peace. [SEAL.]

The justice should state in the complaint those charges which may have been made by the apprentice, and in his notice to the master he should communicate to the master the complaint actually made against him by his apprentice. *The notice should correspond with the complaint*, that the master may come prepared with such answers as he may think necessary. The justice will observe that the variety of complaints above made, and repeated in the note, are only given to exhibit such as may be and frequently are preferred, and that he may in all of them have a short notice as to the manner of noting the charge made in the complaint and notice, which is always to be made in strict accordance with the statement of the apprentice, and in each other. It is unnecessary to multiply forms or notices in order to exhibit the difference between those which may be made against a mistress or against master, from those against a master; the magistrate will be abundantly competent to settle such differences. Attention and some experience will be of much value in these, as well as in all other matters which may come before him. Similar memoranda may be made and notices given in regard to complaints made by masters against apprentices. When it becomes necessary to issue a warrant against an apprentice, it may be in the following form:

XII. WARRANT FOR AN APPRENTICE.

COUNTY OF ERIE, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said county, greeting:

You are hereby commanded to take the body of [A. B.] if [he] be found in the said county, and bring [him] before J. R., one of our justices in and for the said county, to answer the commonwealth upon a charge, founded on the oath [or affirmation] of [C. D. of having absconded from the service of his master, the deponent,] and further to be dealt with according to law. And for so doing this shall be your warrant.

WITNESS the said J. R., at F. township in said county, who hath hereunto set his hand and seal, the [fifth] day of [July,] in the year of our Lord one thousand eight hundred and fifty-nine. J. R., Justice of the Peace. [SEAL.]

If it shall become necessary to bind the parties over to the next county court of quarter sessions, recognisances should be taken, and a return made to the court. A copy of the docket entry of the magistrate will be a proper return to bring the matter under the notice of the court.

XIII. RECOGNISANCE TO BE TAKEN OF THE MASTER TO ANSWER TO A COMPLAINT MADE BY HIS APPRENTICE.

You, C. D., do acknowledge yourself to be indebted to the commonwealth in the sum of \$100, to be levied of your goods and chattels, lands and tenements, upon condition that if you shall appear at the next Court of Quarter Sessions, to be held at —, for the county of —, then and there to answer to a complaint made against you, of having severely beaten your apprentice, A. B., and shall not depart the court without leave, then this recognisance shall be void, otherwise to be and remain in full force and virtue. *Are you content?*

A recognisance of the same form will answer when the *apprentice* is to be bound over to the court, with this difference, that he should, beside his own recognisance, give *security* for his appearance.

One party being bound over to answer to a charge, the person or persons who have made the charge should be bound in recognisance to give evidence, at the court, when the case shall come before it.

XIV. RECOGNISANCE OF AN APPRENTICE TO GIVE EVIDENCE.

You, A. B., do acknowledge yourself to be indebted to the commonwealth, in the sum of \$50, to be levied of your goods and chattels, lands and tenements, upon condition that if you shall personally appear at the next Court of Quarter Sessions, to be held at —, in and for the county of Erie, then and there, on behalf of the commonwealth, to give evidence in the case of the Commonwealth *vs.* C. D., for severely beating you, and shall not depart the court without leave, then this recognisance shall be void, otherwise to be and remain in full force. *Are you content?*

A recognisance of the same kind will answer when the master shall be required to be bound over to give evidence.

XV. DOCKET ENTRY IN CASE OF MASTER AND APPRENTICE.

Commonwealth } July 5th 1859, A. B., the apprentice of C. D., the defendant, personally
vs. } appears and makes complaint that his master has severely beaten him
 C. D. } with a stick of wood. Same day wrote a note to the defendant requiring
 } his attendance at this office, on the 6th of July inst., at 3 o'clock. Notice
 served on oath by L. T., Constable. July 6th, defendant appears. A. B. *sw.* Bail in
 \$100 required from defendant, &c. C. D. of H— township, carpenter, bound in \$100
 for his appearance at the next Court of Quarter Sessions to answer to the above charge,
 &c. A. B. and P. Q. his guardian, each bound in \$50 that the said A. B. shall appear
 and give evidence in the above case at the next Court of Quarter Sessions, &c.

It has been already observed that a copy of the docket entry will make a proper return to bring this complaint before the court; the docket entry should have the following addition made at the foot of it before it shall be sent to the court.

I certify that the above is a correct transcript of the proceedings had before me, in the above case, as they are of record on my docket.

Witness my hand and seal, at F— township, in the county of Erie, this 10th day of August, A. D. 1859. J. R., Justice of the Peace. [SEAL.]

XVI. AN ASSIGNMENT OF AN APPRENTICE TO BE WRITTEN ON THE BACK OF THE INDENTURE.

KNOW ALL MEN by these presents, that I, the within-named A. B., by and with the consent of C. D., my within-named apprentice, and of E. F., his father, parties to the within indenture, (testified by their signing and sealing these presents,) for divers good causes and considerations, have assigned and set over, and do hereby assign and set over, the within indenture, and the said C. D., the apprentice therein named, unto G. H., his executors, administrators and assigns, for the residue of the term within mentioned, he and they performing all and singular the covenants therein contained on my part to be kept and performed. AND I, the said C. D., do hereby covenant on my part, with the consent of my father, the said E. F., faithfully to serve the said G. H., as an apprentice, for the residue of the term within mentioned, and to perform towards him all and singular the covenants within mentioned on my part to be kept and performed. AND I, the said G. H., for myself, my executors and administrators, do hereby covenant to perform all and singular the covenants within mentioned on the part of the said A. B., to be kept and performed towards the said apprentice. WITNESS our hands and seals, at —, in the county of Erie, the sixteenth day of August 1859.

Signed, sealed and delivered, August 16th 1859,
before J. R., Justice of the Peace.

A. B.	[SEAL.]
C. D.	[SEAL.]
E. F.	[SEAL.]
G. H.	[SEAL.]

Arrest for Debt.

SINCE the passage of the act of the 12th of July 1842, the only civil cases in which a justice of the peace can issue a *capias* or warrant of arrest, or an execution authorizing the imprisonment of the person of the defendant, are trespass, trover, or where it is proved by affidavit, that the plaintiff's demand is for the recovery of money collected by a public officer, or for official misconduct. That act provides as follows:

"No person shall be arrested or imprisoned on any civil process issuing out of any court of this commonwealth, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract, express or implied, or for the recovery of any damages for the non-performance of any contract, excepting in proceeding, as for contempt, to enforce civil remedies, action for fines or penalties, or on promises to marry, on moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment, in which cases the remedies shall remain as heretofore." Act 12 July 1842, § 1. Purd. 86.

"No execution issued on any judgment rendered by any alderman or justice of the peace, upon any demand arising upon contract, express or implied, shall contain a clause authorizing an arrest or imprisonment of the person against whom the same shall issue, unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of the alderman or justice of the peace, either that such judgment was for the recovery of money collected by any public officer, or for official misconduct." Ibid. § 23. Purd. 595.

"No *capias* or warrant of arrest shall issue against any defendant in any case in which, by the provisions of the preceding action, an execution on the judgment recovered could not be issued against the body; and whenever a *capias* or warrant of arrest in such case shall issue, the like affidavit shall be required as for the issuing of an execution by the provisions of said section." Ibid. § 24.

"Whenever a plaintiff shall reside out of this commonwealth, he may, upon giving bond, with sufficient surety, for the payment of all costs which he may become liable to pay, in the event of his failing to recover judgment against the defendant, have a *capias* or warrant of arrest, if he shall be entitled to such writ, on making the affidavit required in the twenty-third section of this act, or a summons, which may be made returnable not less than two nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein, and if the same shall be returned, personally served, the justice or alderman issuing the same may proceed to hear and determine the case in the manner heretofore allowed by law." Ibid. § 25.

If it appear upon the face of the record that the justice has exceeded his jurisdiction, by issuing process against the person of a defendant in a case in which such process is forbidden by law, his proceedings will be considered a nullity, and the defendant will be discharged on *habeas corpus*. 1 D. 185. Thus, in an action for a penalty, which is directed to be recovered "as debts of like amount are by law recoverable," the defendant is not liable to arrest; and an execution in such case, authorizing the imprisonment of the person, is void, and the defendant may be relieved by a *habeas corpus*. Martin's Case, Com. Pleas, Phila. 15 April 1854. And see 4 Y. 287, 240.

Where a plaintiff has an election to bring an action either *ex contractu* or *ex delicto*, as in the case of a common carrier or other bailee, he cannot, by such election, deprive the defendant of any substantial privilege or defence; and in such case the defendant shall not be subjected to imprisonment in consequence of the mere change in the form of action. 5 P. L. J. 113. 1 T. & H. Pr. 275. See 6 Barr 362. But where the action is for a distinct *tort*, although one deducible from the existence of a contract, if the plaintiff disaffirm the contract, and proceed for the fraudulent or tortious conduct of the defendant, in such cases bail may be demanded in the first instance. Bright. R. 197. And where the action is in form *ex delicto*, after judgment, an execution may issue against the body of the defendant. 2 P. L. J. 48.

It has been decided in New York that the act to abolish imprisonment for debt does not apply to suits founded in tort, though a contract between the parties is alleged by way of inducement. 5 Hill 578. Therefore, where there has been a wrongful conversion of goods, the defendant may be held to bail in New York, in whatever way the property came into his possession. Ibid. 182.

A justice of the peace has no power to issue the warrant of arrest, prescribed in cases of fraud, by the act of 1842. Wood v. Bell, Pittsburgh Legal Journal, 25 November 1854. Nor can a judge of the common pleas issue such warrant on a transcript of the judgment of a justice filed for the purpose of creating a lien. 2 P. 251.

An arrest on civil process may be made on the return day of the writ. 9 Johns. 117. But an arrest after the time it is made returnable is a trespass and void. 6 Mass. 22.

The neglect of an attorney to pay over money collected for his client, is within the exceptions of the act of 1842, and upon a judgment obtained for money so collected, he may be arrested in execution. 2 Gr. 60.

Women are not relieved from arrest for debt by the act of 1842, but by that of 19th February 1819, 7 Sm. 150, which provides that no female shall be arrested or imprisoned for or by reason of any debt contracted after its passage, and this provision is re-enacted by the act of 13th June 1836, § 6 (P. L. 573). Morris v. Hofheimer, District Court, Phila. 6 June 1860. And consequently, an attachment cannot issue against a female trustee to compel payment of the trust funds in her hands; for such process is but a civil writ of execution. 1 Ash. 373.

Arson.

- I. Statutes relating to arson.
- II. What constitutes arson.
- III. Information for arson.

- IV. Warrant against the accused.
- V. Commitment for arson.

I. ACT 31 MARCH 1860. Purd. 240.

SECT. 137. If any person shall maliciously and voluntarily burn or cause to be burned, or set fire to, or cause, or attempt to set fire to, with intent to burn any factory, mill or dwelling-house of another, or any kitchen, shop, barn, stable or other out-house that is parcel of such dwelling, or belonging or adjoining thereto, or any other building by means whereof a dwelling-house shall be burnt, then, and in every such case, the person so offending shall be adjudged guilty of felonious arson, and, on conviction thereof, shall be sentenced to pay a fine not exceeding two thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, at labor, not exceeding twelve years. And in case of the malicious burning or setting fire to any dwelling-house, or building that is parcel of such dwelling or belonging thereto, there is any person in the same, the offender, being convicted thereof, shall be sentenced to pay a fine not exceeding four thousand dollars, and to undergo an imprisonment, at separate or solitary confinement, not exceeding twenty years.

SECT. 138. If any person shall wilfully and maliciously burn, or cause to be burned, set fire to, or attempt to set fire to, with intent to burn, or aid, counsel, procure or consent to the burning or setting fire to, of any barn, stable or other building of another not parcel of the dwelling-house, or any shop, storehouse or warehouse, malthouse, mill or other building of another, or any barrick, rick or stack of grain, hay, fodder or bark, piles of wood, boards or other lumber, or any ship, boat or other vessel of another lying within any county in this state, or any wooden bridge within the same, or state capitol or adjoining offices, or any church, meeting-house, court-house, jail or other public building belonging to this commonwealth, or to any city or county thereof, or to any body corporate or religious society whatever, the person offending shall, on conviction, be adjudged guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two thousand dollars, and to undergo

an imprisonment, by separate or solitary confinement, at labor, not exceeding ten years.

SECT. 139. Every person, being the owner of any ship, boat or other vessel, or the owner, tenant or occupant of any house, out-house, office, store, shop, warehouse, mill, distillery, brewery or manufactory, barn or stable, or any other building, who shall wilfully burn or set fire thereto, with intention to burn the same, with an intention thereby to defraud or prejudice any person, or body politic or corporate, that hath underwritten or shall underwrite any policy of insurance thereon, or on any moneys, goods, wares or merchandise therein, or that shall be otherwise interested therein, shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

SECT. 140. If any person shall wilfully set on fire, or cause to be set on fire, any woods, lands or marshes within this commonwealth, so as thereby to occasion loss, damage or injury to any other person, he or she shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding twelve months.

SECT. 141. If any person shall unlawfully and maliciously place or throw it, into, upon, against or near any building or vessel, any gunpowder or other explosive mixture, with intent to do bodily harm to any person, or to destroy or damage any building or vessel, or any machinery, working tools, fixtures, goods or chattels, every such offender shall, whether or not injury is effected to any person, or any damage to any building, vessel or machinery, working tools, goods or chattels, be guilty of felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

II. WHAT CONSTITUTES ARSON.

Arson, at common law, is the maliciously, voluntarily and actually burning of the house or out-house of another. 4 Bl. Com. 226. And this definition is followed by the act of 1860, prescribing the punishment of arson. At common law, the burning of one's own property unaccompanied by an injury to, or by a design to injure, some other person, is not a punishable offence. 2 Pick. 325. Lewis' Cr. L. 81. But the burning of a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor. Lewis' Cr. L. 79, 82. 2 East P. C. ch. 21, § 7, p. 1080. Cald. 227.

The burning of a barn, with hay and grain in it, is felony and arson at common law. 5 W. & S. 885. If a building be set on fire which is so near a dwelling-house as to endanger the burning of it, it is arson. 2 Rich. 242. 10 Met. 422. A jail is an inhabited dwelling-house within the statute. 18 Johns. 115. 4 Call 109. Setting fire to a jail by a prisoner, merely for the purpose of effecting his own escape, and not with an intention to burn it down, is not within the statute. 18 Johns. 115. 5 Iredell 350. But if the prisoner intend to burn down the building, to effect his main design, which is to escape, he is guilty. 5 Iredell 350.

If any part of a dwelling-house, however small, be consumed by fire, maliciously and wilfully applied, the offence of arson is complete. 16 Mass. 105. 8 Iredell 570. In an indictment at common law it is unnecessary to allege that the house burned was a dwelling-house, for the word "house" imports it. 4 Call 109. Setting fire to an unfinished boat in a shop, with intent to burn the building, is a misdemeanor at common law. Thacher's Cr. Cas. 240. It is an attempt to commit arson, if the prisoner persuade another to do it, and give him the materials, he himself not intending to be present. 4 Hill 138.

Such as be taken for house-burning, feloniously done, are not bailable by justices of the peace. 2 Inst. 189. 2 Ash. 236. 2 U. S. Law Mag. 316. Purd. 250-1.

III. INFORMATION FOR ARSON.

BERKS COUNTY, ss.

J. L., of the township of B——, in the county of Lancaster, yeoman, personally came before J. R., one of the Justices of the Peace in and for the county of Berks, and made oath, that on the night of the twentieth instant, between the hours of eight and twelve of

the clock, the barn of the said J. L., situated in B—— township aforesaid, containing a large quantity of hay and grain, was entirely consumed by fire; that threats having been made upon a former occasion by F. W., of L—— township, in the said county of Lancaster, laborer, that he would do this deponent some mischief, and the said F. W., since the burning of the said barn, having left his usual place of abode in L—— township aforesaid, the deponent hath good cause to suspect, and doth suspect, the said F. W., of setting fire to the said barn. Further saith not. J. L.

Sworn and subscribed, February 23d 1859, before J. R., Justice of the Peace.

IV. WARRANT AGAINST THE ACCUSED.

BERKS COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of O——, in the County of Berks, greeting:

WHEREAS, information hath been made unto J. R., one of the Justices of the Peace in and for the said county, on oath of J. L——, of the township of B——, in the county of Lancaster, yeoman, that on the night of the twentieth instant, between the hours of eight and twelve of the clock, the barn of the said J. L——, situated in B—— township aforesaid, containing a large quantity of hay and grain, was entirely consumed by fire; and this deponent has good cause to suspect, and doth suspect, the said F. W. of setting fire to the said barn; you are, therefore, hereby commanded forthwith to take the said F. W., and bring him before the said J. R., to answer unto the said complaint, and further to be dealt with according to law. Witness the said J. R., at the borough of R——, in the said county of Berks, the twenty-third day of February, in the year of our Lord one thousand eight hundred and fifty-nine.

J. R., Justice of the Peace. [SEAL.]

Return of Constable.—I have taken the within-named F. W——, whose body I have ready, as within I am commanded. X. Y., Constable.

V. COMMITMENT FOR ARSON.

BERKS COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of O—— township, in the County of Berks, and to the Keeper of the Common Jail of the said county:

WHEREAS, F. W., of O—— township aforesaid, laborer, hath been brought before K. M., one of the Justices of the Peace in and for the county aforesaid, charged on oath of J. L., of the township of B——, in the county of Lancaster, yeoman, with having, on the night of the twentieth instant, between the hours of eight and twelve of the clock, set fire to the barn of the said J. L., situated in B—— township aforesaid, containing a large quantity of hay and grain, whereby the same was entirely consumed: These are, therefore, to command you the said constable to convey the said F. W., forthwith, to the common jail of the said county of Berks, and deliver him to the keeper thereof; and you the said keeper are hereby commanded to receive the said F. W. into your custody, in the said jail, and him there safely keep until he be thence delivered by due course of law. Witness the said K. M., at O—— township aforesaid, the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and fifty-nine.

K. M., Justice of the Peace. [SEAL.]

The crime described in the 138th section of the Penal Code is a misdemeanor only, which is triable in the court of quarter sessions; but that described in the 137th section, is a felony, of which exclusive jurisdiction is vested in the oyer and terminer. 8 Pitts. Leg. J. 290.

Assault and Battery.

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| I. Definition of an assault and battery. | IV. Complaint for an assault and battery. |
| II. What will justify a battery. | V. Warrant for an assault and battery. |
| III. Provisions of the penal code. | VI. Proceedings before the justice. |

I. DEFINITION OF AN ASSAULT AND BATTERY.

WHAT IS DEEMED AN ASSAULT.—An assault is an attempt or offer with force or violence to do a corporal hurt to another; as by striking at him with or without a weapon, or presenting a gun at him, at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within reach of it; or by holding up one's fist at him, or by drawing a sword and waving it in a menacing manner. *Bac. Abr.* Or by riding a horse so near to one as to endanger his person. 3 *Strob.* 137. Or by any such like act done in an angry, threatening manner. 1 *Hawk. P. C.* 110. But it seems agreed, at this day, that *no words whatever* can amount to an assault. *Ibid.* So, if a man raise his arm against another, but accompany the action with words showing a determination not to strike, it is no assault. 1 *S. & R.* 347. See 2 *Greenl. Ev.* § 82. 1 *Cr. C. C.* 310. 3 *Ibid.* 435. 5 *Ibid.* 348. And to present a gun within shooting distance of one who is armed with a knife, and about to attack the defendant, is no assault, if there was no attempt to use the gun, or intention to use it, unless first assailed. 9 *Ala.* 79.

WHAT IS DEEMED A BATTERY.—A battery, which always includes an assault, is the actual doing an injury to the person of a man, be it ever so small, in an angry, or revengeful, or rude, or insolent manner; or by spitting in his face, or violently jostling him out of the way. 1 *Hawk. P. C.* 110. Thus, to attack and strike with a club with violence the horse before a carriage in which a person is riding, is an assault on the person. 1 *P. R.* 380. And taking hold of a person's coat, in an angry, rude or insolent manner, or with a view to hostility and detaining the wearer, amounts not only to an assault, but to a battery. 1 *Bald.* 600.

One charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault: therefore, on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. 1 *Hawk. P. C.* 110.

II. WHAT WILL JUSTIFY A BATTERY.

If a person comes into my house, and will not go out (after having been required so to do), I may justify laying hold of him, and turning him out, not using more violence than is necessary to eject him from my premises. *Nels. Assault.* Thus, also, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another, to turn him out of the church, and prevent his disturbing the congregation. *Ibid.*

If an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him, in the attempt to take him, he may justify it. *Bac. Abr.* So, if a parent, in a reasonable manner, chastise his child, or a schoolmaster his scholar, or a jailer his prisoner, or if one confine a friend who is mad, and bind and beat him, &c., in such a manner as is proper in his circumstances, or if a man force a sword from one who offers to kill another, or if a man gently lay his hands on another, and thereby stay him from exciting a dog against a third person, or if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavors with violence, to dispossess me of my lands, or the goods of another, delivered to me to be kept for him, and who *will not desist upon my laying my hands gently on him* and disturbing him, or if a man beat, wound or maim one who makes an assault upon his person or that of his wife, parent, child or master, or if a man fight with, or beat one who attempts to kill any stranger, if the beating was absolutely necessary to obtain the good end proposed, or rendered necessary in self-defence—in all these cases, it seems the party may justify the assault and battery. *Bac. Abr.*

It is admissible for the defendant to show that the alleged battery was merely th

correcting of a child by its parent, the correcting of a servant or scholar by his master, or the punishment of the criminal by the proper officer; but if the parent or master chastising the child, exceed the bounds of moderation and inflict cruel and merciless punishment, he is a trespasser, and liable to be punished by indictment. The law confides to schoolmasters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible criminally, unless the punishment be such as to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions. Whart. C. L. § 1259. 4 Am. L. J. 137.

III. PROVISIONS OF THE PENAL CODE.

Any person who shall be convicted of an assault and battery, or of an assault, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court. Act 31 March 1860, § 97. Purd. 234.

If any person shall unlawfully and maliciously inflict upon another person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully cut, stab or wound any other person, every such person shall be guilty of a misdemeanor, and being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to an imprisonment, either at labor by separate or solitary confinement, or to simple imprisonment, not exceeding three years. Ibid. § 98.

IV. COMPLAINT FOR AN ASSAULT AND BATTERY.

MONROE COUNTY, ss.

Before me, the subscriber, one of the justices of the peace in and for the county of Monroe, personally came A. B., of the township of S—, in the said county, yeoman, who, upon his solemn affirmation, according to law, saith, that on Friday last, being the fifth day of May, instant, at the township aforesaid, C. D., of the same township, currier, made an assault upon this affirment, and then and there did violently beat and abuse him and further saith not.

Affirmed and subscribed, May 8th, A. D. 1859,
before me, J. R., Justice of the Peace.

(Signed) A. B.

V. WARRANT FOR AN ASSAULT AND BATTERY.

MONROE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Monroe:

WHEREAS, complaint hath been made before J. R., one of the justices of the peace in and for the county of Monroe, upon the solemn affirmation of A. B., of the township aforesaid, yeoman, that on Friday last, being the fifth day of May, instant, at the township aforesaid, C. D., of the same township, currier, made an assault upon him, the said A. B., and then and there did violently beat and abuse him: These are, therefore, to command you forthwith to take the said C. D., and bring him before the said J. R., to answer the said complaint, and further to be dealt with according to law. Witness the said J. R., at S. township aforesaid, the eighth day of May, in the year of our Lord one thousand eight hundred and fifty-nine.

J. R., Justice of the Peace. [SEAL.]

Return of the Constable.—The within-named C. D. is now in my custody.

T. Y., Constable, May 8th 1859.

VI. On hearing, if the defendant admit the truth of the charge, or if the justice shall, by evidence, be satisfied it is well founded, he is to call upon the defendant to enter into a recognisance, in such amount as he, the justice, shall think sufficient to insure his attendance at court to answer the charge; requiring also one surety. If the defendant neglect or refuse to give the bail required, he must be committed to jail. If the evidence shall be such as to satisfy the justice that the complainant was the aggressor, he should call upon him to give security for his appearance to answer at the next court of quarter sessions, unless the parties can be persuaded that it is a matter, a public inquiry into which would reflect no credit on either of them, and ought to be discontinued. If the defendant be discharged, he should on no account be charged any costs. If either of the parties be bound over, the justice should, as in every case of a binding over, make a return to the next court of the proceedings had before him, to the end that such order may be taken on it as the public good shall require.

By the revised penal code, justices of the peace are authorized to settle cases of assault and battery, where the complainant shall appear before him, and acknowledge to have received satisfaction for the injury, and thereupon, in his discretion, to discharge the defendant from his recognisance, or in case of committal, to discharge the defendant from arrest. This, however, does not extend to an assault and battery committed by or on any officer or minister of justice. In cases of a trivial nature, in which the public have no interest, and which in a vast majority of instances only expose the prosecutor and the defendant to contempt or shame, it is the duty of the justice to endeavor, to exercise his influence, to do his best, to induce them to consent that all further proceedings may be stayed.

Assignments.

- I. Of void assignments.
- II. Of preferences in assignments.

- III. Proceedings on an assignment.

I. OF VOID ASSIGNMENTS.

INASMUCH as the proceeds of property in the hands of an assignee for the benefit of creditors, under a void assignment, are liable to be attached by the judgment creditors of the assignor, by process of attachment in execution, it is of great importance that a justice of the peace should be well instructed in the forms which are required to render such an assignment valid. 5 W. & S. 103. 5 Barr 39. 1 H. 307.

And this is regulated by the act of 24th March 1818, which provides that all assignments for the benefit of creditors, "which shall not be recorded in the office for recording of deeds, in the county in which such assignor resides, within thirty days after the execution thereof, (a) shall be considered null and void as against any of the creditors of the said assignor." Purd. 61.

A partial assignment is within the act, and must be recorded. 2 Wh. 240. And an assignment of the surplus remaining after such partial assignment. 5 Wh. 280. And so is a power of attorney to collect moneys and pay them to certain creditors, in a prescribed order of preference. 2 J. 164. And also an absolute conveyance, with accompanying declaration of a trust. 4 Barr 477. And a lease reserving rent in trust for the benefit of creditors, is within the act. 8 C. 458. 4 Wr. 269.

But a mortgage in trust to secure certain creditors is not within the act. 4 W. & S. 383. Nor is a judgment in trust for creditors. 2 C. 93. Nor an assignment made directly to the creditors beneficially interested in it, either as collateral security, or in satisfaction. 12 H. 432. 7 C. 502. And see 2 Wr. 382. 3 Phila. 454. To bring a case within the act, there must be a *cestui que trust*, with as adverse interest to that of the assignee. 6 Wr. 441. See Ibid. 235. 8 Wr. 92. There must also be a transfer of the property; more than a mere transmission of its custody or management. 7 P. F. Sm. 221.

The assignment must be recorded in the proper county, although the personal property be situated in another state. 7 Barr 499. But the act does not apply to an assignment by a resident of another state. 5 H. 91. 6 H. 185. 1 Phila. 29. And where an assignment includes as well real as personal estate, it must be recorded not only in the county where the assignor resides, but also in the county where the land is situate, or it is not valid as against a subsequent purchaser from the assignor, without notice. 3 H. 399.

An unrecorded assignment is valid as to a subsequent voluntary assignee, 4 Barr 274. See 25 Leg. Int. 269. And an unrecorded mortgage is a lien as against an assignee of the mortgagor in trust for the benefit of creditors; for he is neither a creditor nor a purchaser for value. 8 C. 121.

In order to give effect to a deed of assignment as against the creditors of the assignor, it is necessary that there should be a delivery of it to the assignee. 5 W.

(a) The thirty days begin to run from the execution of the instrument, not from its delivery. 10 Wr. 415.

3. But an actual manual delivery is not required; the execution of an assignment by a trustee, without his previous knowledge or assent, and the delivery of it to a messenger to be conveyed to him, is enough, if he subsequently assent to it, and accept the trust. 1 B. 502. So, the deposit of it in the post-office directed to the assignee, is equally available. 5 W. 343. And so is a delivery to a third person for the use of the assignee. 5 S. & R. 318.

The act of 3d May 1855 provides that "whenever any person making an assignment of his or her estate situate within this commonwealth, for the benefit of creditors, shall be resident out of this state, such assignment may be recorded within any county, where such estate, real or personal, may be, and take effect from its recording. (a) *Provided*, That no *bonâ fide* purchaser, mortgagee or creditor having a claim thereon before the recording in the same county, and not having had previous actual notice thereof, shall be affected or prejudiced: and the courts of common law may dismiss or appoint trustees under such assignment, as in other cases." Purd. 61. By act 23d April 1857, this is extended to prior assignments. See 3 Gr. 34.

The resolution of the 21st January 1843 provides that "It shall not be lawful for any company incorporated by the laws of this commonwealth, and empowered to construct, make and manage any railroad, canal or other public internal improvement, while the debts and liabilities, or any part thereof, incurred by the said company to contractors, laborers and workmen, employed in the construction or repair of said improvement, remain unpaid, to execute a general or partial assignment, conveyance, mortgage or other transfer, of the real or personal estate of the said company, (b) so as to defeat, postpone, endanger or delay their said creditors, without the written consent of the said creditors first had and obtained; and any such assignment, conveyance, mortgage or transfer, shall be deemed fraudulent, null and void, as against such contractors, laborers and workmen, creditors as aforesaid." Purd. 60. And the act of 4th April 1862 gives a remedy in such case, by *scire facias*, against assignee. Purd. 1266.

II. OF PREFERENCES IN ASSIGNMENTS.

A debtor may make a voluntary assignment for the benefit of his creditors of his real or personal, or any part thereof, but he may not, in and by the instrument of assignment, create and reserve an interest for himself or his family. Such an assignment is void under the statute of 13 Eliz., which avoids all conveyances made with intent to delay, hinder or defraud creditors. 6 B. 344. 12 S. & R. 201. 2 P. R. 92. 3 P. R. 91.

An assignment stipulating for a release and excepting the household furniture of assignors and property exempt from execution, is voidable by creditors. 2 J. 1.

But a reservation of property to the amount of \$300, such as is exempt from sale by the act of 1849, will not avoid the deed. 2 C. 473. 13 Wr. 465. There will an exception of certain specific property. 12 C. 258. And see 3 Wr. 19. 19 Leg. Int. 133.

The acts of 1843 and 1849, have imposed the further restriction upon assignors, that they shall not prefer one creditor or set of creditors to another; and have voided all such attempts to give a preference.

All assignments of property in trust which shall hereafter be made by debtors or trustees, on account of inability at the time of the assignments to pay their debts, shall prefer one or more creditors (except for the payment of wages of labor), shall be void and construed to inure to the benefit of all the creditors in proportion to their respective demands; (c) and all such assignments shall be subject in all respects to the laws now in force relative to voluntary assignments: *Provided*, That the claims

(b) If this be not done, a foreign attachment will bind the property. 14 Wr. 230.

(c) An assignment by a railroad company of unpaid instalments due on subscriptions to capital stock, to an indorser, to secure him against loss by reason of his indorsement for the company, is not an assignment in trust for creditors, and therefore, not invalid, because

not recorded under the statute. 8 Wr. 92.

(c) This act applies to an assignment whereby a part of the assignor's property is assigned to be divided amongst certain named creditors, *pro rata*, there being other creditors, but not sufficient remaining property to pay them. 7 P. F. Sm. 193.

of laborers thus preferred shall not severally exceed the sum of fifty dollars." Act 17 April 1843, § 1. Purd. 60.

"Any condition in assignments of property made by debtors to trustees on account of inability at the time of the assignment to pay their debts, within the meaning of the act, entitled 'An act to prevent preferences in assignments,' approved April 17th 1843, for the payment of creditors only who shall execute a release, shall be taken as a preference in favor of such creditors, and be void, and the assignment be held and construed to inure to the benefit of all the creditors in proportion to their respective demands." Act 16 April 1849, § 4. Purd. 60.

The Act of 1843 does not invalidate the assignment; it only avoids preferences in assignments, and makes them to operate for the benefit of all the creditors of the assignor as if such preferences were not inserted. 6 H. 185, 331. Nor does it prohibit a composition with a part of the creditors. 6 H. 331. 11 H. 481. Nor an assignment of partnership property for the payment of the firm debts only. 9 H. 77. For such assignment in no way hinders the several creditors from reaching the surplus remaining after payment of the debts of the partnership. 9 C. 414. Nor does it prevent a debtor from assigning a particular chose in action directly to a creditor for the purpose of securing his debt, although the effect may be to give him a preference over the other creditors. 1 Gr. 212.

Judgments confessed to secure creditors are not such preferences as are avoided by this act. 7 Barr 449. It goes no further than to forbid preferences in and by the instrument by which the debtor surrenders to his creditors all dominion over his property. 7 H. 59, 61. 8 H. 87, 63, 152. When property has been actually levied upon by the sheriff, and an assignment is made pending the levy, if the execution creditors consent to a sale by the assignee, he is justified in first paying the amount of these executions, and the necessary costs of the levy; if, however, no actual levy was made, and the executions were issued for the mere purpose of giving these creditors a preference, such payments ought not to be allowed. 2 P. 103.

The wages of laborers are not only exempted from the operation of the act of 1843, but they are further protected by the act of 22d April 1854, which provides as follows: "In all assignments of property, whether real or personal, which shall hereafter be made by any person or persons or chartered company, to trustees or assignees, on account of inability, at the time of the assignment, to pay his or their debts, the wages of miners, mechanics and laborers employed by such person or persons or chartered company, shall be first preferred and paid by such trustees or assignees, before any other creditor or creditors of the assignor: *Provided*, That any one claim thus preferred shall not exceed one hundred dollars." Purd. 60.

This act, however, does not give the wages of miners, mechanics and laborers a preference of payment over liens of record. 5 C. 328. 9 C. 511. And see 6 C. 274. It extends to real as well as personal estate. 5 C. 328. 9 C. 511. And see 18 Leg. Int. 76.

III. PROCEEDINGS ON AN ASSIGNMENT.

In every case in which any person makes an assignment of his estate, real or personal, or of any part thereof, in trust for the benefit of creditors, it is the duty of the assignee, within thirty days after the execution thereof, to file in the office of the prothonotary of the court of common pleas of the county in which the assignor resides, an inventory or schedule of the estate or effects so assigned, accompanied by an affidavit of the assignee that the same is a full and complete inventory thereof, so far as the same has come to his knowledge.

The court of common pleas thereupon appoints two or more disinterested and competent persons, to appraise the estate and effects so assigned. These appraisers, or two of them, having first taken an oath or affirmation, before some person having authority to administer oaths, to discharge their duties with fidelity, are required forthwith to proceed and make an appraisalment of the estate and effects assigned, according to the best of their judgment; and having completed the same, to return the inventory and appraisalment to the court, where it is filed of record. The appraisers are entitled, as compensation for their services, to receive a sum not exceeding one dollar for each day diligently employed by them in the performance of their duties.

The appraisalment having been filed, the assignee is required to give bond, with

at least two sufficient sureties, to be approved by one of the judges of the court of common pleas, in double the amount of the appraised-value of the estate so assigned; which bond is filed in the prothonotary's office, and by him entered of record, and inures to the use of all persons interested in the assigned estate. Act 14 June 1836, *Purd.* 61. If security be not given, the act 21st March 1831, empowers the court to dismiss the assignees and to appoint others. *P. L.* 193.

The assignee may act before giving bond. If he neglect to file an inventory or give bond, the remedy is to cite him before the court, to show cause why he should not be dismissed. 6 *W. & S.* 326. Although the act of assembly requires that the assignee should give bond with two sufficient sureties, to be approved by one of the judges, yet a bond with but one surety and which does not appear to have been approved, is not void; and it may be enforced against the assignee and surety. 8 *W.* 223.

If any of the assigned property be the subject of a suit pending, the assignee is authorized by the act of 13 June 1840, to appeal from an award of arbitrators therein, and also to sue out a writ of error upon the judgment that may be rendered, without paying costs or giving security; unless in the former case, the assignee shall have taken out the rule of reference. *Purd.* 61.

The act 4th May 1864, § 1, *Purd.* 1313, provides that any assignor, under whose assignment in trust for the benefit of creditors, either by general words or particular description, there have been transferred any articles of household furniture or things of domestic use, may, after the appraisement thereof, apply to the court of common pleas of the proper county, to have set aside for the use of the said assignor and family, any of the said articles and things, not exceeding in value, at the appraisement thereof, three hundred dollars; and the court may, if no cause be shown to the contrary, after due notice to creditors, order that the same be released from the assigned estate and handed to the assignor.

Whenever it shall be made to appear, to the satisfaction of the court having jurisdiction of the accounts of an assignor under any assignment in trust for creditors, either upon the report of an auditor or otherwise, after notice, by advertisement, for such length of time as may be ordered by the court, that all the undisputed claims upon the assigned fund or estate, have been paid or released, and security to the satisfaction of said court as hereinafter set forth, shall be given for the payment of any and all claims in dispute, the said court may order and direct the assignee to reconvey to the assignor, all the assigned estate remaining in his hands and possession, and all outstanding interest in the assigned estate; and the deed of reconveyance shall be acknowledged in open court, and entered among the records thereof; and thereupon, the said estate shall be holden free and discharged from any and all of the trusts of said assignment. *Ibid.* § 2.

The security required by this act, shall be by deposit of money, or of sufficient and available securities for money, under the direction of the court, or by mortgage on real estate, which shall inure to the benefit of the parties interested, who may sue for the same, in the name of the commonwealth, in like manner as official bonds are sued. *Ibid.* § 3.

Assumpsit.

THE action of *assumpsit* lies where a party claims damages for breach of simple contract, that is, a *promise* not under seal. Such promises may be express or implied; and the law always implies a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application. *Stephen on Pleading* 18. And the act of 1810 gives to justices of the peace, jurisdiction of all causes of action arising from contract, either express or implied, where the sum demanded does not exceed \$100, except in cases of real contract where the title to lands may come in question, or actions upon promise of

marriage. They have, consequently, jurisdiction of most cases of *assumpsit*, with the exception of those which are specially excluded by the statute.

In every action of *assumpsit* there ought to be a consideration, promise, and breach of promise. Leon. 405. To make a consideration sufficient in law to support an *assumpsit*, there must be some benefit arising to the defendant or some injury or loss to the plaintiff. 2 B. 509. It is not essential that the consideration should be adequate in point of actual value. It is sufficient that a slight benefit be conferred by the plaintiff on the defendant, or a third person; or even if the plaintiff sustain the least injury, inconvenience or detriment, or subject himself to any obligation, without benefiting the defendant or any other person. A consideration is sufficient, if it arise from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff, with the assent, express or implied, of the defendant; or by reason of any damage, or any suspension or forbearance of the plaintiff's right at law or in equity; or any possibility of loss occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party undertaking. 2 W. 105. 5 Barr 162. 1 H. 53. Thus, *assumpsit* may be maintained on a promise to subscribe a certain amount towards the building of a church. 6 H. 13. 8 H. 260. 9 C. 114. 1 Wr. 210.

A moral or equitable obligation is a sufficient consideration for an assumption. 5 B. 33. 8 W. & S. 10. But it must be such as was once a legal obligation; as a promise to pay a debt barred by the statute of limitations; or from which the debtor has been discharged by bankruptcy; for when a man is under a moral obligation which no court of law or equity can enforce, and he promises, the honesty and rectitude of the thing is a consideration. 1 Barr 451.

A compromise of a doubtful claim is a sufficient consideration to support a promise. 6 W. 421. 9 W. 230. And a promise to pay the debt of another, in consideration that the creditor would wait, forbear or give time indefinitely, or for a reasonable time, at the instance and request of the defendant, is binding. 5 R. 69. 2 Barr 30. Such contract, however, must be in writing. See title "Guaranty."

The law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil or political institutions of the state. 5 W. & S. 321. And where part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, it avoids the whole. 5 Barr 452. The test, whether a demand connected with an illegal transaction is capable of being enforced by law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case. 11 S. & R. 164.

In order to constitute a valid promise, it is not necessary that it should be made to the plaintiff himself; if made to a third person, with a view to be communicated to the plaintiff, it is sufficient. 1 Barr 334. In general, he must be made plaintiff from whom the consideration flowed. 5 Barr 521. But the action will lie by a party beneficially interested in a contract made by another. 7 W. & S. 94. Thus, if one pay money to another for the use of a third person, or, having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the consideration, the action must be by the promisee. 6 W. 182. See 2 Phila. 63. 4 Wr. 448.

An assignee of a chose in action may maintain, in his own name, an action of *assumpsit*, upon an express promise by the defendant to pay him, without any new consideration. 3 Leg. & Ins. Rep. 61. An express promise of a debtor, to pay the assignee of his creditor, will bind him as firmly as if it had originated in a consideration moving from him, and been his from the outset. 4 Ibid. 27.

Where one takes the personal property of another, the owner may waive the tort, and maintain *assumpsit* for its value. 2 H. 295. 2 Greenl. Ev. §§ 108, 120, 226. *Assumpsit* for goods sold and delivered may be maintained, where goods have been delivered by the plaintiff to the defendant, though not ordered, if retained by him; the retention implies a promise to pay the market price of the goods. 2 Leg. Gaz. 89.

Attachment by Justices of the Peace,

Commonly called a Domestic Attachment.

I. A DOMESTIC ATTACHMENT is so called because it may issue against persons who are inhabitants, have their domicile, or are *domesticated* here, in cases where they have been guilty of certain acts of absconding, absenting or concealment; and is, so far as respects creditors, in the nature of a commission of bankruptcy, because it is for the benefit of all the creditors, and all the property of the debtor is seized and distributed among them *pro rata*.^(a)

1. It can be issued only against persons who are *inhabitants* of the state.

2. It cannot be issued without oath or affirmation first made.

3. It is for the benefit of all the defendant's creditors, and not for the benefit of the plaintiff alone.

4. All the property of the persons proceeded against is placed in the custody of two freeholders [trustees], who are to distribute it among the creditors.

5. It can only be dissolved by satisfying the court [justice], that the parties were not liable to the attachment. Serg. on Attach. 1, 2, 4, 5, 6.

The act of 22d August 1752, as amended by that of 4th December 1807, provides that if any person shall absent him or herself out of this government, or abscond from his or her usual place of abode, not taking care to satisfy his or her just debts, it shall and may be lawful for any justice of the peace where such person's estate may be found, to grant a writ of attachment for any debt not exceeding one hundred dollars, directed to any constable of the same county, to attach the goods and chattels, or other effects of such person, to answer the creditor. Purd. 357-8.

Justices of the peace have no jurisdiction to issue an attachment against the property of a defendant not residing in the state. 1 H. 28. Foreign attachment, which can only be issued by the courts of common pleas, is a remedy against debtors that are absent and *non-resident*; while domestic attachment is a remedy against *resident* debtors absenting or concealing themselves. 8 H. 147. It is not necessary to authorize the issuing of a domestic attachment by a justice of the peace, that the defendant should have absconded or secreted himself *for the space of six days*; that provision of the act of 1752 was repealed by the act of 1807. 3 W. 144. 1 M. 75. The absence of a theatrical manager in pursuance of his business, is no ground for a domestic attachment. 19 Leg. Int. 140. An attachment issued by a justice of the peace may be executed by a deputy-constable. 3 P. R. 230. A domestic attachment may issue upon a debt not due, if there be in other respects sufficient grounds for it. 4 W. & S. 201.

The acts of assembly provide further that before the granting any such attachment, the person or persons requesting the same, or some other credible person or persons for him or them, shall, upon oath or affirmation, declare that the defendant in such attachment is indebted to the plaintiff therein named in a sum not exceeding one hundred dollars, and that the defendant has absconded or departed from the place of his usual abode in this state, or has remained absent from the state, or has confined himself in his own house, or concealed himself elsewhere, with design to defraud his creditors, as is believed, and that the defendant has not left a clear fee-simple estate in lands or tenements within this commonwealth sufficient to pay his debts, so far as the plaintiff or deponent knows or believes; which oath or affirmation the justice of the peace that grants such writ, is empowered and required to administer. And if any attachment be granted out otherwise, or contrary to the true intent and meaning of the act, the justice of the peace so granting the same, shall, for every such offence, forfeit the sum of one hundred dollars, for the use of him or her that will sue for the same. Purd. 357-8.

It is not necessary that the affidavit to ground a domestic attachment should aver the defendant's residence. 1 M. 75. But an affidavit, which states the causes for

(a) The bankrupt law of 1867 has superseded the state domestic attachment law, in cases where the debts of the defendant amount to more than \$250. 26 Leg. Int. 317.

which the attachment issued in the alternative, *e. g.* that the defendant "absconded or departed from the place of his usual abode, or secreted himself with design," &c., is bad, and the writ must be quashed. 3 W. 144. 1 M. 75. 3 P. L. J. 307.

In an action for maliciously suing out a domestic attachment, it is enough for the defence, that the suspiciousness of the plaintiff's conduct had made recourse to an attachment a measure of reasonable precaution, irrespective of the fraudulent intention of the debtor. 4 W. & S. 201.

As soon as the justice of the peace before whom the writ of attachment is returnable, accepts the constable's return thereof, the said justice shall immediately appoint two substantial freeholders to take into their custody the goods and chattels attached, for which they shall be accountable until they shall dispose of the same, as directed by the act of assembly. *Purd.* 358.

The right of the trustees to the defendant's goods does not relate back to the issuing of the attachment, as in cases of proceedings in the common pleas. 3 P. R. 230. They are entitled to a balance in the sheriff's hands, after satisfying an execution. 3 P. R. 389.

Where a defendant against whom a domestic attachment had issued, transferred to G. a check for the payment of money, which G. applied to the payment of a debt for which he was security for the defendant, it was held, that an action would not lie, by the trustees, against G., to recover the amount of the check. 1 W. & S. 108.

The justice is also required forthwith to publish his proceedings by advertisement in the most public places, near the late dwelling-place of the defendant, and likewise in one or more public newspapers, appointing the time and place for all the creditors of the person against whose effects and estate the attachment is granted, to appear, then and there, to discover and make proof of their demands. And if, after a full and careful examination, it shall appear that there is a just debt due to any person from the said defendant, exceeding the sum of one hundred dollars, then the said justice shall no further proceed, but shall deliver and certify to the prothonotary of the court of common pleas of the same county, the said attachment, and all proceedings thereon had before him; whereupon further proceedings shall be had in the court of common pleas, with like effect as if the writ of attachment had issued out of that court. *Purd.* 358.

When any attachment shall be granted by a justice of the peace, no second or other attachment issued by the said justice, or by any other justice within the same county, or by the court of common pleas of the said county, shall bind or affect the property of the defendant within the county, whilst the proceedings in the first writ of attachment remain undetermined. *Ibid.*

When the justice shall accept of the return of an attachment from the constable, and it shall appear to him that any cattle or other chattels necessary to be maintained at expense, or any perishable goods, have been attached, it shall be lawful for the justice to order sale of them to be made by the freeholders, within ten days; of which public notice shall be given, at least six days before the sale thereof, by advertisements to be set up at the most public places near the place of sale. And the money arising therefrom shall be lodged in the hands of the freeholders, to be attached or distributed among the creditors, in the manner directed and appointed by the act. *Ibid.*

Perishable goods are such as are liable to perish before the term arrives at which the trustees are authorized to sell. Wines and liquors are not such perishable goods. 4 Am. L. J. 355. But a shallop was ordered to be sold as a perishable commodity. 1 D. 379.

If no debt exceeding one hundred dollars shall appear to be due from the defendant, then the goods, chattels and other effects in the hands of the freeholders shall be brought to an appraisalment, but not sold, (except changeable or perishable goods,) until the expiration of three months from the granting of the attachment, to the end that the debtor may have time to redeem them, if he see fit.

But if, after the expiration of three months, the debtor shall not appear and redeem them, on notice thereof being given to the justice, he shall forthwith order and direct the said freeholders to make sale thereof; and out of the money arising therefrom, and all other money then in their hands, arising from any part of the

defendant's estate, (reasonable charges first deducted,) to make payment to the creditors, who shall appear and make proof of their debts within the said three months, in proportion to their respective debts, and the overplus, if any, to be returned to the owners. But before any such sale is made, the freeholders shall give at least ten days' notice thereof, by advertising in the most public places the time and place of such sale. *Purd.* 358-9.

The freeholders, within six days after making sale and distribution, shall render a true account of their proceedings to the justice who granted the attachment, to be by him kept as a record of their proceedings therein. *Purd.* 359.

Justices of the peace and aldermen have like power with the courts of common pleas, to dissolve writs of attachment in cases within their jurisdiction, and upon the same proofs; provided application be made for that purpose within twenty days after the return of the writ. *Ibid.*

A domestic attachment may be dissolved on application of the defendant, supported by affidavit, denying the allegations upon which the attachment was founded, and the justice being satisfied that the defendant was not liable to the attachment. *Purd.* 355. It is sufficient to give notice of such application to the attaching creditor. Notice to all the creditors is not required. The parties who have issued the process are bound to support it, when attached. *Ibid.* 2 Y. 277.

The dissolution of an attachment will not have the effect of invalidating any sale made by the trustees, or of any payments to them. *Purd.* 355.

II. OATH OR AFFIRMATION PREVIOUSLY TO GRANTING AN ATTACHMENT.

J. D. }
vs. } Attachment not exceeding \$100.
 R. R. }

DAUPHIN COUNTY, ss.

J. D., of the township of S—, in the county of Dauphin, yeoman, upon his solemn affirmation doth declare, that R. R., of the same township, is indebted to him in a sum not exceeding one hundred dollars, and that the said R. R. has absconded from the place of his usual abode in this state, with design to defraud his creditors, as is believed, and that the said R. R. has not left a clear fee-simple estate in lands and tenements within this state sufficient to pay his debts, so far as the said J. D. knows or believes. (Signed) J. D.

Affirmed and subscribed, May 1st 1859,
 before me, J. R., Justice of the Peace.

DOMESTIC ATTACHMENT.

DAUPHIN COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Dauphin:

We command you, that you attach R. R., of the township of S—, in the county aforesaid, by all and singular his goods and chattels or effects, in whose hands or possession soever the same may be found within this county, so that he appears before J. R., one of our justices of the peace in and for the said county, on the 6th day of May inst., at nine o'clock in the forenoon of that day, at his office in H— township aforesaid, to answer J. D. of a plea of debt not exceeding one hundred dollars. Hereof fail not. Witness the said J. R. at S— township aforesaid, the first day of May, A. D. 1859.

J. R., Justice of the Peace. [SEAL.]

Constable's return.—Attached one feather bed and bedding, one cow, one barrel of cider, six Windsor chairs, one iron tea-kettle, two iron pots and one tub. Attached the same in the hands of David White, of Swatara township, tailor.

So answers L. M.,

Constable of Swatara township.

Or if the constable cannot find property of the defendant, he may return, "The defendant has no goods and chattels within the county whereby he can be attached." So answers, &c.

APPOINTMENT OF FREEHOLDERS.

DAUPHIN COUNTY, ss.

To R. S. and D. C., of S— township, greeting:

You are hereby authorized and required to take into your custody all the goods and chattels and effects of R. R., of the township aforesaid, cordwainer, mentioned in the schedule hereunto annexed, and attached at the suit of J. D., for which you are to be

accountable, until the same shall be disposed of according to law. Given under my hand and seal at S—— township aforesaid, the 7th day of May, A. D. 1859.

J. R., Justice of the Peace. [SEAL]

SUMMONS AGAINST THE GARNISHEE.

DAUPHIN COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the township of S——, in the County of Dauphin, greeting :

WHEREAS, J. D., of the township aforesaid, yeoman, upon the first day of May inst., obtained an attachment from J. R., one of our justices of the peace in and for the county aforesaid, directed to you, wherein you were commanded to attach R. R., of the said township, by all and singular his goods and chattels, or other effects, in whose hands or possession soever the same might be found within this county, to answer the said J. D. of a plea of *debt* not exceeding one hundred dollars. And whereas, in pursuance of the said attachment, you, the said constable, did make return to the said justice, that you had attached sundry goods and effects of the said R. R. in the hands of D. W., of the township aforesaid, according to a schedule of the same goods and effects annexed to the said attachment. These are, therefore, to command you to summon the said D. W. to appear before the said J. R., at his office, in the township aforesaid, on the seventh day of May inst., at two o'clock in the afternoon of that day, to show cause, if any he hath, why he should not yield up the goods and effects, attached as aforesaid, in his hands for the use of the creditors of the said R. R. Hereof fail not. Witness the said J. R., at S—— township aforesaid, the 2d day of May, A. D. 1859.

J. R., Justice of the Peace. [SEAL]

"Served on the within-named D. W., by producing to him the original summons, and informing him of the contents thereof."

L. M., Constable.

NOTICE TO THE CREDITORS.

WHEREAS, in pursuance of an Act of General Assembly of the commonwealth of Pennsylvania, an attachment hath been granted by the subscriber, one of the justices of the peace in and for the said county of Dauphin, at the instance of a certain J. D., of S—— township, in the county of Dauphin, against a certain R. R., of the township of S——, in the county aforesaid, whereon certain goods and chattels and effects of the said R. R. have been attached and are now in the custody of R. S. and D. C., of the said township. This is, therefore, to give notice to the creditors of the said R. R. to appear on the tenth day of May 1859, at the house of W. M. of the township aforesaid, innkeeper, then and there to discover and make proof of their demands agreeably to the directions of the said act.

J. R., Justice of the Peace. [SEAL]

ORDER TO FREEHOLDERS TO SELL CHANGEABLE AND PERISHABLE GOODS.

DAUPHIN COUNTY, ss.

To R. S. and D. C., of S—— township, greeting :

WHEREAS, among other articles attached as the property of R. R., late of S—— township, in the county of Dauphin, and now remaining in your custody, until further orders, there are *one cow, and a barrel of cider*, the former of which must necessarily be maintained at expense, and both are liable to perish. You are, therefore, hereby required to make sale of the said cow and barrel of cider within ten days from this date, first giving public notice thereof at least six days before the sale by advertisements, to be set up at the most public places near the place of sale. Given under my hand and seal at S—— township aforesaid, the 10th day of May, A. D. 1859.

J. R., Justice of the Peace. [SEAL]

FORM OF APPRAISEMENT.

AN appraisement of the several goods and chattels attached at the suit of J. D. as the property of R. R., late of S—— township, in the county of Dauphin, cordwainer, by virtue of the warrant of J. R., Esq., one of the justices of the peace in and for the county of Dauphin, viz.:

One feather bed and bedding, valued at	\$30.00
One brindled cow	25.00
Six Windsor chairs	3.00
One iron tea-kettle	1.00
Two iron pots	1.40
One tub	50
One barrel of cider	2.00

June 1st, A. D. 1859.

Appraised by us,

J. G. and T. B., Appraisers.

GENERAL ORDER TO FREEHOLDERS TO SELL.

DAUPHIN COUNTY, ss.

To R. S. and D. C., of S—— township, greeting:

WHEREAS, three months are expired since the goods, chattels and effects of R. R., late of the township of S—— aforesaid, were attached, and notice hath been given to me that the said R. R. hath not appeared to redeem the said property. You are, therefore, hereby required and directed to make sale of the said goods, chattels and effects, and out of the money arising therefrom, and all other money in your hands from any part of the said R. R.'s estate arising, reasonable charges first deducted, you are to make payment to the creditors of the said R. R., who shall have appeared and made proof of their debts within the said three months, in proportion of their respective debts, returning the overplus, if any, to the said R. R. But before any sale shall be made, you are to give at least ten days' notice thereof by advertising in the most public places the time and place of such sale; and within six days next after making sale and distribution, as aforesaid, you are to render a true account of your proceedings to me. Given under my hand and seal at S—— township aforesaid, the 20th day of August, A. D. 1859.

J. R., Justice of the Peace. [SEAL.]

ADVERTISEMENT OF SALE.

PUBLIC NOTICE is hereby given, that by virtue of an order from J. R., one of the justices of the peace in and for the county of Dauphin, will be exposed to public sale, on Monday the 12th day of September next, at ten o'clock in the forenoon, at the house of W. M., innkeeper, in the township of S——, in the said county, one feather bed and bedding, six Windsor chairs, one iron tea-kettle, two iron pots, and one tub, attached as the property of R. R., late of the said township, cordwainer. Attendance will be given, and the terms of sale made known, by

September 1st 1859.

R. S. } Freeholders duly
D. C. } appointed, &c.

Attachment against absent and fraudulent Debtors.

- | | |
|----------------------------------------------|-------------------------------------|
| I. Attachments against non-resident debtors. | VII. Form of plaintiff's affidavit. |
| II. Attachments against fraudulent debtors. | VIII. Form of plaintiff's bond. |
| III. Of the plaintiff's bond. | IX. Form of attachment. |
| IV. Service of the attachment. | X. Forthcoming bond. |
| V. Proceedings before the justice. | XI. Affidavit to open judgment. |
| VI. Of the lien of the attachment. | XII. Notice of rehearing. |
| | XIII. Form of docket entry. |

I. ATTACHMENTS AGAINST NON-RESIDENT DEBTORS.

WHENEVER by the provisions of the twenty-fourth section of this act no *capias* can issue, [that is, for any demand arising from contract, except for money collected by a public officer, or for official misconduct,] and the defendant shall reside out of the county, he shall be proceeded against by summons, or attachment, returnable not less than two, nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein. Act 12 July 1842, § 26. Purd. 598.

This section does not authorize justices of the peace to issue attachments against the property of persons not residing within the state. 1 H. 128. See 4 N. Y. 384. In order to sustain an attachment against a debtor not a resident of the same county with the creditor, the applicant must give bond as directed by the 27th section of the act. 4 N. Y. 254. *Contra*, 15 Wend. 479. 23 Wend. 336.

II. ATTACHMENTS AGAINST FRAUDULENT DEBTORS.

It shall be the duty of any alderman or justice of the peace to issue an attachment against any defendant, on the application of the plaintiff, in any case, where, by the provisions of this act, no *capias* can issue, upon proof, by the affidavit of the plaintiff, or some other person or persons, to the satisfaction of the alderman or justice, that the defendant is about to remove from the county any of his pro-

perty with intent to defraud his creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete any of his property, with the like fraudulent intent, which affidavit shall also specify the amount of the plaintiff's claim, or the balance thereof, over and above all discounts which the defendant may have against him. Act 12 July 1842, § 27. Purd. 598.

The plaintiff's affidavit must state with precision one or more of the causes for issuing the attachment, mentioned in this section; if several causes, as, for instance, that the defendant has assigned or secreted his property, with the intent mentioned in the act, are set forth in the *alternative*, the affidavit will be insufficient. 3 P. L. J. 307. 1 M. 75. 3 W. 144. 4 N. Y. 385. *Contra*, 11 N. Y. 339.

The court of common pleas of Philadelphia county have decided, that a defendant against whom an attachment has been issued, under the act of 1842, may traverse (or deny) the cause for issuing the writ, set forth in the plaintiff's affidavit. The proper mode of so doing is by a plea in abatement. *McKinty v. Shore*. Whether the defendant was about to remove his property, is matter in abatement, to be pleaded. 7 Humph. 465. The truth of the facts on which an attachment is founded, can be investigated only on a plea in abatement, and not on a motion. 10 Missouri 350. 6 Ala. 139. An attachment, if sufficient on its face, is a justification to the officer serving it, although, in fact, issued on an insufficient affidavit. 11 H. 189. 1 Barb. 552. 24 Wend. 485.

Irregularity in the affidavit and bond to support an attachment, should be taken advantage of by motion to quash the attachment. 1 Morris 54. And although the affidavit made, and bond executed by the plaintiff to found an attachment, be defective, the defendant waives the irregularity by appearing and confessing judgment. 3 P. L. J. 307.

An affidavit to found an attachment set forth "that the said defendants were about to remove their property from this state to the injury of the plaintiff: this fact was traversed by plea in abatement, and under this issue, the defendants offered to prove that one of them had sufficient unincumbered personal property in the state to discharge the plaintiff's demand. The evidence was objected to and excluded by the court: *held*, that the court erred in excluding the evidence. 5 Gilman 21. To sustain an attachment on the ground that the debtor "is about to remove his property from this state to the injury of such creditor," two things must concur: *first*, the debtor must be about to remove his property from the state; and *secondly*, such removal, if effected, must be to the injury of the creditor. The single fact that he is about to remove his property from the state will not justify a creditor in seizing it by attachment. *Ibid*.

III. OF THE PLAINTIFF'S BOND.

Provided, That before such attachment shall issue, the plaintiff, or some one in his behalf, shall execute a bond, in the penalty of at least double the amount of the claim, with good and sufficient securities, conditioned that in case the plaintiff shall fail to recover a judgment of at least one-half the amount of his claim, he shall pay to the defendant his damages for the wrongful taking of any property over and above an amount sufficient to satisfy the judgment and costs, and that if the plaintiff shall fail in his action he shall pay to the defendant his legal costs, and all damages which he may sustain by reason of the said attachment. Act 12 July 1842, § 27. Purd. 598.

There must be at least two sureties to the bond, besides the plaintiff; wherever an act of assembly speaks of sureties in the plural, a single surety, however responsible, will not satisfy the requirements of the law. 4 R. 32. 4 W. 21. 7 C. 522. But see 8 W. 223. No one but the defendant can take advantage of a defect in the bond. 11 H. 189.

In a proceeding by attachment, under this section, where the justice entered a nonsuit because a copy had not been served on the defendant, the bond given by the plaintiff is binding on his sureties, even though the clause as to *failure in the action*, has been omitted in it. Such bond is not void against a surety merely because the penalty to a small extent exceeds double the amount of the plaintiff's claim. Nor is it necessary to pursue the principal in such bond, before having recourse to the sureties. 2 H. 413.

IV. SERVICE OF THE ATTACHMENT.

Every such attachment shall be made returnable not less than two, nor more than four days from the date thereof, and shall be served by the constable to whom the same shall be directed by attaching so much of the defendant's property not exempt by law from sale upon execution, as will be sufficient to pay the debt demanded, and by delivering to him a copy of the said attachment and an inventory of the property attached, if he can be found in the county, and if not so found, then by leaving a copy of the same at his place of residence, with some adult member of his family, or of the family where he shall reside; or if he be a non-resident of the county, and cannot be found, then by leaving a copy of said attachment and inventory with the person in whose possession the said property may be. Act 12 July 1842, § 28. Purd. 598.

An attachment under this act, unlike an attachment in execution, can only be levied on personal chattels, which can be taken into the manual custody of the constable, and not upon debts due the defendant, or rights in action. 8 C. 452. Goods attached are in the custody of the law, and cannot be distrained for rent. 4 W. & S. 344. Nor can they be taken in execution by process issued by another justice; a sale under such process would be void, and pass no title to the property. 1 Gr. 172. But where a tenant's goods are attached and removed from the premises by the constable, the landlord is entitled to his rent out of the proceeds of sale. 6 W. & S. 333.

The constable shall state specifically in his return the manner in which he shall have served such attachment, and it shall be his duty to take the property attached into his possession, unless the defendant, or some other person for him, shall enter into a bond, with sufficient surety, in the penalty of double the amount of the claim, conditioned that in the event of the plaintiff recovering judgment against him, he will pay the debt and costs, at the expiration of the stay of execution given by law to freeholders; or that he will surrender up the property attached to any officer having an execution against him on any such attachment. Act 12 July 1842, § 29. Purd. 598.

In a suit by attachment prosecuted against two persons, as joint debtors, the justice has no right to proceed and render judgment, where the return of the constable only shows a service of the attachment on one of the defendants, but is silent as to service on the other, and where the defect is not cured by an appearance. 2 N. Y. 110. In all cases where an attachment is issued by a justice, it is the duty of the constable to attach the goods of the defendant, make an inventory of the property seized, and serve a copy of the attachment and inventory on the defendant personally, if he can be found in the county. If he cannot be found in the county, the copy must be left at his last place of residence; or if he have no place of residence in the county, with the person in whose possession the goods are found: and the return of the officer must "state specifically whether such copy was or was not personally served upon the defendant." Ibid. 112.

V. PROCEEDINGS BEFORE THE JUSTICE.

If such attachment shall be returned personally served upon the defendant, at least two days before the return day thereof, the alderman or justice shall, on the return day, proceed to hear and determine the same, in the same manner as upon a summons returned personally served; but if the same shall not have been so served, the alderman or justice shall issue a summons against the defendant, returnable as summonses issued by justices of the peace are now by law returnable; and if the said summons shall be returned personally served, or by leaving a copy at the residence of the defendant, or that the defendant, after diligent inquiry, cannot be found in the county, then in either case the alderman or justice of the peace shall proceed to hear and determine the cause, in the same manner as upon a summons personally served. Act 12 July 1842, § 30. Purd. 598.

Any defendant, against whom a judgment shall have been rendered in any case where the attachment or summons shall not have been personally served, may, within thirty days after the rendition of the same, apply to the alderman or justice rendering the same for a hearing of the matter, and if he, or some other person

knowing the facts, shall, for him, make an affidavit, setting forth that he has a just defence to the whole or part of the plaintiff's demand, it shall be the duty of the alderman or justice to open the judgment, and give notice to the plaintiff of the time when he will hear the parties, which time shall not be less than four, nor more than eight days distant. On the said hearing, the justice shall proceed in the manner directed in the thirtieth section of this act. *Ibid.* § 31.

The privilege of a rehearing given by this section does not apply to actions originally commenced by summons. 1 Phila. R. 515.

A judgment obtained before any alderman or justice, in any suit commenced by attachment, when the defendant shall not be personally served with the attachment or summons, and shall not appear, shall be only presumptive evidence of indebtedness, in any *scire facias* that may be brought thereon, and may be disproved by the defendant; and no execution issued upon such judgment shall be levied upon any other property than such as was seized under the attachment, nor shall any defendant, in such case, be barred of any set-off which he may have against the plaintiff. Act 12 July 1842, § 32. *Purd.* 599.

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X
The defendant in a suit commenced by attachment, under this act, is entitled to the benefit of the \$300 exemption law, if the judgment be founded on a contract. 18 Leg. Int. 68.

This act shall not be construed to extend the jurisdiction of justices of the peace and aldermen to demands above one hundred dollars, and the same right which is given to the parties respectively, to appeal from the decision of an alderman or justice of the peace, by the act of the twentieth day of March, one thousand eight hundred and ten, relating to the proceedings of justices of the peace, is hereby given to the parties respectively, in proceedings upon summons or attachments issued by aldermen or justices of the peace, under this act. And all and singular the provisions of the said act, and its several supplements not hereby expressly repealed, and not inconsistent with the provisions of this act, are hereby declared to be in full force, and to apply to the provisions of this act, so far as the same relates to proceedings before aldermen or justices of the peace, and to the powers of the courts of record over the proceedings of justices of the peace. Act 12 July 1842, § 34. *Purd.* 599.

VI. OF THE LIEN OF THE ATTACHMENT.

No attachment hereafter issued by any alderman or justice of the peace of this commonwealth, in pursuance of the twenty-seventh section of the act, entitled "An act to abolish imprisonment for debt and to punish fraudulent debtors," approved the twelfth day of July, Anno Domini one thousand eight hundred and forty-two, shall remain and continue a lien on the property attached for a longer period than sixty days, from and after the time when the plaintiff might legally have had execution issued on said judgment; but the said property shall, after the expiration of the said time, be discharged from such attachment: *Provided*, that the said property shall remain liable to be seized and taken in execution as in other cases: *And provided further*, that whenever an appeal shall be entered and taken from the judgment of the justice, the lien on the property attached as aforesaid, shall remain for the period of sixty days after final judgment. Act 22 March 1850, § 1. *Purd.* 599.

If the defendant, in case of an appeal, desire to relieve his goods from the lien of the attachment, he must, in addition to the usual bail on appeal, also give a bond, under the 29th section of the act, for the forthcoming of the property attached, to answer any execution in the case, after final judgment; in default of which, the goods will still remain in the custody of the officer.

VII. FORM OF PLAINTIFF'S AFFIDAVIT.

COUNTY OF PERRY, ss.

On this twentieth day of May 1859, before me the subscriber, one of the justices of the peace in and for the county of Perry, personally appears A. B., and being duly sworn,

saith, that C. D. is justly indebted to him in the sum of fifty dollars, for goods sold and delivered by this deponent to the said C. D., over and above all discounts which the said C. D. may have against him. And that the said C. D. is about to remove his personal property, *viz.*, his household furniture, from this county, with intent to defraud his creditors.

A. B.

Sworn and subscribed before me, the day and year aforesaid,
J. R., Justice of the Peace.

The terms of the affidavit may be varied according to the circumstances of the case, by stating that the defendant has assigned and disposed of, or that he has secreted his property, with intent to defraud his creditors, or that he is about to do either of these acts, with the like fraudulent intent; but care must be taken not to state more than one cause for the attachment in the *alternative*, or the proceedings will be set aside on *certiorari*. If the defendant has been guilty of more than one of the acts mentioned, they should both be distinctly set forth in the conjunctive. 3 P. L. J. 307. 1 M. 75. 3 W. 144.

VIII. FORM OF PLAINTIFF'S BOND.

KNOW ALL MEN by these presents, that we, A. B., E. F., and G. H., all of the county of Perry, are held and firmly bound unto C. D., of the same county, in the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said C. D., his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we, and each of us, do bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the twentieth day of May, Anno Domini, one thousand eight hundred and fifty-nine. Whereas the said A. B. hath this day made application to J. R., Esquire, one of the justices of the peace in and for the county of Perry, for an attachment against the said C. D., to recover the sum of fifty dollars, alleged to be due and owing to the said A. B. by the said C. D. Now the condition of this obligation is such, that if the said A. B. shall fail to recover a judgment against the said C. D. of at least one-half the amount of his said claim, and the said A. B. shall pay to the said C. D., his executors, administrators or assigns, all damages that shall accrue for the wrongful taking of any property over and above an amount sufficient to satisfy the judgment and costs, in the said suit of attachment; or if the said A. B. shall fail in his action, and shall pay to the said C. D. his legal costs and all damages which he may sustain, by reason of said attachment, then this obligation to be void, otherwise to be and remain in full force and virtue.

Sealed and delivered in the presence of
J. R., Justice of the Peace.

A. B.	[SEAL.]
E. F.	[SEAL.]
G. H.	[SEAL.]

IX. FORM OF ATTACHMENT.

PERRY COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of E—— Township, or to the next Constable of the said County most convenient to the defendant, greeting:

WE COMMAND you that you attach C. D. by all and singular his goods and chattels, in whose hands or possession soever the same may be found within the said county of Perry, so that he be and appear on the twenty-fourth day of May, A. D. 1859, at ten o'clock in the forenoon, before J. R., one of our justices of the peace in and for the said county, to answer A. B. in a plea of debt or demand, arising from contract either express or implied, wherein the said plaintiff claims the sum of fifty dollars. Witness our said justice, who hath hereunto subscribed his name, and affixed his seal, the twentieth day of May, in the year of our Lord one thousand eight hundred and fifty-nine.

J. R., Justice of the Peace. [SEAL.]

The attachment must be served by the constable, by taking actual possession of the defendant's goods, unless a forthcoming bond be given, and by delivering to the defendant, or leaving at his residence with an adult member of his family, or if he be a non-resident and cannot be found, with the person in whose possession the property may be found, a copy of the attachment, and also an inventory of the goods attached; all which must be specifically stated in his return, or the proceedings will be liable to reversal on *certiorari*.

Return of the Constable.—By virtue of the within attachment, on the 20th day of May, 1859, I attached one sofa, one bureau, and twelve mahogany chairs, of the defendant, to whom I delivered a true copy of the said attachment, and an inventory of the goods attached. I also return, that the defendant has given bond (hereunto annexed) for the forthcoming of the said goods to answer any execution in this suit.

S. S., Constable.

X. FORTHCOMING BOND.

KNOW ALL MEN by these presents, that we, C. D. and Y. Z., are held and firmly bound unto A. B. in the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said A. B., his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we, and each of us, do bind ourselves, and each of us, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, dated the 20th day of May 1859. Whereas, S. S., constable of E—— township, in the county of Perry, by virtue of a writ of attachment issued by J. R., Esquire, one of the justices of the peace in and for the said county, at the suit of the said A. B. against the said C. D., for the sum of fifty dollars claimed by the said A. B., has attached one sofa, one bureau, and twelve mahogany chairs, of the said C. D. Now the condition of this obligation is such, that if in the event of the said A. B. recovering judgment against the said C. D. in the said attachment suit, he, the said C. D., shall pay the amount of the said judgment with interest and costs, at the expiration of the stay of execution given by law to freeholders, or if he shall surrender up the said property attached, to any officer having an execution against him on such attachment, then this obligation to be void, or else to be and remain in full force and virtue.

Sealed and delivered in the presence of
S. S., Constable.

C. D. [SEAL]
Y. Z. [SEAL]

One surety is sufficient to this bond. If the attachment be not served *personally* on the defendant, the magistrate is required to issue a summons against him, in the usual form; and if the summons also be returned without having been personally served, although the justice may proceed to give judgment, and issue execution against the *goods attached*; yet, if the defendant, in such case, apply for a rehearing, within thirty days, and an affidavit be made that he has a just defence to the whole or part of the claim, it is the *duty* of the justice to open the judgment, and give notice to the plaintiff of the time when he will hear the parties, not less than four, nor more than eight days distant.

XI. AFFIDAVIT TO OPEN JUDGMENT.

A. B. }
vs. } Before Justice J. R.
C. D. }

C. D., the above-named defendant, being duly sworn, saith that he has a just defence to the whole of the plaintiff's claim in this case.

C. D.

Sworn and subscribed before me, this 10th day of June, A. D. 1859.

J. R., Justice of the Peace.

XII. NOTICE OF REHEARING.

A. B. }
vs. } Before Justice J. R.
C. D. }

C. D., the above-named defendant, having appeared before me this tenth day of June, A. D. 1859, and made oath that he has a just defence to the whole of the plaintiff's claim, I have opened the judgment rendered against him, according to the provisions of the Act of Assembly in such case made and provided, and have appointed the 15th day of June 1859, at ten o'clock in the forenoon, to hear the said parties, at which time you are hereby required to appear before me, and make proof of your claim against the said defendant. Witness my hand and seal, this 10th day of June, A. D. 1859.

J. R., Justice of the Peace. [SEAL]

To A. B., Plaintiff above named.

XIII. FORM OF DOCKET ENTRY.

ADAM BROWN	
VS.	
CHARLES DAVIS.	
COSTS.	
Justice	
Plaintiff's oath	30
Attachment	40
Seizing action	35
Ret. and oath of const.	15
Summons	20
Ret. and oath of const.	15
Oath	10
Designating plif.'s claim and	
returning judg't.	25
Seizure	25
Defendant's oath	10
Opening judgment	20
Supersedeas	25
Return of execution	15
Bail	15
Two oaths	50
Total and judgment	25
Justifying bail (1 oath)	10
Seizing bail	25
Seizing and paying over	75
Satisfaction	10
Constable	
Serving attachment	35
Shiago	12
Serving summons	35
Shiago	12
Serving execution	80
Shiago	12
Serving notice	25
Shiago	12
	\$6.63

CIVIL SUIT.—May 20th 1869, plaintiff appears and makes affidavit that the defendant is justly indebted to him in the sum of \$50, for goods sold and delivered, over and above all discounts, &c., and that the defendant is about to remove his personal property from the county, with intent to defraud his creditors. Same day, bond filed and attachment issued, returnable the 24th inst., at 10 A. M. S. S., constable, returned on oath, "Attached defendant's goods, and served copy and inventory on J. K., the person in whose possession the same were found, defendant being a non-resident and not found within the county." May 24th 1869, summons issued, returnable the 29th inst., at 10 A. M. S. S., constable, returned on oath, "Defendant, after diligent inquiry, cannot be found in the county." May 29th 1869, plaintiff appears and claims \$50 for goods sold and delivered to defendant. Defendant does not appear. T. S. sworn for plaintiff. After hearing, judgment publicly for plaintiff, for \$50 and costs. Same day, execution issued. S. S., constable. June 10th 1869, defendant appears and makes oath that he has a just defence to the whole of plaintiff's claim. Judgment opened and execution superseded, and notice issued to plaintiff to appear on the 15th inst., at 10 A. M. S. S., constable, returned on oath, "Served on plaintiff personally." June 15th 1869, parties appear. T. S. sworn for plaintiff. R. M. sworn for defendant. After hearing, judgment publicly for plaintiff, for \$50 and costs. Same day, defendant enters bail for stay of execution. Bail justified. I am held in \$100, conditioned for the payment of this judgment, in the event that the defendant fail to pay the same at the expiration of six months from the rendition thereof.

(Signed) S. E.

Dec. 10th 1869, money paid into office by defendant.

Received satisfaction.

(Signed) ADAM BROWN.

Attachment in Execution.

- I. Acts regulating attachments in execution.
- II. What may be attached in execution.
- III. Proceedings on attachments in execution.
- IV. Attachment to levy debts.
- V. Affidavit to levy stock.
- VI. Recognisance.
- VII. Interrogatories to garnishee.
- VIII. Rule on garnishee to answer.
- IX. Answers of garnishee.
- X. Execution against garnishee.
- XI. Docket entry.

I. ACT OF 16 JUNE 1836. Purd. 434.

SECT. 32. The proceedings to levy an execution upon stock, debts and deposits of money belonging or due to the defendant, shall be as follows, to wit:

In the case of stock, if it shall be held in another name (a) than that of the real owner thereof, the plaintiff shall file in the office of the prothonotary of the court [or justice], an affidavit, stating that he verily believes such stock to be really the property of the defendant, and shall enter into a recognisance with two sufficient sureties, conditioned for the payment of such damages, as the court [or justice] may adjudge to the party to whom such stock shall really belong, in case such stock should not be the property of the defendant. (b)

(a) Where the defendant holds stock in his own name the proceedings may be under the act 29 March 1819, § 2 (Purd. 436), which provides that such stock shall be liable to be taken in execution and sold, in the same manner as other goods and chattels, subject to any debt due by the defendant to the com-

pany. 4 H. 295. Or the plaintiff may proceed by attachment, under this act. 14 Wr. 314. 4 Phila. 29.

(b) The third section of the act of 29 March 1819, which has been partially supplied by the acts in the text, but which may be useful in construing the laws now in force, provided

SECT. 33. Upon the filing of such an affidavit and recognisance, it shall be lawful for the prothonotary [or justice] to issue process, in the nature of an attachment, against such stock, with a clause of summons to the person in whose name the same may be held, in the nature of a writ of *scire facias* against garnishees in a foreign attachment, and thereupon the plaintiff may proceed to judgment, execution and sale of the said stock, in the manner allowed in cases of foreign attachment against personal estate.

SECT. 34. The like proceedings may be had against stock owned by a defendant, and held in his own name, without the affidavit and recognisance aforesaid; and if any person shall claim to be the owner of such stock, he may, upon filing an affidavit that the stock is really his property, and entering into a recognisance with two sufficient sureties, conditioned for the payment of such damages as the court [or justice] may adjudge to the plaintiff, if such stock should really belong to the defendant; the court [or justice] shall admit him to become a party upon the record, and take defence, in like manner as if he was made garnishee in the writ.

SECT. 35. In the case of a debt due to the defendant, or of a deposit of money made by him, or of goods or chattels pawned, pledged or demised as aforesaid, the same may be attached and levied in satisfaction of the judgment in the manner allowed in the case of a foreign attachment, but in such case, a clause in the nature of a *scire facias* against a garnishee in a foreign attachment, shall be inserted in such writ of attachment, requiring such debtor, depository, bailee, pawnee, or person holding the demise as aforesaid, to appear at the next term of the court, or at such other time as the court [or justice] from which such process may issue shall appoint, and show cause why such judgment shall not be levied of the effects of the defendant in his hands.

SECT. 36. It shall be the duty of the officer charged with the execution of such writ, to serve a copy thereof upon the defendant in such judgment, (a) and upon every person and corporation within his proper county named in the said writ of attachment, in the manner provided for the service of a writ of summons in a personal action.

SECT. 37. From and after the service of such writ, all stock belonging to the defendant in the corporation upon which service shall be so made, and all debts and deposits of money, and all other effects belonging or due to defendant by the person or corporation upon which service shall be made, shall remain attached in

as follows: "Whereas, it sometimes happens that the stock of such bodies corporate is held in another name or names, than those of the real owner or owners thereof, and it is just that stock so held should be made liable for the debt of the real owner or owners; therefore,—Whenever any plaintiff or creditor shall file an affidavit with the prothonotary of the court, alderman or magistrate, in which or before whom such plaintiff or creditor has instituted, or is about to institute a suit, stating that he verily believes such stock to be really and *bonâ fide* the property of the debtor against whom such suit has been, or is about to be brought, and also shall enter into a recognisance with two sufficient sureties conditioned for the payment of such damages, as such court, alderman or magistrate, may adjudge to the party or parties to whom such stock shall really belong, in case such stock should not be the property of such debtor; it shall and may be lawful for such court, alderman or magistrate, to cause to be issued process in the nature of a foreign attachment against such stock, and to summon as garnishee the person or persons in whose name or names the same shall be held, and proceed against the said stock and such garnishee, in all respects in the same manner as by the

laws of this commonwealth proceedings now are or hereafter may be prescribed in cases of foreign attachments against personal estate; and upon judgment being had in favor of the plaintiff in any such suit, execution may issue immediately for the sale of such stock in the same manner that goods and chattels are sold on writs of *feri facias*: *Provided*, that in case of a judgment before a justice of the peace or alderman, where the amount in controversy shall exceed five dollars and thirty-three cents, an appeal shall be allowed to the court of common pleas, agreeably to the same rules and regulations now or hereafter to be prescribed for granting appeals in other cases cognisable before a justice of the peace." Purd. 436. It will be perceived that this act enables a creditor to attach stock held in the name of another person than the real owner, not only where he has obtained a judgment, but also by original process of attachment, where he is about to institute a suit against the defendant, on making the affidavit, and giving the security therein provided.

(a) By the subsequent act of 20 March 1845 (Purd. 436), service on the defendant is dispensed with where he resides out of the county, or service cannot be effected on him by the officer within his bailiwick.

the hands of such corporation or person, in the manner heretofore practised and allowed in the case of foreign attachment.

SECT. 38. If judgment shall be given for the plaintiff in such attachment, it shall be lawful for him to have execution thereof as follows, to wit:

If the property attached be stock in a corporation as aforesaid, the execution shall be by a writ of *fiери facias*, [the common execution issued by justices,] against the original defendant, by virtue of which such stock, or so much thereof as shall be necessary to satisfy the judgment and costs, may be sold by the sheriff [or constable], as in other cases.

If the property attached be a deposit in money or a debt due as aforesaid, execution shall be had in the manner allowed in the case of effects in the hands of a garnishee in a foreign attachment. (a)

ACT 13 APRIL 1848. Purd. 435.

SECT. 10. All legacies given [and lands devised] to any person or persons, and any interest which any person or persons may have in [real or] personal estate of any decedent by will or otherwise, which are subject to foreign attachment by the act of twenty-seventh of July, one thousand eight hundred and forty-two, entitled "An act to enable creditors to attach legacies and property in the hands of executors and administrators, and for other purposes," (b) shall be subject to be attached and levied upon, in satisfaction of any judgment, in the same manner as debts due are made subject to execution by the thirty-second section of the act of sixteenth June, eighteen hundred and thirty-six, entitled "An act relating to executions;" *Provided*, That the plaintiff in said judgment shall tender to the garnishee or garnishees, if he or they be executors or administrators, a bond with sufficient security, as is provided by the second section of the said act of twenty-seventh of July, eighteen hundred and forty-two: (c) and the same rights in all respects which the debtor may have, and no greater in any respect whatever, are hereby placed within the power of the attaching creditor. [See Act of 10th April 1849.]

ACT 20 MARCH 1845. Purd. 436.

SECT. 4. So much of the act of assembly passed 16th day of June 1836, entitled "An act relating to executions," as provides for the levy and recovery of stock, deposits, and debts due to defendants by process of attachment and *scire facias*, is hereby extended to all cases of attachments to be issued upon judgments against corporations (other than municipal corporations), (d) and from and after the passage of this act all such process which hereafter may be issued, may be proceeded unto final judgment and execution, in the same manner and under the same rules and regulations as are directed against corporations by the provisions of the act of 16th June 1836, relating to executions; (e) and so much of the 36th section of the

(a) The 59th and 60th sections of the act of 13 June 1836 (Purd. 436), provide that in case of foreign attachment, "after a verdict for the plaintiff in any *scire facias*, as aforesaid, it shall be lawful for him to have execution of his judgment in the attachment, to be levied of the goods and effects so found in the hands or possession of the garnishee, or of so much of them as shall be sufficient to satisfy his demand, with legal costs of suit and charges, as aforesaid. The plaintiff may also at the same time have execution against the garnishee upon the judgment obtained against him on a *scire facias*, as in the case of a judgment against him for his proper debt to be executed if the garnishee shall neglect or refuse, upon the lawful demand of the proper officers, to produce and deliver the goods and effects of the defendant, as aforesaid, or to pay the debt or duty attached, if the same shall be due and payable."

(b) Purd. 492. This act contains a *proviso*, that its provisions "shall not extend to legacies and distributive shares of married

women," which are likewise protected by the act of 11 April 1848. Purd. 699.

(c) Purd. 492. This act provides that a bond shall be given with sufficient security, to be approved by the court, in double the amount to be received from such garnishee, with like conditions as are prescribed in the 41st section of the act of 24 February 1834 (Purd. 302), to wit: that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the rateable part of such debt or demand, and of the costs and charges attending the recovery of the same."

(d) See 8 Pittsburgh Leg. J. 92.

(e) The 72d section of this act (Purd. 199) directs that "all executions which shall be issued, from any court of record, against any corporation not being a county, township or other public corporate body, shall command the sheriff or other officer, to levy the sum recovered, together with the costs of suit, of the goods and chattels, lands and tenements

act of 16th June 1836, as requires service of the attachment on any defendant, be and the same is hereby repealed, except where the defendant is a resident of the county in which the attachment issued.

ACT 15 APRIL 1845. Purd. 603.

SECT. 1. The jurisdiction of aldermen and justices of the peace is hereby extended to the issuing, service, trial, judgment and execution of all process required by the 32d, 33d, 34th, 35th, 36th, 37th and 38th sections of the act relating to executions, passed the 16th day of June 1836.

SECT. 2. Any alderman or justice of the peace, before whom any judgment remains unsatisfied, and an execution has been returned, "no goods," may, on the application of the plaintiff, and his compliance with the requisitions of the act to which this is a supplement, issue an attachment, in the nature of an execution, as therein provided, to levy upon stock, debts and deposits of money belonging or due to the defendant, in satisfaction of such judgment.

SECT. 3. The said writ of attachment may be issued, returnable not less than four, nor more than eight days, and shall be served, in the manner pointed out for the service of a summons, upon the debtor, depository, bailee, pawnee, or other person having property of the defendant in his hands, made liable to attachment by the act to which this is a supplement; and on or before the return day of said writ, the plaintiff may file with the magistrate interrogatories in writing, addressed to the person summoned as garnishee, in regard to the property and effects of the defendant alleged to be in his hands at the time of the service of said writ; a copy of the same, with a rule to answer, shall be served upon said garnishee *personally*, to answer, under oath or affirmation, all such interrogatories as the magistrate shall deem proper and pertinent, within eight days after the same shall be served.

SECT. 4. If such garnishee shall neglect or refuse to answer said interrogatories within eight days, (unless for cause shown, the time has been extended,) he shall be adjudged to have in his possession property of the defendant equal in value to the demand of the said plaintiff; and judgment may be rendered by default against said garnishee for the amount of the same, with costs.

SECT. 5. If the said garnishee, in his answers, admit that there is in his possession or control, property of the defendant liable under said act to attachment, then said magistrate may enter judgment specially, to be levied out of the effects in the hands of the garnishee, or so much of the same as may be necessary to pay the debt and costs: *Provided however*, That the wages of any laborer, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer. (a)

SECT. 6. The plaintiff, the defendant or the garnishee in the attachment, may appeal from the judgment of the alderman or justice of the peace, to the next term of the court of common pleas, on complying with the provisions of the laws regulating appeals in other cases: *Provided*, That the fees allowed to justices and aldermen, and constables, under this act shall be the same as allowed by the general fee-bill for similar services in other cases.

ACT 10 APRIL 1849. Purd. 436.

SECT. 11. The 10th section of the act of 13th April, Anno Domini 1843, entitled "An act to convey certain real estate, and for other purposes," (providing that all legacies given, and lands devised to any person or persons, and any interest which any person or persons may have in the real or personal estate of any decedent by will or otherwise, which are subject to foreign attachment by the act of the 27th of July, Anno Domini 1842, entitled "An act to enable creditors to attach legacies and property in the hands of executors and administrators, and for other

of such corporation." It is confined by its terms to executions issued from a court of record; an execution issued by a justice in an attachment in execution upon a judgment against a corporation should be in the usual form, and command the constable to levy the sum recovered of the goods and chattels, moneys, rights and credits of the corporation attached, in the hands of the garnishee, &c.

Under the act of 1845, the funds of an insolvent canal company may be attached in the hands of their banker; and it is no defence that the banker is also a creditor of the corporation. 12 C. 214.

(a) A waiver of the benefit of this provision in a promissory note, is void, and confers no jurisdiction on a justice. 13 Wr. 387.

purposes," shall be subject to be attached and levied upon in satisfaction of any judgment, in the same manner as debts due are made subject to execution by the 22d section of the act of 16th of June, Anno Domini 1836, entitled "An act relative to executions,") shall be deemed to authorize the issuing and service of process in the nature of attachment, at any time after the interest which any person or persons may have in the real or personal estate of any decedent, shall have accrued by reason of the death of such decedent: *Provided*, That a sale of the aforesaid interest of the defendant in the proceeding by attachment, authorized by the aforesaid 10th section of [the act of] 13th of April, Anno Domini 1843, shall not be compelled by any process of execution, until a year shall have elapsed from the time when the interest aforesaid vested in the defendant, unless the executors or administrators of the decedent shall have sooner filed their account. In all cases when executors, administrators or trustees of the estates of decedents shall have been made garnishees in the process in the nature of attachment authorized by the 10th section of the act of 13th of April, Anno Domini 1843, entitled "An act to convey certain real estate, and for other purposes," they shall be entitled to their costs, as well as the expenses necessarily incurred by them in attending to the proceeding in which they may have been garnishees.

II. WHAT MAY BE ATTACHED IN EXECUTION.

Whenever a party has a right of action, his creditors may attach it, unless it be for wages. 12 C. 28. Debts in suit, and unsatisfied judgments, may be attached. 2 D. 277. 2 M. 130. 1 Barr 380. Although the judgment were recovered in another state. 7 C. 114. So may debts due *in presenti*, but payable *in futuro*. 2 D. 212. 5 H. 440. 6 H. 388. 1 T. & H. Pr. 940. A debt payable in city bonds. 5 Wr. 229. A note deposited in pawn. 2 Barr 39. An overdue note in the hands of the maker. 1 T. & H. Pr. 941. And a note not matured. Ibid. 940. 6 H. 388. But such attachment will not avail against an indorsee without notice. 5 C. 186. So also, the proceeds of a fund in the hands of trustees may be attached. 12 C. 28. The proceeds of property in the hands of an assignee under a void assignment. 5 W. & S. 103. 5 Barr 39. 1 H. 307. 10 C. 152. A loss incurred on a policy of insurance; 7 W. & S. 76; 8 Ibid. 350; although the amount be unliquidated; 9 Wr. 129; 4 Phila. 286; 3 P. L. J. 299; and the moiety of the cost of a party-wall; have all been held liable to attachment. 9 Barr 501. So a debt due to a non-resident may be attached, if the debtor be within reach of our process. 6 C. 520.

Money in the hands of an attorney at law may be attached for the debt of the client. 2 Barr 346. 1 H. 307. Serg. Attach. 98. And money in the hands of the debtor's banker. 12 C. 214. But money levied by a sheriff or constable upon an execution cannot be attached. 2 W. & S. 400. 1 H. 307. 2 P. L. J. 199. 3 P. L. J. 62. 1 Leg. Gaz. 53. Nor money in the hands of a prothonotary. 1 D. 354. Or of a justice of the peace. 4 W. & S. 342. Nor money in the hands of a debtor of a decedent. 2 D. 73. 6 P. L. J. 192. 2 Phila. 101. Nor the surplus in the hands of a constable, after a sale under a distress for rent. *Comfort v. Taylor*, Common Pleas, Phila. March T. 1848. But where the defendant in an execution requested the sheriff, in making sale of his personal property, to sell the exempted articles for his (the defendant's) benefit, which was done; the court held, that the proceeds were liable to attachment in the hands of the sheriff. 4 P. L. J. 239. So also, if the defendant himself sell the property exempt from execution, the money is liable to attachment in the hands of the purchaser; and so are the damages recovered by him in an action of trespass for taking it in execution, for such recovery transfers the right of property and has the effect of a sale. 11 H. 489. But money awarded to a defendant, out of the proceeds of his real estate, under the exemption law, and paid over to his attorney by the sheriff, is not liable to be attached in the hands of the attorney. 7 C. 329.

The fees due a juror cannot be attached. 4 P. L. J. 226. 12 Wr. 270. Nor the salary of a public officer. 2 M. 330. Nor money held by the treasurer of a board of school directors. 3 Barr 368. Or by a supervisor of a state canal or railroad. 8 P. L. J. 201. 4 How. 20. Nor the commissions of an executor, in his own hands or those of his co-executor. 11 Wr. 94. Nor can a bequest to a

wife be attached for the debt of the husband. 2 W. 90. 1 Wh. 179. Or damages recovered in the joint names of husband and wife, for an injury to the person of the wife, during coverture. 4 P. L. J. 406. Nor can a municipal corporation be made garnishee. 5 C. 173. 1 T. & H. Pr. 950. Or a foreign corporation. 3 T. & H. Pr. 831. Unless located in this state. 7 C. 114. Nor can an attachment against a railroad company be levied on money in the hands of its ticket agents, arising from the sale by them of tickets to passengers. 11 C. 22.

A certificate of stock in a bank in another state, sent to an individual here with authority to sell it, is not subject to attachment, under the laws of this state. 1 H. 223. The capital stock of a bank owned by itself, and in its own possession, whether acquired by purchase or otherwise, is not subject to an attachment in execution, for a debt due by the bank. 10 W. 230.

An attaching creditor stands in the shoes of the debtor; and any equities that could be set up against the latter, are equally available against the former. 10 C. 299. 6 H. 96. Thus, where a note has been assigned and transferred *bona fide* in payment of a debt, before the service of an attachment, the assignee is entitled to the money, and not the attaching creditor. 1 Barr 263. And after a *bona fide* assignment of a judgment, it is not liable to be attached for the debt of the assignor. *Bavington v. Alcock*, District Court, Phila. Dec. T. 1848. A draft upon a particular fund in the hands of an attorney for collection, is an equitable assignment of it; and although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer. 8 W. & S. 9. But where a check on a bank was not presented until several days after its date, and in the mean time, an attachment in execution was laid upon the funds of the drawer, in the bank, it was *held*, that the latter was entitled to preference, and that the holder of the check must be postponed. 2 M. 327. So, where the defendants drew bills on their factor for a larger amount than the balance in his hands, and the latter declined to accept, unless he were placed in funds, which was not done by the defendants, and an attachment was subsequently levied on the balance in the hands of the factor; it was *held*, that the attaching creditor was entitled to the fund to the exclusion of the holder of the bills. 2 P. L. J. 363.

If the garnishee receive money of the debtor, after the service of the writ, it is bound by the attachment. 8 H. 412. 8 W. 420. 14 Wr. 216.

An attachment in execution cannot be issued on a judgment against a municipal corporation. 4 Barr 490. 3 Pitts. Leg. J. 92. *Purd.* 436.

A partnership debt may be attached in the hands of the garnishee, for the private debt of one of the partners; and the garnishee will be compelled to pay over to the separate creditor the proportion of the indebted partner. 2 D. 277. 2 Y. 190. 5 Wh. 125.

Under the acts of 1843 and 1849, the interest of any legatee or devisee in the estate of a decedent may be attached in the hands of the executors or administrators. 3 H. 103. 7 W. & S. 376. 2 Wr. 93. 7 *Ibid.* 89. Or in the hands of a testamentary trustee. 12 C. 28. 10 Wr. 485. Or of a purchaser of the real estate, under a sale made by the administrator, he having filed an account prior to the sale showing a balance in favor of the estate. 1 J. 361. 3 H. 103. Such attachment may be laid on the fund, in whose hands or possession soever the same may be; as the executor's agent who has received the defendant's share of the proceeds of real estate. 6 H. 414. The attachment of a legacy in the hands of an executor, transfers the right to receive it to the attaching creditor, subject to the rights of the garnishee; if the legatee be indebted to the estate of the testator to an amount exceeding the legacy given to him, the executor has the same right to set off such indebtedness against the attaching creditor, as he would have had against the legatee. 11 C. 333. But the administrator cannot set off a judgment held in his own right against the legatee. 2 Wr. 93.

The proviso to the 5th section of the act of 15th April 1845, exempting wages from attachment, is a general provision applicable to all judgments, whether entered in the common pleas, or on the docket of a justice. 5 C. 264. This proviso is intended to protect and secure to the laborer what is earned by his own hands, not the contracts of those who make profit out of the labor of others. 5 Barr 117. But the wages of a miner, who, by his own labor, mines coal at a certain price per ton, and employs a common laborer to assist him at so much per day, are not attachable.

9 C. 241. And where, by agreement, the wages of a laborer are to be credited as part payment on a parol contract for the sale of land, which is subsequently repudiated by the vendor, they still remain the wages of labor, and as such are not liable to be attached. 12 C. 342. But if a master carpenter is to receive from his employer, for the labor of his hands, more than the wages paid by him to them, such profits are attachable in the hands of the employer. 13 Wr. 147.

III. PROCEEDINGS ON ATTACHMENT IN EXECUTION.

An attachment in execution may issue on a judgment recovered prior to the act of 1836. 7 Barr 482. Or on a judgment recovered more than five years before, without a *scire facias*: in the attachment, the defendant has a day in court, in which he can take any defence he could have made on a *scire facias*. 4 Barr 232. 5 Barr 115. 7 W. & S. 44. It is rightly instituted in the county where the garnishee resides. 7 W. & S. 432.

In a writ of attachment in execution, it is not necessary to state the kind or nature of the property to be attached: it is sufficient, if the writ command the sheriff (or constable) to attach "the goods and chattels, rights, credits and moneys," of the defendant, in the hands of the garnishee. 6 Wh. 181. The debtor himself must be made the garnishee, not merely the person who holds the evidence of the debt. 1 C. 362. Nor one who has merely a lien on the property. 3 Phila. 219. Several garnishees may be joined in one writ. Ibid. 35. And a fraudulent grantee of chattels may be made garnishee. 2 Gr. 819.

An attachment, under the act of 1836, is process to enforce the judgment, and it is, in substance, if not in form, an execution: it differs from a *fiery facias*, essentially, only in this, that it reaches effects from which the debt could not otherwise be levied. It cannot issue on an award of arbitrators, till the twenty days allowed for an appeal have expired. 1 H. 394. The defendant may claim the benefit of the exemption law, as against such writ. 2 Wr. 190. 3 Gr. 319. 8 Wr. 206. 2 P. F. Sm. 423. It is not exclusively a proceeding *in rem*, but is also a proceeding personally against the garnishee. 5 C. 396.

The answers of the garnishee need not be sworn to before the justice who issued the attachment; they may be sworn to before any other magistrate. *Minhinnick v. Long*, Com. Pleas, Phila. Dec. T. 1847. A garnishee in an attachment in execution is not necessarily obliged to annex to his answers copies of the correspondence between him and the defendant; and, in general, the court will relieve him from so doing. 4 P. L. J. 87. Garnishees admitted in their answers, that they held property of the defendant more than sufficient to pay a debt which defendant owed them, *if certain commercial adventures turned out well*: held, that plaintiff was not entitled to judgment. 4 P. L. J. 112.

The plaintiff is only required, on the trial, to prove such a case, as would have entitled the defendant to recover, in a suit by him against the garnishee. 4 Wr. 248.

A garnishee may set off a cross-demand against the defendant in the execution; but the set-off must have been acquired before the service of the attachment, and the burden of proving that his right of set-off was acquired before the attachment was laid, rests on the garnishee: there is no presumption existing in the case. 1 H. 552. See 10 C. 299. 12 C. 214. 1 Wr. 491. 2 Wr. 217. Where a debt is attached after it has been assigned, the garnishees may give notice of the attachment to the assignee, who must then come in and defend for his interest, or be forever barred. *Willock v. Neel*, Dist. Court, Allegheny, Dec. 1850. Where a judgment debt has been attached, the court will stay proceedings until the determination of the attachment suit. *Paxson v. Sanderson*, 1 T. & H. Pr. 953. 1 Phila. 177.

If the garnishee in an attachment in execution make default, by not appearing after due service of the writ, judgment ought not to be given against him, to be levied of his goods and chattels, &c. The judgment ought to be, that the plaintiff have execution of so much of the debts, &c., due by the garnishee to the defendant, and attached in his hands, as may satisfy the judgment of the plaintiff, with interest and costs; and if the garnishee refuse or neglect, on demand by the sheriff [or constable], to pay the same, then the same to be levied of his, the garnishee's goods

and chattels, according to law, as in the case of a judgment against him for his own proper debt; and that the garnishee be thereupon discharged, as against the defendant, of the sum so attached and levied, &c. 6 Wh. 181. See 2 Wr. 93. 5 *Ibid*. 229. A judgment for the garnishee in an attachment in execution, *on his answer*, is improper; the court [or justice] can do no more than refuse judgment for the plaintiff. 7 Barr 231.

The garnishee is not liable to the plaintiff for costs, beyond the amount attached in his hands, unless it be proved that there are effects of the defendant in his hands to a larger amount than he admits in his answer; but if more is proved, then the costs must be paid by the garnishee. 2 D. 113. 5 S. & R. 446. Brightly on Costs 191. By the provisions of the act of 1705, 1 Sm. 46, relating to foreign attachments, the garnishee was to be allowed, out of the effects attached, a reasonable satisfaction for his attendance, which was held to extend to and include not only the expenses of his attendance, but also a reasonable sum for fees paid to counsel, for preparing his answers, and attending to his interests in the suit. 13 S. & R. 226. 2 M. 75. But this section of the act of 1705 having been supplied by the act of 16 June 1836 (Purd. 491), which contains no such provision, this allowance is no longer to be made (9 Barr 468), except where executors, administrators or trustees of the estates of decedents, are made garnishees, who, by act of 10 April 1849 (Purd. 436), are to be allowed their costs and expenses necessarily incurred by them in attending to the proceeding in which they may have been garnishees.

A garnishee in an attachment in execution, who, to interrogatories of the plaintiff, files his answers, is entitled to recover his costs, where the plaintiff, not content with his answers, suffers a nonsuit, after compelling him to plead and prepare for trial. 1 Barr 213. In an attachment in execution, several garnishees were summoned, and separate issues taken by each, and determined some in favor of the garnishees, and others in favor of the attaching creditor: *held*, that the issue against each garnishee was in the nature of a separate suit, and that the garnishees were entitled to recover full costs on the issues determined in their favor. *Magruder v. Adams*, 1 T. & H. Pr. 737.

Where the answer of the garnishee, in an attachment in execution, shows that he holds goods of the defendant which have been pawned, pledged or demised to him, the court, construing the whole act relating to executions together, will award that, upon the judgment, a *feri facias* should issue, under the provisions of the 23d section, ordering the goods to be sold subject to the rights of the pawnee, who, upon payment of his claim, would be compelled to yield possession to the sheriff's vendee. *Lamb v. Vanseiver*, 1 T. & H. Pr. 972. But see 2 Gr. 319. 3 Phila. R. 219. Execution against the stock of a corporation held by a defendant in his own name, may be either by a writ of *feri facias*, under the act of 29 March 1819 (Purd. 436, pl. 38); 4 H. 295; or by attachment under the act of 1836. 14 Wr. 314. 4 Phila. 29.

The legal effect of an attachment laid upon a debt is, to restrain the garnishee from paying over the money either to his individual creditor or to the attaching creditor, until the attachment is disposed of, and then only according to the result of that proceeding. 8 Barr 109. Assignment of a debt, either actual or by operation of law, as by an attachment in execution, carries with it the right to use all securities for its recovery. 4 Barr 248.

The pendency of an attachment is no bar to an action against the garnishee, at the suit of the legal holder of the debt attached; it neither abates nor bars an action; pleading it has only the effect of giving notice of the claim, and enabling the court [or justice] to mould the judgment so as to protect the parties' rights. 1 P. F. Sm. 357.

A verdict and judgment against the garnishee in an attachment execution is not conclusive in a subsequent action by the trustees in insolvency of the defendant in the execution, against the garnishee. 11 C. 308. And a judgment in favor of the garnishee is no bar to a subsequent attachment at the suit of another creditor. 5 C. 396. 1 P. F. Sm. 387. 4 Phila. 276. A plaintiff may issue a second attachment, whilst a former one is pending and undetermined. 4 Wr. 309.

IV. ATTACHMENT TO LEVY DEBTS.

COUNTY OF POTTER, ss.

The Commonwealth of Pennsylvania,

To the constable of E—— township, or to the next constable of the said county, most convenient to the defendant, greeting:

WE COMMAND you that you attach C. D., by all and singular his goods and chattels, rights, moneys and credits, in whose hands or possession soever the same may be, so that he be and appear before J. R., Esquire, one of our justices of the peace in and for the said county, on the 28th day of June, A. D. 1860, at four o'clock in the afternoon, to answer A. B. And also, that you make known to E. F., that he be and appear before our said justice, on and at the same day and hour, to show if anything they, or either of them, have, or has, or know, to say why a certain judgment recovered before our said justice, on the first day of May, A. D. 1860, against the said C. D., by the said A. B., for the sum of twenty dollars, besides costs of suit, which judgment remains unsatisfied, shall not be levied of the effects of the said C. D. in the hands of the said E. F.; and have you then there this writ. Witness our said justice, who hath hereunto set his hand and seal, this twentieth day of June, A. D. 1848. J. R., Justice of the Peace. [SEAL.]

This attachment must be served on the garnishee in the same manner as a summons, and should also be served on the defendant, if he can be found within the county.

Return of the Constable.—Served on the within-named C. D. and E. F., respectively, on the 21st day of June 1860, by leaving a copy of the said attachment at their respective dwelling-houses, in the presence of one of their families respectively.

S. S., Constable.

In the case of attachment of stock, if held in another name than that of the real owner, the plaintiff shall (before suing out the above writ) file in the office of the magistrate an affidavit, and enter into recognisance in the following form, viz.:

V. AFFIDAVIT.

E. F. }
vs. } Debt not exceeding \$100.
A. B. }

LYCOMING COUNTY, ss.

BEFORE ME, one of the justices of the peace in and for the county of Lycoming, personally appeared E. F., the plaintiff above named, who, being duly sworn according to law, deposeth and saith that there are ten shares of stock of the Lehigh Bank, held in the name of R. S., of the city of Pittsburgh, but which said shares the said deponent verily believes are really the property of the above-named A. B. And further saith not.

E. F.

Sworn and subscribed before me, this 10th day of May, A. D. 1860.

L. M., Justice of the Peace.

VI. RECOGNISANCE.

E. F. }
vs. } Debt not exceeding \$100.
A. B. }

LYCOMING COUNTY, ss.

WE, E. F., the plaintiff above named, G. H. and J. K., all of the borough of E——, in the county aforesaid, do acknowledge ourselves to owe and be indebted to A. B., of N——, in the sum of fifty dollars, to be levied of our goods and chattels, lands and tenements, respectively, to the use of the said A. B., his executors, administrators or assigns. The condition of this recognisance is such, that whereas the said E. F. is about to sue out a writ of attachment in the nature of an execution against the said A. B., and to attach certain Lehigh Bank stock held in the name of R. S., of Pittsburgh, in satisfaction of a judgment recovered against the said A. B. before L. M., one of the justices of the peace in and for said county, for ten dollars, with costs. Now, if the said E. F. shall and do well and truly pay and satisfy the said R. S., or other person to whom said stock really belongs, for all such damages as he or they shall be adjudged to have sustained by reason of the said attachment, or proceeding therein, in case said stock shall not be the property of the defendant, then this recognisance to be void, otherwise to be and remain in full force and virtue.

Taken and acknowledged before me, this 10th day of May, A. D. 1860.

L. M., Justice of the Peace.

Where stock is attached which belongs to another person than the defendant, the owner may be admitted to become a party to the suit, and take defence in like manner as if he had been summoned as garnishee, upon his filing an affidavit that the stock is really his property, and entering into a recognisance with two sureties, conditioned for the payment of such damages as may be adjudged the plaintiff, if the stock should really belong to the defendant. The above form of affidavit and recognisance can be readily altered to meet such a case.

VII. INTERROGATORIES TO GARNISHEE.

A. B. } Before Justice J. R.
 vs. } Attachment in Execution.
 E. F., Garnishee of C. D. } Interrogatories to be answered by garnishee, filed June 20th 1860.

First. Do you know C. D., of whom you are garnishee in the above writ of attachment?
 Second. Have you had commercial or other transactions with the said C. D.? If yea, what was the state of your accounts with the said C. D. at the time of the service of the above writ of attachment upon you?

Third. Was there, or was there not, a balance in your hands in favor of the said C. D. at the time of the service of the said writ of attachment upon you? If yea, state the amount particularly.

Fourth. Had you in your possession any goods, merchandise, moneys, rights, credits or effects of any nature whatsoever, belonging to the said C. D., at the time of the service of the above writ of attachment on you? If yea, state the amount of said money, and the nature of the rights and credits, and the nature and quantity of said goods, merchandise or effects.

A. B.

VIII. RULE ON GARNISHEE TO ANSWER.

A. B. } Before Justice J. R.
 vs. } Attachment in Execution.
 E. F., Garnishee of C. D. }

AND now, June 20th 1860, on motion of A. B., plaintiff, rule entered on the garnishee to answer the interrogatories filed in this case, in eight days, or judgment, according to the act of assembly in such case made and provided. Witness my hand and seal.

J. R., Justice of the Peace. [SEAL]

SIR:

Take notice that the foregoing interrogatories, to be answered by you, have been filed, and that a rule has been entered to answer the same in eight days from the service of this notice; and also, that unless your answers thereto, in writing, on oath or affirmation, be filed in my office, within that time, judgment will be entered against you by default, for the amount of the plaintiff's claim.

J. R., Justice of the Peace.

To Mr. E. F., garnishee.

The act of assembly requires that the copy of the interrogatories and rule to answer should be served on the garnishee *personally*. If, on the return day of the attachment, the copy of the interrogatories and rule to answer have not been served, at least eight days previously, on the garnishee, *in person*, the justice, on the application of the plaintiff, should continue over the cause, until such time as will be sufficient to effect the service required by law.

IX. ANSWERS OF GARNISHEE.

A. B. } Before Justice J. R.
 vs. } Attachment in Execution.
 E. F., Garnishee of C. D. }

E. F., the garnishee above named, being duly sworn, [or affirmed,] saith, in answer to the interrogatories filed by the plaintiff in this case:

First. I do know the said C. D., of whom I am garnishee in the writ of attachment issued in this case.

Second. I have had commercial transactions with the said C. D. I have purchased goods from him. At the time of the service of the writ of attachment upon me, I was indebted to the said C. D. in the sum of twenty dollars, for goods purchased from him.

Third. As I have already stated in answer to the second interrogatory, there was a balance of \$20 in my hands, in favor of the said C. D., at the time of the service of the writ of attachment.

Fourth. At the time of the service of the writ of attachment, I had not in my possession any goods, merchandise, moneys, rights, credits or effects of any nature whatever,

belonging to the said C. D., except as I have before stated in answer to the second interrogatory.

Sworn [or affirmed] and subscribed before me, this 20th day of June 1860.

J. R., Justice of the Peace.

X. EXECUTION AGAINST GARNISHEE.

POTTER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of E—— township, or to the next Constable of the said County most convenient to the defendant, greeting:

WHEREAS, A. B., on the second day of July 1860, before J. R., Esquire, one of our justices of the peace in and for the said county, obtained judgment against E. F., garnishee of C. D., for the sum of twenty dollars, to be levied of the moneys, rights and credits of the said C. D., in the hands and possession of the said E. F., which judgment remains unsatisfied. Therefore, we command you, that you levy the said sum of twenty dollars of the moneys, rights and credits of the said C. D., attached in the hands of the said E. F.; and if the said E. F. refuse or neglect, on demand, to pay the same, then that you levy the said sum of twenty dollars of the proper goods and chattels of the said E. F., as in the case of a judgment against him for his own proper debt; and indorse hereon, the time you make your levy, and hereon, or on a schedule to be hereto annexed, a list of the same; and within twenty days from the date hereof expose the same to sale, by public vendue, you having given due notice thereof, by three or more advertisements put up in the most public places in your township; and returning the overplus, if any, of the said sale, to the said garnishee; and of your proceedings herein, together with this execution, make return to our said justice, on or before the twenty-second day of July 1860.

Witness our said justice, who hath hereunto set his hand and seal, this second day of July, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

XI. DOCKET ENTRY.

A. B.
vs.
E. F., Garnishee of C. D.

COSTS.

Justice	
Indorsement	40
Serving action	25
Return and oath of const.	15
Interrogatories	30
Return to garnishee	30
Oath of rule	10
Return of service of rule (1 oath)	10
Answer (1 oath)	10
Final and judgment	50
Execution	25
Return	15
Indorsement	10
Constable	
Serving att. on garnishee	35
Return	12
Serving att. on debt.	25
Return	12
Serving notice of rule	25
Return	12
Serving execution	50
Return	1.20
Shops	12
	<u>\$4.68</u>

ATTACHMENT IN EXECUTION issued June 20th 1869, returnable the 28th inst. at 4 o'clock, P. M., on judgment obtained before me by the said A. B., against the said C. D., on the 1st May 1869, for \$20, and costs. S. S., constable. Same day, plff. files interrogatories, and rule entered on garnishee to answer in eight days, or judgment. Returned on oath, "Served attachment on debt. and garnishee, and served copy of interrogatories and rule to answer, on garnishee, personally, on 21st inst." June 28th 1869, plff. appears, and claims to have execution of his judgment on the effects of the debt. in the hands of the garnishee. Debt. does not appear. Garnishee appears, and files his answer, admitting that he is indebted to the debt. in the sum of \$20, whereupon judgment that the plff. have execution of the said debt of \$20, due by the garnishee to the debt., and attached in his hands; and if the said garnishee refuse or neglect, on demand by the constable, to pay the same, then the same to be levied of his the garnishee's goods and chattels, as in case of a judgment against him for his own proper debt; and that the garnishee be thereupon discharged, as against the debt., of the sum so attached and levied. July 2d 1869, execution issued against garnishee. S. S., constable. Returned July 5th 1869, "Money paid into office." Received \$15.42 cents, amount of debt attached, less costs of attachment suit.

(Signed)

A. B.

Attachment for Contempt.

When and how it should issue.

A JUSTICE of the peace has no power to punish contempts committed before him, in a summary manner, by imprisonment. That power belongs to the higher courts alone. 2 C. 99. (a) But they may, in such cases, hold the offender to bail to answer upon indictment, and to be of good behavior in the meanwhile; and may commit him in default of bail. An indictment will lie for a contempt of a justice of the peace, which, though not a breach of the peace, amounts to an obstruction of the execution of his office. 12 S. & R. 175. 2 Br. 142.

The only case in which a justice can issue an attachment for contempt, is that of disobedience of his process. If a witness, not having a sufficient excuse, neglect to attend upon a subpoena, he is liable to be proceeded against by attachment for a contempt of the process of the law. In order to ground this summary mode of proceeding, it is necessary to prove that the witness was *personally* served with the subpoena; unless by his own act he dispense with the legal form of service. 1 T. & H. Pr. 543-4. 1 Y. 303.

An attachment has been refused where the witness was very old, weak and infirm, and it was sworn that he could not attend without danger of his life. And where it appeared that witnesses against whom an attachment had issued for disobedience to a subpoena, had been so much indisposed as to be incapable of attending, they were discharged, and the costs of the attachment directed to abide the event of the suit. 1 D. 340. The general rule appears to be, that the party applying for an attachment, must make out a clear case of contempt. 1 T. & H. Pr. 544. The following is the form of an attachment to compel the attendance of a witness:

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To M. G., Constable of the 2d ward of the said city, greeting:

We command you, that you attach M. R., of the said city, tanner, if he be found in your bailiwick, and him safely keep, so that you have his body before the subscriber, one of our aldermen in and for the said city, at his office, at No. 340 South Fifth street, on the 10th of October 1860, aforesaid, to answer us of a certain contempt by him done, in refusing to appear before our said alderman, at his office, then and there to testify his knowledge in a certain action depending before our said alderman, wherein W. Y. is plaintiff and A. D. defendant, as the said M. R. was duly required and summoned so to do. Have you then there this writ.

Witness the said alderman, at Philadelphia aforesaid, this the eighth day of October, in the year of our Lord one thousand eight hundred and sixty.

G. W., Alderman. [SEAL.]

When the case shall be again before the justice and the witness in attendance, he must pay the costs of the attachment and service, unless he can satisfactorily prove that it was not in his power to attend at the time he was required. Under such circumstances the costs must abide the issue of the suit. The justice has no power to punish the contempt of the process by imprisonment; even the superior courts can punish disobedience to process by *fine* only. 1 Gr. 458. Purd. 188.

If the witness attend, but refuse to be sworn and give evidence, he may, on application, be committed—"for having refused to testify his knowledge in a case now pending before our alderman G. W., at his office in the city of Philadelphia, he having refused to be sworn and give evidence in the said case." A witness persevering in silence, when questioned, may be committed for contempt, and confined until he does answer. 2 Rep. Con. Ct. 167. 4 P. L. J. 130. 1 Greenl. Ev. § 319. The commitment in such case, should be "until the witness is willing to testify." 8 Law Rep. 167.

An alderman appointed under a rule of a court of record to take depositions, is empowered to imprison a witness who contumaciously refuses to be sworn in order to testify in the cause. 4 P. L. J. 126. But although the alderman, in such case, has power to attach or commit, it seems, the more proper course is, to make a special

(a) The act of 18 April 1870, gives this power to the aldermen and justices of Allegheny county. Purd. 1598.

return of the matter to the court from which the rule issued, when the witness may be subpoenaed to appear at the bar of the court, and answer, or be attached. *Pfies v. Elmes*, 1 T. & H. Pr. 510.

Where a witness before an alderman refused to answer a proper question in the cause, and the alderman committed him until he should fully answer, *ROGERS, J.*, refused to discharge the witness, on *habeas corpus*, and remanded him until he should answer the question propounded. *Bright. R.* 109.

Attorneys.

I. Attorneys at law.

II. Warrants of attorney.

I. ATTORNEYS AT LAW.

AN ATTORNEY AT LAW is a person duly admitted in the courts of law, and who is appointed by another person, usually denominated his client, to prosecute, or defend, some suit on his behalf; and he is considered as a public officer, belonging to the courts of justice in which he may be admitted. 3 Bl. Com. 25.

The constitution of Pennsylvania provides "that in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel." Art. IX., sect. 9. And by the act of 21st March 1806, it is provided that "in all civil suits or proceedings in any court within this commonwealth, every suitor and party concerned, shall have a right to be heard by himself and counsel, or either of them." *Purd.* 66.

The right of a party to be heard by himself or counsel, was originally conferred by the provincial act of 1700, which enacted "that in all courts, all persons, of all persuasions, may freely appear in their own way and according to their own manner, and there personally plead their own cause themselves, or, if unable, by their friends." *Bradford's Laws*, 1714, p. 24.

The judges of the several courts of record of this commonwealth shall, respectively, have power to admit a competent number of persons, of an honest disposition, and learned in the law, to practise as attorneys in their respective courts. Act 14 April 1834, § 68. *Purd.* 66.

Before any attorney, admitted as aforesaid, shall make any plea at the bar, except in his own case, he shall take an oath or affirmation, as follows, viz.:

"You do swear or affirm, that you will support the constitution of the United States, and the constitution of this commonwealth, and that you will behave yourself in the office of attorney, within this court, according to the best of your learning and ability, and with all good fidelity, as well to the court as to the client; that you will use no falsehood, nor delay any person's cause for lucre or malice." *Ibid.* § 69.

No alderman or justice of the peace shall practise as attorney or counsellor in any court of justice in this commonwealth, in any case which has been or may be removed from before him by appeal, or by writ of *certiorari*; or act as agent in any such case. *Ibid.* § 75.

If any attorney at law shall misbehave himself in his office of attorney, he shall be liable to suspension, removal from office, or to such other penalties as have hitherto been allowed in such cases by the laws of this commonwealth. *Ibid.* § 73.

If any attorney shall retain money belonging to his client, after demand made by the client for payment thereof, it shall be the duty of the court to cause the name of such attorney to be stricken from the roll of the attorneys, and to prevent him from prosecuting longer in such court. *Ibid.* § 74.

An attorney's agreement to refer a cause binds his client. 1 D. 164. And he may agree to a case stated. 14 Wr. 85. His authority to confess a judgment need not be in writing. 1 P. F. Sm. 493. Payment to the attorney is payment to the

principal. 2 Doug. 624. The court will always look into the dealings between attorney and client, and guard the latter from imposition. 9 Johns. 253.

An attorney at law may maintain an action on an implied assumpsit for professional services rendered by him, without regard to the quality of the services. 4 W. 334. 2 P. R. 62. An attorney has no lien for his fees on money in the hands of the sheriff. 3 W. 357. But he has a lien for his professional compensation on the papers in his hands, or on the money collected by him. 7 H. 99. 2 Wr. 231.

An attorney at law who collects money and refuses to pay it over to his client, until sued for it, is entitled to no compensation for his professional services. 4 W. 420. 7 Barr 376. Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, the attorney is responsible for that loss. 8 Mass. 57.

Members of the bar are not entitled to witness fees for attendance in a court in which they actually practise. 1 Wh. 276.

When money is paid to an attorney for services to be rendered at a future day, a right of action to recover it back arrives at the time he neglects or refuses to render the service. 2 Mass. 198.

An attorney at law is not privileged in Pennsylvania from arrest on a *capias*. 1 R. 350.

A payment to an attorney by a sheriff, who has notice that the attorney's authority has been revoked, is bad. 3 W. 357.

A power of attorney to collect money, the attorney to receive one-half of the net proceeds, as compensation, is not irrevocable. 3 P. F. Sm. 212, 266.

II. WARRANTS OF ATTORNEY.

A warrant of attorney is a written authority to the attorney or attorneys to whom it is directed, to appear for the person executing it, to receive a declaration for him in an action at the suit of the person therein mentioned, and thereupon to confess the action, or suffer judgment to pass by default; and to sign a release of all errors and defects touching such proceedings. 1 T. & H. Pr. 397.

A warrant of attorney is generally given under seal, though it is said this is not indispensable. 1 Bouv. Inst. 351. 5 Taunt. 264. 1 T. & H. Pr. 397.

A warrant of attorney may be attested by the attorney to whom it is directed. 6 Eng. L. & Eq. 355. 8 Ibid. 378.

The judgment of a justice of the peace entered by authority of a warrant of attorney is void; a transcript thereof filed in the common pleas as a judgment, upon which executions were issued, lands levied and sold, is also void, and will be reversed, and restitution of the money made by the sheriff's sale awarded. 6 W. 294.

A warrant of attorney to confess judgment given by a single woman, is not revoked by her subsequent marriage. 11 C. 146.

Auctions.

AN AUCTION is a public sale, where the parties designing to purchase bid upon each other, that is, successively offer an *increasing* price; the sale being to the highest bidder. 1 Burrill's Law Dict. 162. From the circumstance of the bids being repeated *aloud* by the salesman or auctioneer, it is sometimes termed a sale "by outcry." Babington on Auctions 3. An auctioneer differs from a broker in being authorized only to *sell*, and that at public auction. 2 H. Bl. 555.

The business of an auctioneer is regulated, in this state, by various acts of assembly, applying to different parts of the commonwealth. By these statutes, auctioneers are required to take out licenses or commissions, authorizing them to carry on the business, for which they must pay a price regulated by law, according to the privileges granted. They give bonds to the commonwealth for the faithful performance of the several duties enjoined upon them by law; and are sworn to conform in all things to the auction laws of the state. Duties are laid on certain goods sold at auction; and penalties inflicted for selling without a commission, or otherwise violating the laws. They are bound to report quarterly to the state treasurer, under oath, the amount of their sales, and to pay over to him the amount of the duties accruing thereon by law.

The act of 9th February 1751, prohibits the giving or selling of any rum, wine or other strong liquors, at any auction, to the persons attending the same, under a penalty of five pounds for each offence; one half for the use of the overseers of the poor, and the other half for the use of the informer. These penalties are recoverable before any justice of the peace, who is authorized summarily to convict the offender, either on his own view, or on the testimony of one or more witnesses; saving to the defendant the right of appeal. These fines are to be levied by distress and sale of the defendant's goods, and for want of such distress, he may be committed to prison, without bail, for the space of forty days.

The auction laws do not extend to hinder any executor or administrator from selling at auction, the lands or goods of their respective testators or intestates; nor to any judicial sales by sheriffs or constables; nor to the sale of goods distrained for rent. Purd. 69.

A sale by auction is not complete until the bid has been accepted. The bid is only an offer to pay a stipulated price for the article about to be sold; and like every other offer, which has not been accepted, it may be withdrawn until accepted. 1 Bouv. Inst. 392. Where a bid had been made at a sheriff's sale by auction, and the sale adjourned, the bid was held to be withdrawn by implication. 6 Barr 486. An auctioneer's authority to sell may be revoked, even after he has incurred expenses in reference to the goods. 3 Eng. L. & Eq. 520.

The general rule of law is, that *parol* evidence of declarations of an auctioneer is not admissible to vary the *written* terms of sale. 1 Pet. C. C. 199. If a purchaser at auction do not fulfil his contract, he is liable for the difference between the price which he bid and a less price for which the goods may be sold at a second sale at auction, with interest thereon. Harper 219. If a purchase be made at auction of numerous articles of personal property, at one and the same time, and from the same vendor, the whole constitutes one entire contract, though the articles purchased be struck off separately, at separate and distinct prices. 2 W. & S. 377. 2 Barr 74. A purchaser at auction "for cash before removal of the goods," is liable in a suit by the vendor, unless he show an offer to pay the price and remove the goods purchased, or that the plaintiff prevented it. *Ibid*.

If goods be sent to auction, with directions to the auctioneer to dispose of them at a certain average advance on the invoice price, and he sell them for less than the limited price, an action may be maintained against him for the difference between the limited price and that for which the goods were sold. 11 S. & R. 86.

It seems, that the seller of goods at auction may lawfully employ an agent to bid the goods up to a limited price without making it publicly known. 11 S. & R. 86. But if the owner of an estate put up to sale by auction employ puffers to bid for him, it is a fraud on the real bidders, and the highest bidder cannot be compelled

to complete the contract. Selw. N. P. 191. The employment of a bidder merely to raise the price at a sale of real estate, under an order of the orphans' court, is a fraud upon the purchaser. 2 H. 446. 4 H. 200. 27 Leg. Int. 92.

An agreement entered into for the purpose of preventing competition at a sale of property, under execution or distress for rent, is void as against public policy. 3 N. Y. 129. 1 Bouv. Inst. 236.

It seems, that an auctioneer, if not interested in the property, may bid at his own sale. 5 Wr. 140.

An auctioneer's bond, under the act of assembly, is a security for his private customers, as well as for the duties payable to the state. 3 Y. 335. 4 D. 95. 3 W. 297. And the person who first brings suit is entitled to priority of payment. 3 D. 500. 1 B. 370.

A licensed auctioneer, in the city of Philadelphia, who advances money on goods, and charges commissions on such advances, is liable to the payment of a pawnbroker's license, under the city ordinance. 11 C. 277.

Bail.

I. Bail defined and explained.

II. Bail in civil cases.

III. Form of a bail-piece.

IV. Bail for stay of execution or appeal.

I. BAIL is used in our common law, for the freeing or setting at liberty of one arrested or imprisoned upon action, either civil or criminal, or surety taken for his appearance, at a day and place certain. Bract. lib. 3, tit. 2, c. 8.

The reason why it is called *bail* is because, by this means, the party restrained is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison; and the end of bail is to satisfy the condemnation and costs, or render the defendant to prison. Tom. L. Dict.

II. BAIL IN CIVIL CASES.

Since the passage of the act of 12th July 1842, to abolish imprisonment for debt, a recognisance of special bail in its *technical* sense—bail for the body—can only be taken, by a justice, for the appearance of a defendant arrested on a *capias*, in a case not within the provisions of that act, viz., in trespass or trover, for the recovery of money collected by a public officer, or for official misconduct.

One who is special bail may depute another to execute a bail-piece for him, or one of two special bail may depute the other to execute it. 6 W. 402.

Bail may take up their principal when attending court as a suitor, or at any other time. 4 Y. 123.

Special bail may arrest their principal *anywhere, at any time, and under any circumstances*. Ibid.

Bail in a suit entered in another state may seize and take the principal in this state. 2 Y. 263.

Bail may depute another to take and surrender their principal; and the bail, or the person deputed by him for that purpose, may take the principal in another state, or at any time and in any place, and may, after demand of admittance, and refusal, break open the door of the principal's house, in order to take him. 7 Johns. 140.

But if they use more force than is necessary, they will (as in other cases) become trespassers *ab initio* [from the beginning], and be liable for false imprisonment. 3 Day 485.

If the creditor has the means of satisfaction in his hands, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety is discharged. 8 S. & R. 452.

When the surety apprises the creditor of the means of obtaining satisfaction without resorting to his personal liability, and the creditor refuses or neglects to use these means, the surety is discharged. 13 S. & R. 157.

It seems that a surety who has property of his principal in his hands, may give

it up to satisfy an execution against *himself* for the debt for which he was surety. Addis. 153.

A temporary stay of execution, by agreement of the plaintiff, in consideration of a confession of judgment by the defendant, will not exonerate the special bail in the action. 3 W. 376.

Where money is paid by a surety for two principals, the law implies a promise by each principal to reimburse the surety for the whole amount paid. 3 Binn. 126.

Special bail has a right to *appeal* from the judgment of a justice against them, notwithstanding the act of 1810 says that, on the judgment of the justice, execution shall issue without stay. 3 S. & R. 93.

A surrender of the principal, in an insolvent bond, *before* the day of appearance, will not discharge the bail from his obligation. 4 W. 69.

The bail of an *insolvent* is entitled to every part of the condition of the bond prescribed by the act of assembly; and if it do not contain the alternative of a procurement of a discharge or a surrender to jail, no recovery can be had upon it. 5 W. 346.

If bail enter into a recognisance, although they are excepted to and never justify, they are liable. 1 Taunt. 427.

Bail may recover such sums as they have been necessarily and fairly obliged to expend—as in sending after and securing their principal after he has absconded, in order to surrender him. 5 Esp. C. 571.

III. FORM OF A BAIL-PIECE.

CITY OF PHILADELPHIA, ss.

A. B.) Before [E. F., Alderman.] ACTION OF TRESPASS.
 vs.) Judgment for plaintiff, for [twenty-six dollars and twenty-nine cents] Damages,
 C. D.) and eighty-seven cents costs.

I do certify, that [G. H.,] of [No. 20 Arch street,] became special bail for the defendant, in the above action, in the sum of [sixty] dollars, for the appearance of the said defendant at my office, on the [seventh] day of [August,] 1860, by recognisance taken before me, one of the aldermen in and for the said city, the [second] day of [August,] 1860, as appears by the record of the said recognisance remaining in my office. Witness the said alderman [or justice of the peace,] who has hereunto set his hand and seal, the [twentieth] day of [August,] in the year of our Lord one thousand eight hundred and sixty.

E. F., Alderman. [SEAL.]

The justice must recollect that so long as the provisions of the act of 12th July 1842, are in force, he cannot issue a bail-piece to arrest the principal, in any case within the provisions of that act.

IV. BAIL FOR STAY OF EXECUTION OR APPEAL.

The act of 20th March 1845 (Purd. 601), provides that the bail in all cases where bail is required for stay of execution, shall be bail absolute, with one or more sufficient sureties, in double the amount of the debt or damages, interest and costs recovered, conditioned for the payment thereof, in the event that the defendant fail to pay the same at the expiration of the stay of execution.

The same act provides that the bail, in cases of appeal from the judgments of aldermen and justices of the peace, shall be bail absolute, in double the probable amount of costs accrued and likely to accrue, with one or more sufficient sureties, conditioned for the payment of all costs accrued, or that may be legally recovered against the appellant.

In order to obtain an appeal or stay of execution, women, as well as men, must give the security required by law. 3 P. L. J. 190.

See ACTIONS AT LAW, IV. and VI. 1.

Bail and Commitment in Criminal Cases.

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|----------------------------------------------------|---------------------------------------------------------------------------------------------------------------|
| I. For what crimes bail may be taken, and by whom. | V. Form, &c., to appear and keep the peace. |
| II. Where and how the prisoner may be committed. | VI. Recognisance to give evidence. |
| III. A general form of commitment. | VII. VIII. IX. Forms to return to court in cases of assault and battery, to keep the peace and give evidence. |
| IV. Form of a recognisance to appear at court. | X. Docket entry of recognisance. |

I. FOR WHAT CRIMES BAIL MAY BE TAKEN, AND BY WHOM.

EXCESSIVE bail shall not be required. Const. U. S. Amend. art. VIII. Const. of Penn. art. IX. § 13.

All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great. Const. of Penn. art. IX. § 14.

In all cases, the party accused, on oath or affirmation, of any crime or misdemeanor against the laws, shall be admitted to bail by one or more sufficient sureties, to be taken before any judge, justice, mayor, recorder or alderman where the offence charged has been committed, except such persons as are precluded from being bailed by the constitution of this commonwealth: *Provided also*, That persons accused as aforesaid, of murder or manslaughter, shall only be admitted to bail by the supreme court or one of the judges thereof, or a president or associate law judge of a court of common pleas: persons accused, as aforesaid, of arson, rape, mayhem, sodomy, buggery, robbery or burglary, shall only be bailable by the supreme court, the court of common pleas, or any of the judges thereof, or a mayor or recorder of a city. Act 31 March 1860, § 7. *Purd.* 250.

All sureties, mainpernors and bail in criminal cases, whether bound in recognisances for a particular matter or for all charges whatsoever, shall be entitled to have a bail-piece, duly certified by the proper officer or person before whom or in whose office the recognisance of such surety, mainpernors or bail shall be or remain, and upon such bail-piece, by themselves or their agents, to arrest and detain, and surrender their principals, with the like effect as in cases of bail in civil actions; and such bail-piece shall be a sufficient warrant or authority for the proper sheriff or jailer to receive the said principal, and have him forthcoming to answer the matter or matters alleged against him: *Provided*, That nothing herein contained shall prevent the person thus arrested and detained from giving new bail or sureties for his appearance, who shall have the same right of surrender hereinbefore provided. *Ibid.* § 8.

To refuse or delay to bail any person bailable is an offence against the liberty of the subject, in any magistrate, by the common law. 4 Bl. Com. 242.

If the offence be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the justice, or warrant, under his hand and seal, containing the cause of his commitment—there to abide till delivered by due course of law. 4 Bl. Com. 244.

A justice of the peace may discharge from prison one committed by him for a bailable offence, whether felony or misdemeanor, taking a recognisance for his appearance at court to answer. 6 W. & S. 314. 2 P. 458.

II. WHERE AND HOW THE PRISONER MAY BE COMMITTED.

If a man commit felony in one county, and be arrested for the same in another county, he shall be committed to jail in that county where he is taken. *Dalt.* c 170.

Yet, if he escape and be taken on a fresh suit in another county, he may be carried back to the county where he was first taken. *Ibid.*

The mention of the name, and the authority of the justice (Lord HALE says), in the beginning of the *mittimus*, is not always necessary, for the seal and subscription of the justice to the *mittimus* is sufficient warrant to the jailer; for it may be supplied by averment that it was done by the justice. 2 H. P. C. 122.

The *mittimus* should contain the name and surname of the party committed, if

known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, color of his hair, and the like, and to add that he refuseth to tell his name. 1 H. P. C. 577. 1 Chit. Cr. L. 27.

It ought to contain the cause, as for treason or felony or suspicion thereof; otherwise, if it contain no cause at all, and the prisoner escape, it is no offence at all; whereas, if the mittimus contained the cause, the escape were treason or felony, though he were not guilty of the offence, and, therefore, for the king's [commonwealth] benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 Inst. 52. 4 Mass. 497. 2 Ash. 61.

A warrant or mittimus, to answer to such things as shall be objected against him, is *utterly against law*. 2 Inst. 591.

Also, it ought to contain the certainty of the cause; and, therefore, if it be for felony, it ought not to be *generally* for felony, but it *must contain the special nature* of the felony, briefly, as for felony *for the death of such an one*, or for burglary, *in breaking the house of such an one*; and the reason is, because it may appear to the judge upon an *habeas corpus*, whether it be felony or not. 2 H. P. C. 122.

The mittimus must be under seal; and without this the commitment is unlawful; the jailer is liable to false imprisonment; and the wilful escape of the jailer, or breach of prison by the felon, makes no felony. 1 H. P. C. 583.

It should also set forth the place at which it is made (that it may appear to be within the jurisdiction of the justice.) 2 Hawk. P. C. 179.

It must also have a certain date of the year and day. *Ibid*.

The act of 30 March 1821, directs that it shall be the duty of every justice of the peace of the county or alderman of the city of Philadelphia, before whom any recognisance of bail or surety in any criminal or supposed criminal case shall be taken, to set down accurately and at large, in a docket or record to be kept for that purpose, the name, place of abode, particularly describing the same, and the occupation or business of such recognisance or surety; and if the said recognisor or surety shall not be a housekeeper, the name and place of abode, particularly describing the same, and the occupation or business of the person or persons with whom such recognisor or surety may reside; and the said justices of the peace of said county, or aldermen of the said city, are required and enjoined to make a full and complete return of said recognisance or surety to the proper court having cognisance of the case, and of all and every the sureties [entries, *qu?*] so made on a docket or record, touching or relating to such recognisance; together with the proceedings of such justice of the peace or alderman, relating to the case in which such person or persons may have become bound as a recognisor or surety as aforesaid. *Purd.* 480.

A recognisance is a bond of record, testifying the recognisor to owe a certain sum of money to some other, and the acknowledging of the same is to remain of record, and none can take it but only a judge or officer of record. *Dalt.* c. 186.

But whosoever any statute giveth them power to take a bond of any man, or to bind over any man to appear at the assizes or sessions, or to take sureties for any matter or cause, they may take a recognisance. Yea, whosoever they have authority given them to cause a man to do a thing, there it seemeth they have power given them to bind the party by recognisance to do it; and if the party shall refuse to be bound, the justice may send him to jail. *Dalt.* c. 168.

He can only require security till the next court. 8 Mass. 78. 1 Mass. 488.

Every obligation and recognisance taken by justices of the peace must be made to the commonwealth. It must also contain the name, place of abode, and trade or calling, both of principals and sureties, and the sum in which they are bound. and it is most commonly subject to a *condition*, which is either indorsed or underwritten, or contained within the body of it, upon the performance of which the recognisance shall be void.

Feme covert (married women) and infants ought to find security, and not be bound themselves.

Where a justice or alderman has authority to inquire into an offence and commit the prisoner; hold him to bail or discharge him, as circumstances may require, he may take a recognisance for his appearance before him, from time to time, attending the examinations. 6 S. & R. 427.

A justice may take recognisance with sureties for the appearance of a party charged with a bailable offence, at an adjourned examination, and if he do not appear, he and his sureties may be called, and a proper entry of their default made. 2 W. C. C. 422.

On a verdict of acquittal, the defendant's recognisance is considered *ipso facto* [by the fact itself] void, and his bail discharged without any further entry. 4 Cow. 410. But see 2 N. Y. 82.

A recognisance for a prisoner's appearance at the next term, and not at the succeeding sessions, is to be discharged at the end of the term, by committing or discharging him, or delivering him on new bail. 2 P. R. 240.

III. FORM OF COMMITMENT, GENERAL.

CAMBRIA COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of D—, in the County of Cambria, and to the Keeper of the Common Jail of the said County:

THESE are to command you, the said constable, forthwith to convey and deliver into the custody of the keeper of the said common jail, the body of A. B., charged before J. R., one of our justices of the peace in and for the said county, with [here specify the offence.] And you, the said keeper, are hereby required to receive the said A. B. into your custody in the said common jail, and him there safely keep until, &c. [as the case may be.] Witness the said J. R., at D— township aforesaid, the fifth day of May, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL.]

IV. FORM OF A RECOGNISANCE TO APPEAR AT COURT.

You, J. L., [the principal,] acknowledge to owe to the Commonwealth the sum of *one hundred dollars*, and you, T. P. and T. T., [the bail,] acknowledge to owe to the Commonwealth the sum of *one hundred dollars* each, to be levied of your several and respective goods and chattels, lands and tenements, to the use of the Commonwealth; upon this condition, that if the said J. L. shall appear, personally, at the next Court of Quarter Sessions of the Peace, to be held at R—, for the county of Berks, then and there to answer such matters and things as shall be objected to him, on behalf of the Commonwealth, for an *assault and battery* on S. B., and not to depart said court without leave, then this recognisance to be void, otherwise to be in full force and virtue. Are you content?

V. FORM OF RECOGNISANCE TO APPEAR, &c., AND KEEP THE PEACE, AND BE OF GOOD BEHAVIOR.

You, J. L., [the principal,] acknowledge to owe to the Commonwealth the sum of *one hundred dollars*, and you, T. P. and T. T., [the bail,] acknowledge to owe to the Commonwealth the sum of *one hundred dollars* each, to be levied of your several and respective goods and chattels, lands and tenements, to the use of the Commonwealth; upon this condition, that if the said J. L. shall, personally, appear at the next Court of Quarter Sessions of the Peace, to be held at R—, for the county of Berks, then and there to answer such matters as shall be objected against him on behalf of the Commonwealth, and shall, in the mean time, keep the peace, and be of good behavior, towards all the citizens of the Commonwealth, and, especially, towards S. B., and not depart said court without leave, then this recognisance to be void, otherwise to be in full force and virtue. Are you content?

VI. FORM OF A RECOGNISANCE TO GIVE EVIDENCE.

You, J. L—, acknowledge to owe the Commonwealth the sum of *fifty dollars*, to be levied of your goods and chattels, lands and tenements, to the use of the Commonwealth; upon this condition, that if you shall, personally, appear at the next Court of Quarter Sessions of the Peace, to be held at R—, for the county of Berks, then and there to testify, on behalf of the Commonwealth, against a certain B. W., and not depart the court without leave, then this recognisance to be void, otherwise to be, and remain, in full force and virtue. Are you content?

When a recognisance is taken before a magistrate, he may set it down on his docket, thus—"J. L., bound in \$100 to appear, &c., T. P. and T. T. bound in \$50 each, to give evidence, &c.," from which he may afterwards make the recognisance out at length, and certify to the next sessions, or (if the offences be not cognisable there) to the court of oyer and terminer.

VII. FORMS OF RECOGNISANCES TO BE SENT TO THE COURT.

Commonwealth } Assault and battery on oath of S. B.
 vs. } J. L., of S— township, yeoman, held in \$100.
 J. L. } R. S., of S— township, yeoman, held in \$100.
 A. T., of L—, carpenter, held in \$100.

Upon condition, that if the said J. L. shall, personally, appear at the next Court of Quarter Sessions of the Peace, to be held at R—, for the county of Berks, then and there to answer such things as shall be objected against him on behalf of the Commonwealth, for assaulting and beating a certain S. B., and not depart the said court without leave, and, in the mean time, keep the peace, and be of good behavior towards all the citizens of the Commonwealth, and, especially, towards the said S. B., then the above recognisance to be void, otherwise the said several sums of money to be levied of their goods and chattels, lands and tenements, respectively, to the use of the Commonwealth.

Taken and acknowledged, the third day of May, A. D. one thousand eight hundred and fifty.
 Before J. R., Justice of the Peace. [SEAL.]

VIII. FOR THE PEACE AND GOOD BEHAVIOR.

Commonwealth } Surety of the Peace, and good behavior, on the affirmation of S. B.
 vs. } J. L., of S— township, yeoman, held in \$100.
 J. L. } R. S., of same township, yeoman, held in \$100.
 A. T., of H—, carpenter, held in \$100.

Upon condition, that if the said J. L. shall, personally, appear at the next Court of Quarter Sessions of the Peace, to be held at C—, for the county of Delaware, then and there to answer such things as shall be objected against him, on behalf of the Commonwealth, and not depart the said court without leave, and, in the mean time, keep the peace, and be of good behavior towards all the citizens of the Commonwealth, and, especially, towards S. B., then the above recognisance to be void, otherwise, the said several sums of money to be levied of their goods and chattels, lands and tenements, respectively, to the use of the Commonwealth.

Taken and acknowledged, the third day of May, A. D. one thousand eight hundred and fifty.
 Before J. R., Justice of the Peace. [SEAL.]

IX. TO GIVE EVIDENCE.

Commonwealth } Fornication—on oath of C. W.
 vs. } D. S., of M—, weaver, held in \$50.
 J. L.

Upon condition, that if the said C. W. shall, personally, appear at the next Court of Quarter Sessions of the Peace, to be held at R—, for the county of Berks, then and there to testify, on behalf of the Commonwealth, against a certain J. L., for committing fornication with a certain C. W., and not depart the said court without leave, then, the above recognisance to be void, otherwise, the said sum of money to be levied of his goods and chattels, lands and tenements, to the use of the Commonwealth.

Taken and acknowledged, the third day of May, A. D. one thousand eight hundred and fifty.
 Before J. R., Justice of the Peace. [SEAL.]

X. DOCKET ENTRY OF RECOGNISANCE.

Commonwealth } Assault and Battery, on oath of S. B.
 vs. } J. L. of S— township, yeoman, held in \$100.
 J. L. } R. S., of S— township, yeoman, held in \$100.
 A. T., of H—, carpenter, held in \$100.

For the appearance of the defendant, &c., to answer, &c.

S. B., held in \$50. } To give evidence, &c.
 C. W., held in \$50.

May 9th, A. D. 1860. Before J. R., Justice of the Peace. [SEAL.]

The parties need not sign the recognisance. If the justice shall subscribe his name, without his seal to it, this is enough, and that may be in either of these forms: *Acknowledged before me, J. R.*, or only to subscribe his name, thus, J. R. The recognisance is a matter of record, presently, as soon as it is taken and acknowledged, although it be not made up. 1 Chit. C. L. 61.

Bailment.

I. Bailment defined.
II. Act of assembly.

III. Judicial opinions on.

I. BAILMENT is a delivery of goods on a condition expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered. Jones Bailm. 2. Story Bailm. § 2. 1 Bouv. Inst. 393.

II. ACT OF 24 SEPTEMBER 1866. Purd. 1449.

SECT. 1. Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, petroleum or other commodity, stored or deposited with any warehouseman, wharfinger or other person in this state, or bills of lading, or receipts for the same, when in transit by cars or vessels to any such warehouseman, wharfinger or other person, shall be negotiable, and may be transferred by indorsement and delivery of said receipt or bill of lading; and any person to whom the said receipt or bill of lading may be so transferred, shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; and no property on which such lien may have been created, shall be delivered by said warehouseman, wharfinger or other person, except on the surrender and the cancellation of said original receipt or bill of lading; or, in case of partial sale or release of the said merchandise by the written assent of the holder of said receipt or bill of lading, indorsed thereon: *Provided*, That all warehouse receipts or bills of lading, which shall have the words, "not negotiable," plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

SECT. 2. No warehouseman, wharfinger or other person, shall issue any receipt or voucher for any goods, wares, merchandise, petroleum, grain, flour or other produce or commodity, to any person or persons, purporting to be the owner or owners thereof, unless such goods, wares, merchandise, petroleum, grain, flour or other produce or commodity, shall have been actually received into store, or upon the premises of such warehouseman, wharfinger or other person, and shall be in store, or on the premises aforesaid, and under his control, at the time of issuing such receipt.

SECT. 3. No warehouseman, wharfinger or other person, shall issue any second or duplicate receipt for any goods, wares, merchandise, petroleum, grain, flour or other produce or commodity, while any former receipt for any such goods, wares, merchandise, petroleum, grain, flour or other produce or commodity as aforesaid, or any part thereof, shall be outstanding and uncalled, without writing across the face of the same, "duplicate."

SECT. 4. No warehouseman, wharfinger or other person shall sell or encumber, ship, transfer or in any manner remove beyond his immediate control, any goods, wares, merchandise, petroleum, grain, flour or other produce or commodity, for which a receipt shall have been given by him as aforesaid, whether received for storage, shipping, grinding, manufacturing or other purposes, without the return of such receipt.

SECT. 5. Any warehouseman, wharfinger or other person, who shall violate any of the foregoing provisions of this act, shall be deemed guilty of fraud; and upon indictment and conviction, shall be fined in any sum not exceeding one thousand dollars or imprisoned in one of the state prisons of this state, not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this act, may have and maintain an action at law, against the person or persons violating any of the foregoing provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation

as aforesaid, before any court of competent jurisdiction, whether such person shall have been convicted of fraud as aforesaid, under this act, or not.

SECT. 7. The provisions of the foregoing act shall apply to grain stored in grain elevators, and to petroleum in barrels, stored or kept in places designated by law; and the owners or lessees of any of said elevators or places designated as aforesaid, shall have the rights and powers, and be subject to the obligations and penalties as therein provided, in regard to warehousemen, wharfingers or other persons.

II. Any damage happening to a chattel while in the hands of a bailee, without his misconduct, and while the chattel is employed in the use for which it was hired, must be sustained by the bailor. 13 Johns. 211. 1 Bouv. Inst. 405.

So if a horse is hired to go a journey, and during the prosecution of the journey it becomes lame, without any ill-treatment by the hirer, he is not answerable for the damage. 13 Johns. 211.

A voluntary bailee, without reward, is liable only for *gross negligence*, for the omission of that care which the most inattentive take. 14 S. & R. 275. 3 H. 176.

It is well settled that the finder of lost property has no lien for expenses gratuitously incurred in taking care of it. 4 W. 66.

Whether the finder has any remedy against the owner to recover an indemnity for his expenses, seems undetermined. *Ibid.*

If one hire a carriage and horses to go a journey, and the owner thereof send his own driver, and the horses are injured by immoderate driving, the person who hired them is not liable to the owner for damages. 9 W. 556.

The hirer incurs no responsibility for anything happening to the carriage or horses, unless such injury have occurred from some act or interference of his. *Ibid.*

If injury happen to property in the hands of a bailee, the interference of the bailor to remedy the evil will not release the bailee from liability for the consequences of his negligence. 7 W. 542.

A hirer, having charge of the property of another, is answerable for an injury which is caused by an omission of that care which a man of common prudence would have taken in his own concerns. 1 Gilp. 579.

An ordinary bailee for hire, in case of the non-delivery of goods intrusted to him, is liable therefor, in the absence of proof of ordinary diligence. The fact of non-delivery is *prima facie* evidence of want of ordinary care, and throws the burden of proof on the defendant. 8 C. 208.

A bailee to whom logs are delivered to be converted into boards, has a lien on them for his labor, independent of any special agreement; and he may maintain an action against an execution creditor of the bailor, by whom they are taken out of his possession. 9 C. 151.

A bailee who has received property, to hold as security for the payment of a debt, is under no obligation to return it, until demand is made, or until he has notice that the debt has been discharged. 4 Wr. 302.

A bailee is not responsible if the property be taken from his possession by the hand of the law, without fault, negligence or act on his part. 4 Wr. 446.

Hiring or leasing personal property, with an agreement that title shall pass, when money paid, is a bailment; and no title is acquired by one who receives it from the bailee with notice of the facts. 1 P. F. Sm. 26.

Bankruptcy.

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| I. Jurisdiction in bankruptcy. | VI. Assignments in bankruptcy. |
| II. Voluntary bankruptcy. | VII. Discharge in bankruptcy. |
| III. Involuntary bankruptcy. | VIII. Probate of debts. |
| IV. Bankrupt firms and corporations. | IX. Distribution. |
| V. Effect of bankruptcy. | X. Criminal proceedings. |

I. JURISDICTION IN BANKRUPTCY.

A **BANKRUPT** is defined to be a broken and ruined trader; one whose table or counter of business is broken up, *bancus ruptus*. 3 Story 453. Or, in other words, "a person who has done or suffered some act to be done, which is by law declared an act of bankruptcy. 1 Bouv. Dict. 188. It is generally considered synonymous with the term "insolvent;" but this is not strictly correct, for a man may be insolvent, without being a bankrupt; and a man may become a bankrupt, though abundantly able to pay his debts. 1 Dougl. 91.

The constitution vests in congress the power to establish uniform laws on the subject of bankruptcies, throughout the United States. Art. I. sect. 8, § 5. This has been done by the act 2 March 1867, whereby the district courts of the United States are constituted courts of bankruptcy, and a very extensive jurisdiction is conferred upon them. 2 Bright. Dig. 74. The constitutional requirement that the system of bankruptcy shall be uniform throughout the United States, is fulfilled, if the bankrupt law operate uniformly upon whatever would have been liable to execution, if no such law had been passed, though the subjects of its operation may not be, in all respects, the same in every one of the states. 16 Am. L. R. 624.

A general idea of the operation of the bankrupt law, is necessary for every business man, inasmuch as from the time it went into operation, it *ipso facto* suspended all action upon future cases arising under the state insolvent laws; 15 Am. L. R. 765: except as to cases in which the party was in arrest for a claim not dischargeable under the act of congress. 27 Leg. Int. 188. It suspended all proceedings under the act of 1842, providing for the issuing of a warrant of arrest against fraudulent debtors, where it operates on the same subject-matter and upon the same persons as the act of congress. 15 Am. L. R. 765. 3 Bank. Reg. 133. And all proceedings under the domestic attachment laws, which fall within the purview of the federal statute. 26 Leg. Int. 367. It is expedient, therefore, that a statute having so extensive a scope should, at least in its general features, be understood by every magistrate and man of business.

The power to pass uniform laws on the subject of bankruptcies is not limited by the principles on which the English bankrupt laws are founded. 1 How. 277. Congress has a complete constitutional authority to enact a bankrupt law giving to the federal courts full jurisdiction in law and equity. 2 Story 648. They have power, under the constitution, to bring all parties, estates and interests connected with a bankrupt, into the district court for adjudication; they have not, it is true, exercised this constitutional power to its full extent by the act of 1867; 16 Am. L. R. 100, 105: but the jurisdiction of the district courts, sitting as courts of bankruptcy, so far as it extends, is supreme and exclusive, in all matters arising under the statute. 1 Bank. Reg. 125, 185.

II. VOLUNTARY BANKRUPTCY.

The statute provides for two kinds of bankruptcy: the one, on the application of the debtor himself, called a voluntary bankruptcy; the other, on the petition of creditors, termed an involuntary bankruptcy.

Any resident of the United States owing debts provable under the act, exceeding \$300 in amount, may be decreed a bankrupt on his own petition, addressed to the judge of the district court of the district in which he has resided or carried on business, for six months preceding the filing of his petition, or for the longest period during such six months. This does not mean the greater portion of the six

months, but the longest period in which business was carried on, in any district, during such period. 3 Bank. Reg. 57.

The form of the petition is prescribed by the statute; but this must necessarily be prepared by counsel, as the schedules required to be annexed, are long and intricate; and the greatest accuracy and precision is required by the courts. Any person who is a resident of the United States may take advantage of the act; its provisions are not confined to traders. 2 Bank. Reg. 163. Or to citizens; an alien may take the benefit of it. 8 Bank. Reg. 114.

III. INVOLUNTARY BANKRUPTCY.

Any person residing and owing debts as aforesaid, who shall commit any or either of the following acts of bankruptcy, may be decreed a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under the act, amount to at least \$250, provided such petition be brought within six months after the act of bankruptcy shall have been committed. The acts of bankruptcy enumerated in the act are:—

1. If such debtor shall depart from the state, district or territory of which he is an inhabitant, with intent to defraud his creditors.

2. If such debtor, being absent, shall, with such intent, remain absent.

3. If such debtor shall conceal himself to avoid the service of legal process, in any action for the recovery of a debt or demand provable under the act. The mere act of being denied to his creditors is not an act of bankruptcy, under this clause, unless the service of process be thereby prevented. 1 W. C. C. 29. And it is no act of bankruptcy, if the debt upon which the writ issued, were not then actually due. 1 Hall L. J. 203.

4. If such debtor shall conceal or remove any of his property, to avoid its being attached, taken or sequestered on legal process.

5. If such debtor shall make any assignment, gift, sale, conveyance or transfer of his estate, property, rights or credits, either within the United States, or elsewhere, with intent to delay, defraud or hinder his creditors. An assignment with intent to hinder, delay or defraud creditors, is an act of bankruptcy, whether the assignor be solvent or insolvent. 3 Bank. Reg. 4. So is a conveyance by a father to his son, in consideration of the father's support. 2 Am. L. T. Bank. 92. And a sale of a stock of goods, not made in the usual and ordinary course of the debtor's business, is *prima facie* fraudulent. 2 Bank. Reg. 29. Whether a general assignment for the benefit of creditors, made without any intent to hinder, delay or defraud creditors, or to delay the operation of the bankrupt law, is or is not an act of bankruptcy, is a question upon which learned judges have differed. The weight of authority is, however, against such assignment being construed to be an act of bankruptcy 17 Am. L. R. 427. 2 Bank. Reg. 181. 3 Ibid. 52. *Contra*, 3 Bank. Reg. 98, 127. But an assignment with preferences is clearly within the law. 2 Bank. Reg. 69.

6. If such debtor has been arrested and held in custody under or by virtue of mesne process or execution issued out of any court of any state, district or territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under the act, and for a sum exceeding \$100, and such process remains in force, and not discharged by payment, or in any other manner provided by law, for a period of seven days. If the debtor be released from custody, on bail, it is not an act of bankruptcy, under this clause. 3 Bank. Reg. 89.

7. If such debtor has been actually imprisoned for more than seven days, in a civil action, founded on contract, for the sum of \$100 or upwards.

8. If such debtor, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money, or other property, estate, rights or credits; or give any warrant of attorney to confess judgment; or procure or suffer his property to be taken on legal process; with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, surety, or otherwise; or with the intent, by such disposition of his property, to defeat or delay the operation of the act.

Under this clause it is held, that a trader who is unable to pay his debts in the ordinary course of business, is *prima facie* insolvent, and the burden is on him to show the contrary; but it is otherwise as to a farmer, whose insolvency must be affirmatively established. 3 Bank. Reg. 54. 16 Pitts. L. J. 45. If a man's debts cannot be made in full out of his property, by levy and sale on execution, he is insolvent within the meaning of the bankrupt law. 3 Bank. Reg. 4.

Every failing debtor who gives a preference to a part of his creditors, thereby commits an act of bankruptcy. 1 Bank. Reg. 10. But a return of goods ordered, pending negotiations for an extension, is not such act. 2 Bank. Reg. 182. A confession of judgment, by an insolvent, if the intent be to give a preference, is an act of bankruptcy, without regard to any question of fraud. 2 Bank. Reg. 140, 164. But in deciding this question, the character of the debtor's business may be taken into consideration. 16 Am. L. R. 693. It is an act of bankruptcy, for an insolvent to suffer judgment by default, on which his property is taken in execution. 3 Bank. Reg. 106. But in such case, the debtor must not only be actually insolvent, and know himself to be so, but he must actually intend and actually give a preference to a creditor. 3 Bank. Reg. 54.

9. If such debtor, being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or has stopped or suspended, and not resumed payment of his commercial paper, within a period of fourteen days. This provision of the act of 14 July 1870 appears to have settled a question upon which there previously existed a great diversity of judicial opinion; it will be observed, that it provides for two classes of cases, a fraudulent suspension, and a suspension for a period of fourteen days, without resumption, either of which is declared to be an act of bankruptcy. That is the construction which had been placed upon the act of 1867, by Judge TREAT, in the District Court for the Eastern District of Missouri, 3 Bank. Reg. 52; and it has been adopted by congress as the true meaning of the law. It is not, however, entirely clear from the wording of the amended act, whether the words "being a banker, broker, merchant, trader, manufacturer or miner," apply to the second class of cases, or whether they are restricted to the case of a fraudulent suspension. They would appear, however, to have been intended to apply to both classes, inasmuch as the non-payment, at maturity, of non-commercial paper, is not an act of bankruptcy. 2 Bank. Reg. 99. It is no defence, that the debtor had ceased to be a trader, at the time of the maturity of his paper. 8 Bank. Reg. 7.

IV. BANKRUPT FIRMS AND CORPORATIONS.

Both the voluntary and involuntary provisions of the bankrupt law apply as well to partnerships as to individuals. If such copartners reside in different districts, the court in which the petition is first filed retains exclusive jurisdiction over the case. The petition, if the application be a voluntary one, must be filed by the partner residing or doing business within the jurisdiction; and notice must be given to the other partners who do not join, as in the case of an involuntary bankruptcy. 2 Ben. 96. In order to reach partnership property through the bankrupt court, all the copartners must first be decreed bankrupt. 3 Bank. Reg. 42. For one member of a firm cannot be discharged on his individual petition, until the firm, if insolvent, be brought into bankruptcy, in order to an administration of the firm assets. 3 Bank. Reg. 54. Nor, under a petition filed by one member of a firm, can his copartners, residing in another district, come in and ask for a discharge. 1 Ben. 266. In case of the bankruptcy of a firm, the act of congress provides for an equitable distribution of the assets, by appropriating firm assets in the first place to the firm creditors, and individual assets to the separate creditors. 2 Bright. Dig. 93.

The provisions of the act likewise apply to all moneyed, business or commercial corporations, and joint stock companies; who may be decreed bankrupt upon the petition of any officer thereof, duly authorized by a vote of a majority of the corporators, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors, if they have committed an act of bankruptcy. But no allowance or discharge can be granted to any corporation or joint stock company, or to any person or officer or member thereof: a railroad company has been held not

to be within the law. 3 Bank. Reg. 81. But see *contrd* 1 Bank. Reg. 196, where it was held that a corporation created for the purpose of carrying on any lawful business defined by its charter, and clothed with power to do so, is such a one as is contemplated by the act.

V. EFFECT OF BANKRUPTCY.

The filing of a petition in bankruptcy makes void all preferences given within the preceding four months, and all fraudulent conveyances executed by the debtor, within six months preceding the institution of proceedings in bankruptcy. The act provides that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of the act, the same shall be void; and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. 2 Bright. Dig. 92.

No security *voluntarily* given by an insolvent to a favored creditor, is valid under this section. 3 Bank. Reg. 92. A mortgage given to secure counsel fees is void under this clause. 3 Bank. Reg. 62. It includes a transfer of securities to protect an indorser. 16 Pitts. L. J. 78. Reasonable cause to believe the debtor to be insolvent, means a state of facts which would put a prudent man upon inquiry. 3 Bank. Reg. 53, 100. And if a creditor having such reasonable cause to believe his debtor to be insolvent, take from him any kind of preference, it is void as against the assignee in bankruptcy. *Ibid.* See 2 Brewst. 560.

The act further provides that if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person, who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of bankruptcy, and that such payment, sale, assignment, transfer or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of the act, the sale, assignment, transfer or conveyance shall be void; and the assignee may recover the property, or the value thereof, as assets of the bankrupt; and if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud. 2 Bright. Dig. 93. Under this clause, it is of no consequence whether a preference given to a creditor was voluntary or the result of threats or coercion; in either case it is void. 2 Am. L. T. Bank. 8. 2 Bank. Reg. 149.

From the time of the commencement of proceedings in bankruptcy, the debtor is subject, at all times, until his discharge, to the order of the court; and he may be examined on oath, on the application of the assignee or of any creditor, or without any application, in reference to the disposal or condition of his property, &c. 3 Bank. Reg. 169. For good cause shown, the bankrupt's wife may also be examined. 2 Bright. Dig. 87.

No bankrupt is liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same be founded on some debt or claim from which his discharge in bankruptcy would not relieve him. 2 Bright. Dig. 87. The bankrupt court has no power to discharge a bankrupt from arrest on state process, in an action of tort, in the nature of deceit. 16 Am. L. R. 690. 2 Ben. 155. Or in an action for a debt contracted in a fiduciary capacity, as a commission merchant. 2 Ben. 38. 2 Bank. Reg. 114. Or from arrest on an execution for costs. 2 Bank.

Reg. 62. But on *habeas corpus* the district court can only determine whether the state court, in its order of arrest, intended to found it on a claim not dischargeable in bankruptcy. 3 Bank. Reg. 73.

No creditor whose debt is provable under the act is allowed to prosecute to final judgment any suit, at law or in equity, therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; if the amount due the creditor be in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment, for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed. 2 Bright. Dig. 84. Under this section, if an action be pending before a justice, on production of a certificate of the defendant's application in bankruptcy, it is his duty to stay proceedings, or if execution have issued after the commencement of the proceedings in bankruptcy, to supersede the same.

A lien, however, acquired by the prior levy of an execution, is not disturbed by proceedings in bankruptcy. 2 Ben. 72. With the exception of property fraudulently conveyed by the bankrupt, the assignee takes nothing but what was vested in the former, subject to all liens and incumbrances. 2 Bank. Reg. 157. 3 Ibid. 12.

VI. ASSIGNMENTS IN BANKRUPTCY.

The debtor having been decreed a bankrupt, it is the right of the creditors at a meeting held after due notice, to choose one or more assignees of the estate. The choice is to be made by the greater part in number and value of the creditors who have proved their debts. Any creditor may act, at all meetings, by his duly constituted attorney, the same as though personally present.

FORM OF LETTER OF ATTORNEY.

In the district court of the United States for the [Eastern] district of [Pennsylvania]
In the matter of John Jones, } In Bankruptcy.
a bankrupt.

To William Smith: Sir, I, Edward Jackson, of the city of Pittsburgh, in the county of Allegheny, and state of Pennsylvania, do hereby authorize you to attend the meeting or meetings of creditors of the bankrupt aforesaid, advertised or directed to be held at a court of bankruptcy, at Philadelphia, on the tenth day of March, A. D. 1870, the day notified in the warrant issued to the messenger, by said court, in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof, may be held, and then and there, from time to time, and as often as there may be occasion, for me and in my name, to vote for or against any proposal or resolution that may be then submitted under the 12th, 13th, 14th, 18th, 19th, 21st, 22d, 23d, 27th, 28th, 33d, 36th, 37th, 42d and 43d sections of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867: and in the choice of assignee or assignees of the estate of the said bankrupt, [and for me to accept such appointment of assignee,] and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid, or the declaration of dividend, or for any other purpose, in my interest, whatsoever. In witness whereof I have hereunto signed my name and affixed my seal, the first day of March, A. D. 1870.

EDWARD JACKSON. [SEAL]

Signed, sealed and
delivered in presence of
A. B. C. D.

The party executing such letter of attorney must acknowledge the same before a judge, register, clerk, or commissioner of the court, or any officer authorized to take the acknowledgment of deeds or other instruments of writing.

A power to several persons jointly cannot be exercised by one of them alone. 1 Bank. Reg. 139. But one member of a firm may constitute an attorney to cast the vote of the firm in the choice of an assignee. 2 Bank. Reg. 165. It seems, that a member of the bankrupt firm cannot represent claims against the estate.

3 Bank. Reg. 9. The attorney of a creditor duly empowered to prove the claim, cannot vote for an assignee, unless specially authorized to do so. 1 Ben. 406.

Any attempt on the part of the register to influence the choice of an assignee is unauthorized and improper. 2 Ben. 113. So, the court will not sanction the solicitation of the votes of creditors, by persons seeking thereby to be chosen assignees. 2 Bank. Reg. 100. A creditor who retains the probate of his debt in his own possession is incompetent to vote for assignee. 1 Bank. Reg. 115. So is a creditor holding security. 16 Am. L. R. 30. A firm can only vote as one creditor. 6 Int. R. Rec. 173. No person who has received any preference contrary to the provisions of the act can vote for or be chosen assignee. 2 Bright. Dig. 83.

The assignee must be a resident of the district. 1 Bank. Reg. 126. Or have a fixed place of daily business therein. 2 Bank. Reg. 161. And he must not be related to the bankrupt. Ibid. 17. A creditor's attorney may be chosen assignee. 1 Bank. Reg. 42. 2 Ibid. 44, 165. But a director of a bank to which the debtor has confessed a judgment, is incompetent. 2 Bank. Reg. 17.

If no choice be made by the creditors at such meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees. 2 Bright. Dig. 79. If no creditor attend at the meeting, it is the duty of the register to appoint an assignee. 1 Ben. 388. So also, if no person receive a majority of the votes in value and number of the creditors who have proved their claims. 6 Int. R. Rec. 173. 2 Bank. Reg. 179. There can be no informal vote by the creditors; if they do not elect, it is the province of the judge or of the register to appoint. 2 Bank. Reg. 151. But after the meeting, the register has no power to permit a creditor to alter his vote, and thereby cause a failure to elect. 2 Bank. Reg. 179.

If the assignee so chosen or appointed fail, within five days, to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees are subject to the approval of the judge; and when in his judgment it is, for any cause, needful or expedient, he may appoint additional assignees, or order a new election. 2 Bright. Dig. 79. It is the duty of the register to state to the judge any reason which he may know to exist, why the election or appointment of an assignee ought not to be approved. 1 Ben. 407. Thus, if it should appear, that the bankrupt had brought in one or more of his friends, though *bonâ fide* creditors, and had by them chosen an assignee, who was also his friend and in his interest, the court would withhold its approval. 6 Int. R. Rec. 116. But if an assignee be chosen by the greater part in value and number of the creditors who have proved their claims, and there be no imputation either upon his capacity or integrity, the judge cannot withhold his approval. 2 Bank. Reg. 35.

The judge may, and upon the request in writing of any creditor who has proved his claim, shall, require the assignee to give bond, with surety, for the faithful performance of his duties; and on failure to do so, for ten days after notice, the judge shall remove him and appoint another in his place. 2 Bright. Dig. 80. This provision for giving security applies to an assignee chosen by the creditors. 2 Bank. Reg. 114. A general bond is not authorized by law. 3 Bank. Reg. 27.

The court after due notice and hearing may, at any time, remove an assignee, for cause. And the same power is given to the creditors by the vote of the greater part of them in value and number who have proved their claims, at a meeting called for that purpose. An assignee may, with the consent of the judge, resign his trust, and be discharged therefrom. Vacancies in the office of assignee may be filled by appointment of the court, or, at its discretion, by a new election by the creditors. 2 Bright. Dig. 82.

As soon as the assignee is appointed and qualified, it becomes the duty of the judge, or, if there be no opposing interest, of the register, to execute a conveyance to the assignee of all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto; which assignment relates back to the commencement of the proceedings in bankruptcy; and thereupon, by operation of law, the title to all such property and estate, both real and personal, vests in the assignee. The effect of this assignment is to override and dissolve any attachment on mesne process made within four months preceding the filing of the petition. 2 Bright. Dig. 80.

It is the duty of the assignee immediately to give public notice of his appoint-

ment; and within six months, to cause the assignment to be recorded in every office in which a conveyance of lands owned by the bankrupt, ought, by law, to be recorded. 2 Bright. Dig. 81. To entitle the assignment to be admitted to record, it need not be acknowledged or proved in accordance with the state laws. 3 Bank. Reg. 48.

The following property is exempted by the statute, and does not pass by force of the assignment, but the title thereto remains in the bankrupt:—

1. The necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of \$500.

Every bankrupt, who is a householder, is absolutely entitled, in addition to the amount exempted by the state laws, to retain his household furniture, not exceeding \$500 in value. 1 Bank. Reg. 106. But the exemption of \$500 is not to be allowed in all cases, out of other property, without discrimination. 16 Am. L. R. 157. A sum of money may be set apart for the use of the bankrupt, under this clause. 17 Am. L. R. 42. But if there be no personal chattels, an allowance in money cannot be made out of the assets collected by the assignee. 2 Bank. Reg. 19. It seems, that real estate may be set apart for the bankrupt, though there is some conflict of opinion on this subject. 2 Bank. Reg. 109. 3 Bank. Reg. 60.

2. The wearing apparel of the bankrupt and that of his wife and children.

3. The uniform, arms and equipments of any person who is, or has been, a soldier in the militia, or in the service of the United States.

4. Such other property as now is, or hereafter shall be, exempted from attachment, or seizure on execution, by the laws of the United States.

5. Such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in the year 1864.

The amount of property exempted by the state laws is exclusive of the \$500 which may be set apart for the bankrupt under the act of congress. 16 Am. L. R. 157. In this state, a vested expectant interest in a sum of money payable at the bankrupt's own death, or at the death of another, not exceeding \$300 in value, may be set apart for him. So may a policy of insurance on the bankrupt's life, payable to his wife, at his decease. 17 Am. L. R. 34.

With these exceptions, all the bankrupt's property, including choses in action, vests in the assignee, by force of the assignment, subject, however, to all prior *bond fide* liens and incumbrances. 3 Bank. Reg. 49.

The 43d section of the bankrupt law provides for a supersedeas of the proceedings by agreement of creditors, and for a settlement of the bankrupt's estate by trustees selected by them. 2 Bright. Dig. 97.

VII. DISCHARGE IN BANKRUPTCY.

At any time after the expiration of six months from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts. If no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, such application may be made at any time after the expiration of sixty days, and within one year from the time of the adjudication. 2 Bright. Dig. 89. It is only when the bankrupt can apply for his discharge within less than six months, that he must apply within a year, in order to obtain a discharge. 2 Bank. Reg. 98, 100, 169. 26 Leg. Int. 85. In other cases, the petition for a discharge may be filed at any time after the expiration of the six months. On filing such petition, notice is to be given to the creditors to appear and show cause, if any they have, why a discharge should not be granted.

The act of congress provides that no discharge shall be granted, or, if granted, shall be valid, in the following cases:—

1. If the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule or inventory; or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate

or his debts, or to any other material fact. To bar a discharge under this clause, it must be shown that an omission from the bankrupt's schedule was intentional. 2 Bank. Reg. 94. The omission of the names of certain creditors from the schedule, with their knowledge and consent, will not bar a discharge, on the objection of other creditors. 2 Bank. Reg. 124. Nor can the creditor, so consenting, object. 2 Bank. Reg. 140.

2. If he has concealed any part of his estate or effects, or any books or writings relating thereto. If the bankrupt has the possession and use of property, which he wilfully omits from his schedules and retains from the assignee, it is no answer to a charge of concealment, that it belonged, of right, to assignees under an earlier assignment in insolvency, under the state law. If the bankrupt has possession of the joint estate and books of account of a firm of which he is a member, he must disclose them to his separate assignee; and if he wilfully fail to do so, a discharge will not be granted. 2 Bank. Reg. 178.

3. If he has been guilty of any fraud or negligence in the care, custody or delivery to the assignee, of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of the act.

4. If he has caused, permitted or suffered any loss, waste or destruction thereof. But such loss must have occurred after the filing of the petition. 3 Bank. Reg. 139.

5. If, within four months before the commencement of the proceedings in bankruptcy, he has procured his lands, goods, money or chattels, to be attached, sequestered or seized in execution.

6. If, since the passage of the act, [2d March 1867] he has destroyed, mutilated, altered or falsified any of his books, documents, papers, writings or securities. But the mutilation of an account-book may be explained. 3 Bank. Reg. 63.

7. If he has made, or been privy to the making, of any false or fraudulent entry in any book of account, or other document, with intent to defraud his creditors.

8. If he has removed, or caused to be removed, any part of his property from the district, with intent to defraud his creditors. But one who was not a creditor at the time of the alleged removal of property, or whose claim was then barred by the statute of limitations, cannot oppose a discharge on such ground. 3 Bank. Reg. 76.

9. If he has given any fraudulent preference, contrary to the provisions of the act. By this is only meant a preference in fraud of the bankrupt law, that is, contrary to its provisions. 1 Bank. Reg. 161. A transfer, by an insolvent debtor, of his stock and book accounts, in payment of a pre-existing debt, though under threats of an attachment, is fraudulent, under this clause. 3 Bank. Reg. 37.

10. If he has made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his property. Where a trader knows, or in reason ought to know, that he is insolvent, and makes payment of an independent debt, not in the course of trade, and without the creditor's knowledge of such insolvency, it is a fraudulent preference, and bars a discharge. 2 Bank. Reg. 114, 145, 149.

11. If he has lost any part of his property in gaming.

12. If he has admitted a false or fictitious debt against his estate.

13. If, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee, within one month after such knowledge.

14. If, being a merchant or tradesman, he has not, subsequently to the passage of the act [2d March 1867] kept proper books of account. To bar a discharge, under this clause, it is not required that the omission to keep proper books of account should have been wilful, or with a fraudulent intent. 2 Bank. Reg. 94, 99. Merchants are responsible for the neglect of their clerks to keep proper books; accidental omissions are not a failure to keep such books; but entries on slips of paper are not sufficient. 3 Bank. Reg. 71. What are proper books of account must be determined by the circumstances of the particular case. 2 Bank. Reg. 99. A cash-book would seem to be indispensable. 2 Bank. Reg. 114. 3 Ibid. 13, 124. So is an invoice-book, or stock-book, for a tradesman. 2 Bank. Reg. 179.

15. If he, or any person in his behalf, has procured the assent of any creditor

to the discharge; or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation. Any contract, covenant or security made or given by a bankrupt, or other person, with or in trust for any creditor, for securing the payment of any money, as a consideration for or with intent to induce the creditor to forbear opposing the discharge of the bankrupt, is declared, by the statute, to be void. And any creditor receiving any sum of money, or security, on such consideration, forfeits his right to a dividend, and also double the amount of the money or security, to be recovered by the assignee for the benefit of the estate. 2 Bright. Dig. 93.

16. If he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the act, in satisfaction of his debts. To bar a discharge, under this clause, a fraudulent payment by way of preference, must have been made in contemplation of bankruptcy; or the creditor must have been a party to the fraud. 2 Bank. Reg. 123. In the absence of fraud, a general assignment for the benefit of creditors, even if it amount to an act of bankruptcy, will not bar a discharge. 3 Bank. Reg. 61. This clause does not extend to a consignment which does not change the title. 3 Bank. Reg. 71.

17. If he has been convicted of any misdemeanor under the bankrupt act, or has been guilty of any fraud whatever contrary to the true intent thereof.

Before any discharge is granted, the bankrupt is required to take and subscribe an oath to the effect that he has not done, suffered or been privy to any act, matter or thing specified in the act as a ground for withholding such discharge, or as invalidating such discharge if granted.

The act further provides that no discharge shall be granted to a debtor whose assets shall not be equal to fifty per cent. of the claims proved against his estate, upon which he shall be liable as a principal debtor, unless on the assent in writing of a majority in number and value of such creditors. (a) The assets to be divided among the creditors must amount to fifty per cent., at the time of hearing. 3 Bank. Reg. 177. And no discharge shall be granted, on a second bankruptcy, unless the bankrupt's estate be sufficient to pay seventy per cent. of the debts proved against it, or the assent be obtained in writing of three-fourths in value of the creditors, or unless the bankrupt has paid or been voluntarily released from all the debts owing on the first bankruptcy. 2 Bright. Dig. 91.

Any creditor who has a provable debt may oppose the discharge of the debtor. 3 Bank. Reg. 66. He must file definite and precise specifications of the grounds of his opposition. 1 Ben. 532. 2 Ben. 136, 138, 153. The discharge may be avoided and set aside, at any time within two years, on the petition of any creditor, on the ground that it was fraudulently obtained. 2 Bright. Dig. 92.

A discharge in bankruptcy, duly granted, releases the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate; with the exception of debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character. Inasmuch as the discharge does not bar a debt created by fraud, or contracted in a fiduciary capacity, the existence of such debt is no ground for a refusal of it. 16 Am. L. R. 618. 2 Ben. 155. 2 Bank. Reg. 98.

The discharge has not the effect of releasing, discharging or affecting any person liable for the same debt, for or with the bankrupt, either as partner, joint-contractor, indorser, surety or otherwise. 2 Bright. Dig. 92.

VIII. PROBATE OF DEBTS.

All debts due and payable from the bankrupt, at the time of the adjudication in bankruptcy, and all debts then existing but not payable until a future day (a rebate of interest being made, when no interest is payable by the terms of the contract) may be proved against the estate of the bankrupt. Any debt which may be proved by complying with any of the provisions of the bankrupt law, is a provable one. 1 Bank. Reg. 196. But a judgment obtained after the adjudication,

(a) The act 14 July 1870 provides that this clause shall not apply to debts contracted prior to 1 January 1869.

extinguishes the original debt, and is not provable. 2 Bank. Reg. 79. *Contra*, 3 Bank. Reg. 145. See 1 Ben. 398. Nor is a note renewed subsequently to the adjudication. 3 Bank. Reg. 108.

All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld from him, may be proved as debts, to the amount of the value of the property so taken or withheld, with interest.

If the bankrupt shall be bound as drawer, indorser, surety, bail or guarantor, upon any bill, bond, note or other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. A party holding the bankrupt's notes, as collateral security, may prove them to an extent sufficient to secure dividends to the amount of his claim. 2 Bank. Reg. 151. So, the liability of the bankrupt as indorser, having become absolute, a creditor holding a mortgage from the maker to secure their payment, may, nevertheless, prove the full amount of the notes against the estate of the indorser. 1 Bank. Reg. 132.

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not otherwise provided for in the bankrupt law, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, (which shall be done in such manner as the court shall order) and shall be allowed to prove for the amount so ascertained.

Any person liable as bail, surety, guarantor or otherwise, for the bankrupt, who shall have paid the debt, or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same, or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided in the rules.

Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof, up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. A creditor cannot prove a claim for unliquidated damages, without an application for the assessment thereof under this clause. 16 Pitts. L. J. 25.

No debts other than those above specified shall be proved or allowed against the estate. 2 Bright. Dig. 83-4.

In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate. A claim of the bankrupt for unliquidated damages cannot be set off against that of a creditor. 1 Ben. 361. No set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition. 2 Bright. Dig. 84.

A lien-creditor is only to be admitted to prove for the balance of his claim after deducting the value of his security, to be ascertained by agreement between him and the assignee, or by a sale of the property in such manner as the court may direct: or he may give up his security to the assignee, and prove his whole debt. A secured creditor must prove for his balance, or he cannot participate in the distribution. 2 Ben. 189. If a lien-creditor prove his debt, the assignee is entitled to be subrogated to his lien upon the real estate of the bankrupt. 26 Leg. Int. 252.

Probate of a debt may be made before the proper register, or before any United

States commissioner; or, if the creditor be in a foreign country, before any minister, consul or vice-consul of the United States.

The probate of a debt must be by deposition in writing, on oath or affirmation. It must set forth the demand; the consideration therefor; whether any and what securities are held therefor; and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings under the bankrupt act; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer or dispose of the said claim, or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings under the act, is or shall be, in any way, affected, influenced or controlled. 2 Bright. Dig. 85.

Such oath shall be made by the claimant testifying of his own knowledge, unless he be absent from the United States, or prevented by some other good cause from testifying, in which cases the probate may be made by his attorney or authorized agent, testifying to the best of his knowledge, information and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath or affirmation of their president, cashier or treasurer. *Ibid.*

FORM OF PROBATE OF DEBT WITHOUT SECURITY.

In the district court of the United States for the [Eastern] district of [Pennsylvania.]

In the matter of John Jones, } In Bankruptcy.
a bankrupt.

Eastern district of Pennsylvania, ss.

At Philadelphia, in the county of Philadelphia, and state of Pennsylvania, on the [tenth] day of [March], A. D. 1870, before me, came Edward Jackson, of Philadelphia, in the county of Philadelphia, and state of Pennsylvania, and made oath and says, that the said John Jones, the person [against] whom a petition for adjudication of bankruptcy has been filed, at and before the filing of the said petition was and still is justly and truly indebted to this deponent in the sum of [three thousand dollars] for goods, wares and merchandise sold and delivered by this deponent to the said bankrupt at his request, for which sum of [three thousand dollars] or any part thereof, this deponent says that he has not, nor has any other person by his order, or to this deponent's knowledge and belief, for his use, had or received any manner of satisfaction or security whatsoever. And this deponent further says, that the said claim was not procured for the purpose of influencing the proceedings under the act of congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of this deponent, to sell, transfer or dispose of, said claim, or any part thereof, against said bankrupt, or to take or receive, directly or indirectly, any money, property or consideration whatever, whereby the vote of this deponent for assignee, or any action on the part of this deponent, or any other person, in the proceedings under said act, has been, is, or shall be, in any way affected, influenced or controlled.

Subscribed and sworn to
before me.

EDWARD JACKSON,
Deposing creditor.

JAMES FISHER,
Register in bankruptcy.

Other forms of probate will be found in Brightly's Bankrupt Law 163; and Rice's Manual 200.

A creditor may amend his proof, but will not be allowed to withdraw it. 1 Ben. 406. He may correct clerical errors therein at any time before final dividend. 3 Bank. Reg. 38. The court has, at all times, full power and control over proofs of claims, and may allow amendments and supplementary proofs to be filed. 3 Bank. Reg. 108.

IX. DISTRIBUTION.

At the expiration of three months from the adjudication, it is the duty of the

assignee to call a general meeting of the creditors, at which they have power to determine as to the expediency of declaring a dividend. The like proceedings are to be had at the expiration of the next three months; and subsequently, a third meeting is to be called by order of the court, and a final dividend declared, unless it be impracticable by reason of pending suits. If other assets come into the hands of the assignee, further dividends may be declared as occasion requires.

Claims against the estate of a bankrupt are to be paid in the following order:—

1. The fees, costs and expenses of suits, and the several proceedings in bankruptcy under the act, and for the custody of property as therein provided. The claim of the bankrupt's attorney for services and disbursements is not one to be paid. 1 Bank. Reg. 195. But in a case of involuntary bankruptcy, if the bankrupt be without means, his counsel fees and expenses will be directed to be paid out of the assets. 3 Bank. Reg. 35. The bankrupt's landlord is entitled to be paid the amount of his accruing rent for the use of the demised premises, for the time the same was necessarily used by the assignee, for the storage of the bankrupt's effects. 16 Am. L. R. 624. fee

2. All debts due to the United States, and all taxes and assessments under the laws thereof. But where the members of a firm become individually bound to the United States, as accommodation sureties, on the bankruptcy of the firm, the government is not entitled to priority of payment out of the partnership assets. 2 Bank. Reg. 183.

3. All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state. A state has, in her sovereign capacity, a lien for taxes, which has precedence over that of a prior mortgage-creditor; but other liens held by a state are to be discharged in the order of their date. 3 Bank. Reg. 85.

4. Wages due to any operative, clerk or house servant, to an amount not exceeding \$50, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. An apprentice is an operative within the meaning of this clause. 1 P. L. J. 368.

5. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference.

6. With these exceptions, all creditors whose debts are duly proved and allowed are entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever.

But any debt proved by any person liable as bail, surety, guarantor or otherwise, for the bankrupt, is not to be paid to the person so proving the same, until satisfactory evidence be produced of the payment of such debt by the person so liable; and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto. 2 Bright. Dig. 88-9.

X. CRIMINAL PROCEEDINGS.

The act of congress provides that if any debtor or bankrupt shall, after the commencement of the proceedings in bankruptcy, do any of the following acts, he shall be deemed guilty of a misdemeanor, and on conviction thereof in any court of the United States, be punished by imprisonment, with or without hard labor, for a term not exceeding three years:—

1. If he shall secrete or conceal any property belonging to his estate

2. If he shall part with, conceal or destroy, alter, mutilate or falsify, or cause to be concealed, destroyed, altered, mutilated or falsified, any book, deed, document or writing relating to his estate; or remove, or cause to be removed, the same, or any part thereof, out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of his assignee in bankruptcy, or to hinder, impede or delay him in recovering or receiving the same.

3. If he shall make any payment, gift, sale, assignment, transfer or conveyance of any property belonging to his estate, with the like intent.

4. If he shall spend any part of his estate in gaming.

5. If he shall, with intent to defraud, wilfully and fraudulently, conceal from his assignee, or omit from his schedule, any property or effects whatsoever.

6. If, in case of any person having, to his knowledge or belief, proved a false or

fictitious debt against his estate, he shall fail to disclose the same to his assignees, within one month after coming to the knowledge or belief thereof.

7. If he shall attempt to account for any of his property by fictitious losses or expenses.

8. If he shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit, from any person, any goods or chattels, with intent to defraud.

9. If he shall, with intent to defraud, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge or dispose of, otherwise than by *bonâ fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for.

The act likewise provides for the punishment of extortion by any officer under color of proceedings in bankruptcy; and for the forgery of any document used in such proceedings; or for using such forged document. 2 Bright. Dig. 98.

For either of these offences, a justice has power to bind the offender over for trial before the district court of the United States.

Banks.

I. Act of assembly relating to banks and banking companies.

II. Of bank notes.

III. Of checks.

IV. Liabilities of banks.

1. ACT OF 16 APRIL 1850. Purd. 91.

SECT. 20. If any president, cashier, director or any other officer or clerk of any such bank, shall fraudulently embezzle or appropriate to his own use, or to the use of any other person or persons, any money or other property belonging to said institution, or left with the same as a special deposit or otherwise, he or they, upon conviction of such offence, shall be fined in any amount not less than the sum so appropriated or embezzled, and sentenced to undergo imprisonment in the proper state penitentiary, to be kept in separate and solitary confinement at hard labor, for any term not exceeding five years: *Provided*, That this shall not prevent any person or persons aggrieved from pursuing his, her or their civil remedy against such person or persons.

SECT. 22. It shall not be lawful for any such bank to issue and put in circulation any bill or note of said bank payable at any other place than at said bank, or otherwise than payable on demand, and of a denomination less than five dollars; (a) and any violation of this section by any officer of any such bank, shall be a misdemeanor, punishable, upon conviction, by a fine of not less than five hundred dollars, and imprisonment in the jail of the proper county not less than one year.

SECT. 26. Whenever any demand for specie shall be made by a note-holder of any bank, subject to the provisions of this act, it shall be the duty of the cashier or other officer of the bank upon whom such demand is made, to pay one-fifth of the amount of such demand in American gold coin, if the same shall be requested by the note-holder making such demand: *Provided*, That the one-fifth of such demand be not less in amount than five dollars.

SECT. 48. From and after the twenty-first day of August, 1850, it shall not be lawful for any person or persons, corporation or body corporate, directly or indirectly to issue, pay out, pass, exchange, put in circulation, transfer or cause to be issued, paid out, passed, exchanged, circulated or transferred, any bank note, note, bill, certificate, or any acknowledgment of indebtedness whatsoever, purporting to be a bank note, or of the nature, character or appearance of a bank note, or calcu-

(a) By the act 17 April 1861, the banks were authorized to issue notes of the denominations of \$1, \$2 and \$3, to an amount not

exceeding 20 per cent. of their capital paid in. Purd. 94.

lated for circulation as a bank note, issued, or purporting to be issued by any bank or incorporated company, or association of persons, not located in Pennsylvania, of a less denomination than five dollars; every violation of the provisions of this section by any corporation or body corporate, shall subject such corporation or body corporate to the payment of five hundred dollars; and any violation of the provisions of this section by any public officer holding any office or appointment of honor or profit under the constitution and laws of this state, shall subject such officer to the payment of one hundred dollars; and any violation of this section by any other person, not being a public officer, shall subject such person to the payment of twenty-five dollars, one-half of which, in each case above mentioned, shall go to the informer, and the other half to the county in which the suit is brought, and may be sued for and recovered as debts of like amount are now by law recoverable in any action of debt, in the name of the commonwealth of Pennsylvania, as well for the use of the proper county, as for the person suing.

SECT. 49. In addition to the civil penalties imposed for a violation of the provisions of the last preceding section, every person who shall violate the provisions of that section, shall be taken and deemed to have committed a misdemeanor, and shall, upon conviction thereof in any criminal court in this commonwealth, be fined in any sum not less than one dollar, and not more than one hundred dollars; and the several courts of quarter sessions shall, in their charges to the grand jury, call their attention to this subject; and it shall be the duty of the several grand juries to make presentment of any person within their respective counties, who may be guilty of a violation of the provisions of the last preceding section; and it shall be the duty of the several constables and other peace officers within this commonwealth, to make information against any person guilty of such violation, and they shall be sworn so to do: *Provided*, That it shall not be necessary, in any civil suit or criminal prosecution under this section, and the last preceding section, to produce, in evidence, the charter of any bank, or articles of association of any company, not located in this state.

ACT 1 MAY, 1861. Purd. 85.

SECT. 36. Every president, director, cashier, teller, clerk or agent of any bank who shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of such bank, or shall, fraudulently, without authority from the directors, issue or put in circulation any of the notes of such bank, or shall, without such authority, fraudulently issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, sign any note, bond, draft, bill of exchange, mortgage or other instrument of writing, or shall make any false entry on any book, report or statement of the bank, with an intent, in either case, to injure or defraud such bank, or to injure or defraud any other company, body corporate or politic, or any individual person, or to deceive any officer or agent appointed to inspect the affairs of any bank, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be confined in the penitentiary, at hard labor, not less than one, nor more than ten years.

ACT 31 MARCH, 1860. Purd. 228.

SECT. 64. If any cashier of any bank of this commonwealth shall engage directly or indirectly in the purchase or sale of stock, or in any other profession, occupation or calling, other than that of his duty as cashier, he shall be guilty of a misdemeanor, and, being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars.

II. OF BANK NOTES.

II. BANK NOTES are treated as money, or cash, in the ordinary course of transactions of business, by common consent, which gives them the credit and currency of money to every effectual purpose. 1 Binn. 457.

A payment in current bank notes discharges the debt, although, in consequence of the previous failure of the bank, of which both parties were ignorant, the notes were of no value at the time of payment. 1 W. & S. 92.

In delivering his opinion in the supreme court, in the case of *Gray v. Donohue*, Judge SERGEANT remarks: "No principle is better established, none more necessary to be maintained, than that bank notes are *not* money in the *legal* sense of the word. They are not a legal tender as money, either in the ordinary trans-

actions of business, or in the collection of debts by legal process. Coin struck at the mint, or authorized by act of congress, are alone lawful money." 4 W. 400.

When a person passes a bank note, though he does not engage to be responsible for its payment at the bank, yet he virtually undertakes that it is what it purports to be; and if it proves to be forged, the consideration has failed, and he is accountable for the money. 1 Marsh. 157.

Nor, if objected to, are bank notes a valid tender; but, if not objected to, the tender is good. 3 Halst. 172.

The holder of bank notes may insist upon payment in gold or silver coin, and is not obliged to receive foreign gold or silver coin, or the bills of the bank, or any other bills, in payment, and is entitled to be paid their numerical value in *specie*, and cannot be compelled to take the value fixed upon them by the brokers and speculators. 1 Ohio 222.

It is not necessary to tender back a counterfeit bank note, to authorize a recovery of the consideration given for it. 1 B. Monroe 195. See 13 S. & R. 319. 2 Greenl. Ev. § 124.

If a payment in bank notes be proved without showing of what denomination, they will be presumed to have been of the lowest denomination in circulation. 2 Greenl. Ev. § 129, a. Ibid. § 255.

In *Martin v. Bank U. S.*, 4 W. C. C. R. 253, it was held that a bank was bound to pay the amount of a bank note, one half of which is presented, on proof of the loss or destruction of the other half; or that the other half has by fraud or accident got out of the possession of the *bona fide* owner. So in the *Bank of Virginia v. Ward*, 6 Munf. 166-9, it was decided that the *bona fide* owner of a bank note, and holder of one-half, having transmitted the other half thereof by mail, which was stolen or lost, may demand payment from the bank of the whole note, on fully proving the loss, and giving a satisfactory indemnity to the bank.

A certificate of deposit, payable to the order of the depositor, *only* on the return of the certificate, is not a negotiable instrument. 6 W. & S. 227. 8 W. & S. 361. 4 C. 452.

III. OF CHECKS.

Bank checks, or drafts on banks, are instruments by means of which a creditor may assign to a third person, not originally party to the contract, the legal as well as equitable interest in a debt raised by it, so as to vest in such an assignee a right of action against the original debtor. 1 H. B. 602.

Bank checks are considered as bills of exchange, and the holder must use due diligence in presenting them for payment. 6 Wend. 445.

Checks must be presented for payment in a reasonable time. 6 Cow. 490.

The holder of a check on a bank, cannot resort to the drawer, without proof of due presentment for payment, and prompt notice of dishonor. 7 C. 100.

If, however, the drawer had no funds in the bank, at the time of drawing the check, presentment and notice may be dispensed with. But if the drawer had funds in the bank, at the time the check was drawn, the subsequent shifting of the balance will not take the case out of the general rule. Ibid.

A check drawn by one person in favor of another, and paid to the latter, is presumed to have been received on account of a debt shown to have existed at the time. 5 C. 128. 10 P. F. Sm. 170.

A paid check, drawn by the defendant's wife, is evidence of payment, in the absence of proof of any other transaction to which it could be applied. 9 C. 235

A check, payable at a future day, is not, in this state, entitled to days of grace. SHARSWOOD, J., 8 Leg. & Ins. Rep. 212

IV. LIABILITIES OF BANKS.

A bank is not liable for the loss of special deposits, either of cash, or other articles, through the dishonesty of any of their officers, provided they take the same care of them that they do of their own specie. The bank is liable for all acts of their officers, which pertain to their official duty: for correct entries, for all mistakes of their clerks, for not giving due notice on notes left for collection, &c., and for all their acts done within the scope of their authority. On general deposits,

however, the bank is liable for all losses, however arising; the privilege given by charter to discount on moneys deposited applying to general deposits only. 17 Mass. 479. But the bank is not chargeable with any general deposits made with an officer, who is not the one specially authorized; as to a book-keeper, for instance, unless the money actually comes into the coffers of the bank, or the book-keeper is then acting for the teller in his absence. 4 Johns. 382.

A bank which receives a note for collection, and when it is over-due places it in the hands of a notary, in the usual course, is not liable for the neglect of the notary to give notice to an indorser. 4 Wh. 105.

A note had been deposited by the holder in a bank for collection. When it fell due and remained unpaid, it was placed as usual in the hands of the bank's notary, whose clerk called at the store of G., the last indorser, to inquire for the place of residence of C., the first indorser. The wife of G., who was in the store, told the clerk that C. resided at a particular place, which was in fact the place of business of C.'s son. Notice was left at that place, and G. was informed of his wife's direction as to the place of residence of C. The note was renewed by agreement between the parties, and when it again fell due, the notary's clerk again left a notice at the place of business of C.'s son, supposing that it was the store of C., by which mistake C. was discharged; *held*, that neither the bank, nor its agent the notary, was liable to the holder of the note for the consequences of the omission to give notice to the indorser. *Ibid*.

Barrator.

ACT 31 MARCH 1860. Purd. 218.

SECT. 9. If any person shall be proved and adjudged a common barrator, vexing others with unjust and vexatious suits, he shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, or undergo imprisonment not exceeding one year, or both, or either, at the discretion of the court.

A justice of the peace may be indicted as a common barrator for exciting prosecutions for offences; and it is not a sufficient defence that the prosecutions were not groundless, if he excited them with a view of exacting fees for afterwards suppressing them. 1 Bailey 379. See 2 Cr. C. C. 60.

Beneficial Societies.

A BENEFICIAL SOCIETY is an association supported by subscription for the mutual relief of the members or their wives, children, relatives or other nominees, against casualties, such as sickness, old age, widowhood, &c. The members usually pay a monthly subscription, out of which they are entitled to receive from the society a weekly allowance in case of sickness, and a gross sum in case of the death of a member or his wife.

Such societies may be incorporated by the courts of common pleas, under the provisions of the act of 13 October 1840. *Purd.* 196.

As a general rule, a member of such society is entitled to relief only from the date of his application, not from the time his sickness or disability accrued. *3 W. & S.* 218. But no action will lie to compel payment of the weekly benefits; the society does not consent to expose itself to the costs and vexation of an action for every weekly pittance that may be in arrear. The only remedy, in such case, is by writ of *mandamus*. *2 Wh.* 313.

The charters of such societies generally provide for the expulsion of a member as a punishment for certain acts contrary to his duty as a corporator, and it is the exercise of this power that gives rise to most of the questions that come before the courts.

When the charter provides for an offence, directs the mode of proceeding, and authorizes the society, on conviction of a member, to expel him, this expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by the courts. *8 W. & S.* 247.

But if there be any irregularity in the proceedings, the courts will interfere by *mandamus*, and compel the society to restore the party to all his rights as a member. *14 Wr.* 107. *3 H.* 251.

It is irregular, to expel a member without giving him an opportunity of being heard in his defence, before the society at large; he ought not to be expelled on the report of a committee of investigation. *3 H.* 251.

The return to a *mandamus* must show that the party had notice to appear and defend himself, that an assembly of the proper persons was duly held, the proceedings before them, a conviction of the offence, and an actual motion by them. *3 H.* 251.

In case of the illegal expulsion of a member, he is entitled to recover damages according to the extent of the injury. *8 H.* 425. And for the purpose of fixing the amount of his damages, he may show that, since his expulsion, he has been in a condition that entitled him to the aid of the society, under its constitution and by-laws. *7 C.* 82.

Bible, Family.

A LEAF extracted from a family bible, containing entries of births and deaths of children, sworn to by some of the children, is good evidence. 2 Dall. 116.

In an action against a justice of the peace by a parent, to recover the penalty for marrying his minor son, the entry in the family bible of the son's birth, proved by the oath of the plaintiff, is competent evidence of the minority of the son. 10 Watts 82. 1 Greenl. Ev. § 104.

But although the entry in a family bible is admissible to prove the date of a birth, it is secondary evidence; and its admissibility for such purpose is subject to the general rule, that primary evidence must be adduced, if it can be obtained. 23 Texas 252. It cannot be received where the person who made the entry is present in court, or within reach of process. 1 McCord 165. 3 Wend. 876.

Bigamy.

IF ANY PERSON shall have two wives or two husbands at one and the same time, he or she shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate and solitary confinement at labor, not exceeding two years, and the second marriage shall be void: *Provided*, That if any husband or wife, upon any false rumor, in appearance well founded, of the death of the other (when such other has been absent for two whole years), hath married, or shall marry again, he or she shall not be liable to the penalties of fine and imprisonment imposed by this act. Act 31st March 1860, § 34. Purd. 223.

If any man or woman being unmarried, shall knowingly marry the husband or wife of another person, such man or woman shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment by separate or solitary confinement at labor, not exceeding two years. Ibid. § 35.

In a prosecution for bigamy, the confession of the defendant is adequate evidence of the first marriage. 1 Ash. 272. 2 Rich. 434. 4 McCord 256. 2 Greenl. Evi. § 461, note 1.

On an indictment for bigamy, an actual marriage must be proved; reputation and cohabitation are not sufficient. 7 Greenl. 58.

The second wife is a competent witness either for or against the prisoner. 2 Iredell 346. 1 East P. C. 469.

To bring a case within the proviso to the 34th section of the act of 31st March 1860, there must be a general report, that the husband or wife died at some particular place, was shipwrecked, or lost his or her life in some way which the report specifies. *Commonwealth v. Smith*, 1 Wh. Dig. 1177, pl. 622.

To give jurisdiction to our courts, the second marriage, which constitutes the offence, must have been contracted in Pennsylvania. Whart. C. L. § 2627.

So, if, in a foreign country, a man marries a second wife in the lifetime of his first, and after the death of his first wife, but the second living, marries a third time in this state, the case is not within the statute; because the second marriage was simply void. 2 Parker C. R. 195.

Bills of Exchange.

- I. Nature of a bill of exchange.
- II. Transfer of bills of exchange.
- III. Acceptance of a bill.
- IV. Days of grace.

- V. Presentment for payment.
- VI. Notice of dishonor.
- VII. Actions on bills of exchange.
- VIII. Damages on protested bills.

I. NATURE OF A BILL OF EXCHANGE.

A **BILL OF EXCHANGE** is an open letter of request addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid, or it may be made payable to bearer. 1 Bouv. Inst. 853, 456.

The person who makes the bill is called the *drawer*, he to whom it is addressed the *drawee*, and when he undertakes to pay the amount, he is then called the *acceptor*. The person to whom it is ordered to be paid is called the *payee*, and if he appoint another to receive the money, that other is called the *indorsee*, as the payee is with respect to him the indorser; any one who happens, for the time, to be in possession of the bill is called the *holder* of it.

The time at which the payment is limited to be made is various, according to the circumstances of the parties, and the distance of their respective residence. Sometimes the amount is made payable *at sight*, sometimes at so many days *after sight*, at other times at a certain distance from the *date*. *Usance* is the time of one, two or three months after the date of the bill, according to the custom of the places between which the exchanges run, and the nature of which must therefore be shown and averred in a declaration on such a bill. Double or treble usance is double or treble the usual time; and half usance is half the time. Where the time of payment is limited by months, it must be computed by calendar, not lunar months; and where one month is longer than the succeeding one, it is a rule not to go in the computation into a third. Thus on a bill dated the 28th, 29th, 30th or 31st of January, and payable one month after date, the time expires on the 28th of February, in common years, and in the three latter cases in leap-year on the 29th (to which are to be added the *days of grace*). Where a bill is payable at so many days after sight or from the date, the day of presentment, or of the date, is excluded. Thus, where a bill, payable ten days after sight, is presented on the first day of a month, the ten days expire on the eleventh: where it is dated the first, and payable twenty days after date, these expire on the twenty-first. Lord Raym. 281. Stra. 829.

Bills of exchange are foreign or inland. *Foreign*, when the drawer resides in one country and the drawee in another. *Inland*, when both the drawer and the drawee reside in the same kingdom. Chit. on Bills 9.

But a bill drawn in one of the United States upon a person in another of the United States is a foreign and not an inland bill of exchange, and subject to all the law of evidence and damage of foreign bills. 2 Peters 586. 1 Rep. Const. Ct. N. S. 100. "Bills drawn on persons in different states, are considered here *foreign bills*." HUSTON, J. 6 Whart. 414. 1 Bouv. Inst. 461.

It is not essential to the validity of a bill of exchange that it be in form negotiable; nor that it should contain the words "for value received." If it be for the absolute payment of money, at all events, it will not invalidate it, if the fund on account of which it is drawn be named as a means whereby the drawee is to be indemnified. 7 C. 506.

By the act of 5th April 1849, § 11, it is provided that bills of exchange, &c., made payable with the current rate of exchange, or in current funds, or with such like qualifications superadded, shall be deemed negotiable by indorsement, and the indorsees may recover thereon in their own names. Purd. 111.

II. TRANSFER OF BILLS OF EXCHANGE.

In the case of a bill payable to A., *for the use of B.*, the right of transfer is only in A., because B. has only an equitable and not a legal interest. Chit on. Bills 123.

A bill of exchange may be drawn by an agent, so also it may be indorsed by a

person acting in that capacity—in which case he must expressly indorse as agent, as “E. F. per proc. A. B.,” or he may write the name of his principal. Chit. on Bills 132.

A qualified indorsement may be thus: “I hereby indorse, assign and transfer my right and interest in this bill to C. D. or order, but with this express condition, that I shall not be liable to the said C. D., or any holder, for the acceptance or payment of such bill, A. B.,” or the form may be, as in France, by the indorser writing his name, and subscribing, “without recourse to me.”

The indorsee of overdue paper takes it exclusively on the credit of the indorser, and subject, even without proof of *mala fides* [bad faith], to all the intrinsic considerations that would affect it between the original parties; but where there is no direct evidence of the time of transfer, the presumption is, that it was made in the usual course of commercial business, and consequently before the day of payment. Barr 164.

The presumption is, that the indorsee of negotiable paper received it *bona fide*, in due course of business, and for a valuable consideration. To put him to the proof of his title, and the consideration paid for it, the defendant must make out a *prima facie* case, that it was obtained by undue means, as by fraud, felony or force, or that it was lost and afterwards put in circulation. 5 C. 365. 7 Wr. 137.

If the drawee of a bill, who has not accepted, discount it for the payee, he acquires the rights of an indorsee for value, and may sue the drawer and indorser, in case of its dishonor at maturity. 4 Wr. 186.

III. ACCEPTANCE OF A BILL.

Acceptance, in its ordinary signification, is an engagement by the drawee, to pay the bill, when due, in money. Byles on Bills 143.

If one accept a forged bill, he is bound in law to pay for it. 4 D. 235, in note.

The acceptor of a bill of exchange is not to be admitted to vary the terms of his acceptance, by parol evidence. 11 C. 448.

Where a bill is accepted “payable when in funds,” the burden is upon the plaintiff to show that the acceptors were in funds. Ibid.

The acceptor of a bill is to be considered as the principal debtor, and the other parties as sureties only; the holder, therefore, who is the creditor, ought not so to stipulate with the acceptor, as to prejudice the remaining parties to the bill. If a holder give time to the principal debtor, the collateral securities are discharged, in law and equity.”—CHAMBRE, J. 3 B. & P. 366.

If the holder of a bill compound with, and discharge the acceptor, he cannot afterwards resort to the other parties. But merely receiving partial payments from the acceptor, without releasing him, does not affect the liability of the other parties. Johns. 41.

IV. DAYS OF GRACE.

A custom has obtained, among merchants, that a person to whom a bill is addressed, shall be allowed a few days for payment beyond the term mentioned in the bill, called *days of grace*. In Great Britain and Ireland (and in the United States and America) three days are given; in other places more. If the last of these days happen to be Sunday, the bill is to be paid on Saturday. These days of grace are not allowed on bills or notes payable on demand. Byles on Bills 162. A draft on a bank, payable at a future day named, is a check, and not entitled to days of grace. SHARSWOOD, J. 8 Leg. & Ins. Rep. 212.

It is provided by the act 21st May 1857, that all drafts and bills of exchange payable at sight, shall be and become due and payable on presentation, without grace, and shall and may, if dishonored, be protested on and immediately after presentation. Purd. 111.

The act of 11th April 1848, provides that payment of all notes, checks, bills of exchange, or other negotiable instruments, becoming due on Christmas day, or the first day of January, the fourth day of July, or any other day fixed upon by law, or by the proclamation of the governor, as a day of general thanksgiving, or for

the general cessation of business, in any year, shall be deemed to become due on the secular day next preceeding. Purd. 110. This is extended to the 22d February by act 7 May 1864. Purd. 1372. And to Good Friday, by act 12 April 1869. Purd. 1583

V. PRESENTMENT FOR PAYMENT.

Payment of a bill of exchange must be demanded on the day of maturity, at the place to which it is addressed. And demand at such place is sufficient to found a notice of dishonor to the other parties, unless, perhaps, when the holder knows the true place of business of the acceptor, in time to present it there. 3 C. 249. 6 C. 139.

A bill of exchange, in the absence of anything to indicate a different place, will be presumed to be addressed to the drawee at his residence, or place of business. Ibid.

It is provided by the act of 21st May 1857, that the presentment for payment of any bill or bills of exchange, made or to be made elsewhere than in this commonwealth, at an office or house referred to only in the margin of the bill, or below the name of the drawee, shall not be so construed as to charge the indorsers for non-payment, unless such office or house was, at the date of the bill, the actual place of business or residence of the drawee, or is distinctly expressed as such in the said reference, or unless it appear by the certificate of protest that upon diligent inquiry the place of business or residence of such drawee could not be found." Purd. 111.

VI. NOTICE OF DISHONOR.

The holder of a bill of exchange must use reasonable diligence to ascertain the residence of the drawer, for the purpose of giving him notice of its dishonor. It is not sufficient to look for the drawer at the place where the bill is dated, if his residence is elsewhere. Notice left with the family of a seafaring man, during his absence at sea, is sufficient. 5 B. 541. 5 Barr 178.

Notice of protest is not required to render a firm liable on an indorsement, where all the members of the firm are members of the house which drew the bill. 3 Barr 399.

The holder of a bill of exchange is not obliged to notify all the parties to it. It is sufficient to notify the party he intends to hold liable. And each indorser has an entire day to give notice to his predecessor on the bill. 6 C. 139.

Notice of dishonor sent to the place of date is sufficient, unless the holder knows that the date does not truly indicate the residence. The rule seems to be, that if the residence be shown to be elsewhere in the same state, due diligence to ascertain it must be proved, and that notice was sent accordingly, unless the removal took place after the drawing of the bill. 3 C. 249.

VII. ACTIONS ON BILLS OF EXCHANGE.

The holder of negotiable paper may sue on it in his own name, although but an agent or trustee for others. 2 P. F. Sm. 393.

An accommodation acceptor paying a bill, for which no funds have been provided, can recover from the drawer, for the law implies a contract to indemnify. 8 Wr. 356.

It is no defence to a bill in the hands of an indorsee, that the consideration has failed as between the original parties. 4 P. F. Sm. 398.

It is no objection to an action by the drawer against the acceptor of a bill, that it has not been indorsed by the payee. 7 Barr 527.

The *onus* of showing that an alteration in a material part of a negotiable instrument was lawfully made, is on the holder. And where the place of payment is in a different handwriting from the body of the instrument, there is a presumption of alteration. 9 Barr 186.

Any material alteration of commercial paper, unaccounted for by the holder, is fatal to a recovery upon it. 9 Barr. 186. 7 H. 178. 3 C. 244.

An indorsee takes an altered bill with all its imperfections, and is bound to explain them; if the alteration is apparent, and unexplained, the bill cannot be received in evidence. 10 Wr. 259.

The maker of negotiable paper is always presumed, in the absence of evidence, to have issued it clear of all blemishes, erasures and alterations, whether of the date or body of the instrument; and the burden of showing that it was defective, when issued, is upon the holder, even though the alteration be beneficial to the maker. 8 C. 423.

Whenever any bill of exchange, &c., shall be negotiated or paid, and the signatures of any of the parties shall have been forged, the indorsee or payer may recover back from the previous party the amount so paid for the same, with lawful interest, from demand of repayment. Act 5th April 1849. Purd. 111. This act was only declaratory of the existing law. Notice of the forgery within a reasonable time after its discovery, and an offer to return the bill, are necessary to the maintenance of an action for the recovery of the consideration paid, unless waived by the defendant, or the bill be shown to possess no value. 6 C. 145, 527.

If the holder of a bill discharge a party who is liable to pay it, he thereby discharges all other parties whose liability was subsequent. But this effect is not produced by the holder's discharging a party who would not be liable to the other parties, though prior to them. 6 Mass. 85.

VIII. DAMAGES ON PROTESTED BILLS.

Whenever any bill of exchange, to be drawn or indorsed after the 1st day of August 1850, within this commonwealth, upon any person or persons, or body corporate, of or in any other state, territory or place, shall be returned for non-acceptance or non-payment, with a legal protest, the person or persons to whom the same shall or may be payable, shall be entitled to recover and receive of and from the drawer or drawers, or the indorser or indorsers of such bill of exchange, the damages hereinafter specified, over and above the principal sum for which such bill of exchange shall have been drawn, and the charges of protest, together with lawful interest on the amount of such principal sum, damages and charges of protest, from the time at which notice of such protest shall have been given, and the payment of said principal sum and damages and charges of protest demanded, that is to say: if such bill shall have been drawn upon any person or persons, or body corporate, of or in any of the United States or territories thereof, excepting Upper and Lower California, New Mexico and Oregon, five per cent. upon such principal sum; and if upon Upper or Lower California, New Mexico or Oregon, ten per cent. upon such principal sum; and if upon China, India or other parts of Asia, Africa or islands in the Pacific Ocean, twenty per cent. upon such principal sum; and if upon Mexico, the Spanish Main, West Indies or other Atlantic islands, east coast of South America, Great Britain or other places in Europe, ten per cent. upon such principal sum; and if upon places on the west coast of South America, fifteen per cent. upon such principal sum; and if upon any other part of the world, ten per cent. upon such principal sum. Act 18th May 1850, § 6. Purd. 110.

The damages which by this act are to be recovered upon any bill of exchange, shall be in lieu of interest and all other charges, except the charges of protest, to the time when notice of the protest and demand of payment shall have been given, and made as aforesaid; and the amount of such bill and of the damages payable thereon, as specified in this act, shall be ascertained and determined by the rate of exchange, or value of the money or currency mentioned in such bill, at the time of notice of protest and demand of payment as before mentioned. Act 30th March 1821, § 2. Purd. 110.

On a bill drawn in another state, the *lex loci* governs. And in such case it is not necessary that the bill be returned to the place where drawn, to entitle the holder to damages. 4 Y. 19.

Damages are not recoverable from the acceptor. By the law merchant, the acceptor of a bill of exchange is not liable for re-exchange, and our statute has regard only to drawers and indorsers. 8 W. 545.

The damages may be recovered without being specially demanded in the declaration. 3 Barr 474, 482.

Damages on a foreign bill, protested for non-payment, are recoverable at the rate of exchange at the time of presentment to the drawer for payment, accompanied with notice of protest, and not at the rate at the time when notice of protest was

received by the drawer, without a presentment of the bill. 2 M. 257. But see 1 Y. 204. 3 W. C. C. 125. Damages are not recoverable if the bill was neither paid nor received in satisfaction of a precedent debt. 1 D. 261. 4 Y. 19. If remitted at the risk of the debtor here, he is entitled to the damages, and not the foreign creditor. 4 D. 157. The damages allowed by the statute are a compensation for interest, damages and re-exchange; and the holder may recover the amount of the bill and damages, with interest on the whole from the date of protest. 3 Barr 474, 482.

A bill dated at Philadelphia, signed here in blank, and sent abroad to be filled up and there negotiated, is within the act. 11 H. 187.

Bonds.

I. Definition and nature of a bond.

II. Assignment of bonds.

I. DEFINITION AND NATURE OF A BOND.

A BOND or obligation is a deed whereby the obligor obliges himself, his heirs, executors and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one; but there is generally a condition added, that, if the obligor do some particular act, the obligation shall be void, or else shall remain in full force, as the repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition be not performed, the bond becomes forfeited, and charges the obligor while living, and his estate after his decease.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law, that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation from which he can never be released. If it be to do a thing that is *malum in se* [an offence of common law], the obligation itself is void: for the whole is an unlawful contract and the obligor shall take no advantage from such a transaction. 2 Bl. Com. 274, 275.

If the condition of a bond be to do a thing which is contrary to a rule of law, merely, and not *malum in se*, the bond is single. 16 S. & R. 307.

A lapse of twenty years creates a presumption of payment, if no interest has been paid in the mean time; but, if the period be shorter than twenty years, the presumption must be supported by circumstances. 2 W. C. C. 323. 9 S. & R. 371. 1 Y. 344, 584.

A bond is not avoided by tearing off the seal by the obligor, fraudulently or inadvertently, without the assent of the obligee. 2 Mason 478. So, of a stranger tearing off the seal of a deed of land. 6 Cow. 746.

II. ASSIGNMENT OF BONDS.

All bonds, specialties and notes in writing, made or to be made, and signed by any person or persons, whereby such person or persons is or are obliged or doth or shall promise to pay to any other person or persons, his, her or their order or assigns any sum or sums of money, mentioned in such bonds, specialties, note or notes, made by the person or persons to whom the same is or are made payable be assigned indorsed and made over to such person or persons as shall think fit to accept thereof. Act 28th May 1715, § 1. Purd. 112.

The person or persons to whom such bonds, specialties or notes are or shall be assigned, indorsed or made over, their factors, agents, executors or assigns, may his, her or their pleasure again assign, indorse and make over the same, and so *et cetera*. Ibid. § 2.

It shall and may be lawful for the person or persons to whom the said bonds, specialties or notes are assigned, indorsed or made over as aforesaid, in his, her or their own name or names, to commence and prosecute his, her or their actions at law, for recovery of the money mentioned in such bonds, specialties or notes, or so much thereof as shall appear to be due at the time of such assignment, in like manner as the person or persons to whom the same was or were made payable might or could have done. Ibid. § 3.

In every such action the plaintiff or plaintiffs shall recover his, her or their damages and costs of suit; and if such plaintiff or plaintiffs shall be nonsuited or a verdict be given against him, her or them, the defendant or defendants shall recover his, her or their costs against the plaintiff or plaintiffs. Ibid. § 4.

Every such plaintiff or plaintiffs, defendant or defendants respectively recovering, may sue out execution for such damages and costs, in the like manner as is usual for damages and costs in other cases. Ibid. § 5.

No person or persons shall have power by virtue of this act to make issue or give out any bonds, specialties or notes, by themselves or servants, than such as they might have made, issued and given out, if this act had never been made. Ibid. § 7.

All assignments made of bonds and specialties shall be under hand and seal before two or more credible witnesses. Ibid. § 8.

Provided, that it shall not be in the power of the assignors, after assignment made as aforesaid, to release any of the debts or sums of money really due by the said bonds, specialties or notes. Ibid. § 9.

The object of this act was to enable an assignee to maintain an action in his own name. 1 D. 28. 1 B. 433, n. 4 S. & R. 177. He takes subject to all the equities existing between the parties at the time of the assignment. 1 D. 28. 2 Y. 23. 2 D. 49. 2 B. 165. 5 B. 232. 1 B. 433, n. 4 S. & R. 177. 11 S. & R. 75. 17 S. & R. 287. 1 P. R. 257. 2 P. R. 245. 8 W. & S. 318. 12 C. 108. And to payments made to the assignor before notice of the assignment. 4 S. & R. 175. 4 W. C. C. 585. 9 S. & R. 74. 5 W. & S. 219. 1 Barr 266.

But if the assignee, when about to take the assignment, call upon the obligee to inquire whether the whole money is due, and take the bond in consequence of his representations, or of his silence as to any defence, he will be protected. 2 Y. 541. 1 B. 433. 5 B. 234. 9 S. & R. 197. 16 S. & R. 18. 1 P. R. 24, 476. 2 P. R. 245. 3 Wh. 275. 5 W. 151. The assignee of an assignee is subject to the same rule. 1 R. 227.

The equity, however, which will affect an assignee for value only extends to want of consideration and defalcation, and not to collateral agreements between the parties. 9 S. & R. 141. 1 P. R. 260. 8 W. & S. 318. 3 Barr 294. Nor to secret equities residing in strangers. 9 Barr 399. And an equitable assignee of a bond given by an innocent purchaser will be protected against an unrecorded mortgage. 3 Y. 351.

A covenant of guaranty indorsed on a bond does not pass by an assignment of it. 3 Barr 292. 8 W. 361. The covenant implied from the assignment of a bond is not a guaranty, but that the assignee should receive the money from the obligor to his own use, and if the obligee should receive it, then the assignor would be answerable over for it. 1 D. 449. 7 H. 133.

Where a bond or other specialty is assigned in the mode prescribed by the act of 1715, that is to say, by an instrument under seal, attested by two or more witnesses, the legal title vests in the assignee, who *must* bring suit thereon in his own name. On the contrary, if the directions of the statute be not pursued, as, for example, if the assignment be not under seal, or although under seal, if there be but a single witness, in such case, the assignment is termed an equitable one, and suit must be brought in the name of the assignor for the use of the assignee.

Coupon bonds, payable to bearer, issued by incorporated companies, are negotiable instruments, and pass by delivery. 4 Phila. 346. 8 Wr. 63. But, in this state, the coupon bonds of municipal corporations issued in pursuance of a special authority conferred by statute, are not negotiable. In this doctrine, however, it is admitted that the courts of Pennsylvania stand alone. 1 Wr. 358. And see 9 C. 239. 8 C. 230. 7 Wr. 400.

Books, &c., required by a Magistrate.

- I. Of the books and forms required. III. The magistrate's law library.
 II. Ruling and paging the dockets, and indexing.

I. ONE of the first considerations which should present itself to the mind of an alderman or justice of the peace, on the receipt of his commission, is, *how* he shall best qualify himself to discharge the duties which have thus been devolved upon him. In the first place, what books does he require? He should, without a doubt, have a copy of a digest of the laws of the state, and a copy of the best guide for justices of the peace which he can procure. These books appear to be indispensable.

Having obtained and carefully read these books, let him get from the most experienced justice near him, a copy of each of the blank forms he shall want, and compare them with the forms which he will find printed in his Justice's Guide. Having ascertained the most approved forms, and made the necessary alterations as to the *name* and *residence* of the justice, and such other alterations, if any, as he may think proper, let him send and have them printed; or perhaps, in the county town, he may purchase them, ready printed, in such quantities as he shall be advised he may require. Printers in county towns would do the public a service and, it is hoped, promote their own interests, by always keeping in their offices the most approved forms of magistrates' blanks. A justice should purchase two dockets: one for *civil* suits, and the other for *criminal* business. As to the manner in which the docket entries shall be made, examples on all the subjects likely to come before him will hereafter be given.

In a small book, provided for that purpose, or in the criminal docket, he should record the indentures of the apprentices he may bind, and the marriages he may solemnize, and note any other miscellaneous duties he may perform, to all which he should have copious and correct indexes.

II. Let the dockets be paged and ruled; the lines at such distances from each other as your handwriting may require. On the left hand of each page let there be a perpendicular line drawn with red ink, about two inches distant from the left hand edge of the page. The portion of the page thus set apart, on the left hand of the perpendicular line, to be considered as set apart for the *names* of the *parties*, the costs, &c.; the remainder of the page being appropriated to the docket entries. *Index* your dockets frequently; that is, in a small book or on a few pages, at the beginning or ending of the docket itself, *alphabetically arranged*, put the name of the plaintiff and the defendant, together with the page of the docket on which the docket entries, relating to that suit, may be found: thus—"A. B. v. C. D., p. 76." With such a guide, the justice may turn to the suit and give whatever information may be required at a moment's notice.

III. The law books required by a magistrate, for the intelligent discharge of the important duties required of him, are few in number, but these should always be of the latest editions, so that he may be furnished with the most reliable guide in a path which, to him, is frequently an untrodden one. 1. In the first place, it is indispensable that he should possess Purdon's Digest of the Laws of Pennsylvania; this will give him the complete body of the statute law of the commonwealth, with the decisions explanatory of it; and the Annual Digest issued immediately after the close of each session of the general assembly, will keep him always well informed upon this branch of the law. 2. The justice should have the present work, as a manual to be constantly referred to, when called upon to exercise his judicial functions. 3. He should have a good Pennsylvania Form Book. The best of these are Dunlap's Forms and Graydon's Forms, either of which will answer his purpose. 4. A good work on Criminal Law is a most useful adjunct to the justice's office. Wharton's American Criminal Law is the latest and best work upon this subject, and no magistrate ought to be without it. With these books, the justice of the peace will be enabled, with ordinary care and attention,

to discharge his duties to the satisfaction of the public and of his own conscience. If he desire to obtain a more extended knowledge of the law, he would do well to procure a copy of Blackstone's Commentaries with Judge Sharswood's notes, by a careful study of which he may become well grounded in the principles of the common law.

Bread and Flour.

[See ADULTERATION.]

I. Acts of assembly.

II. Warrant against a baker for selling loaf bread.

I. ACT 1 APRIL 1797. Purd. 123.

SECT. 2. All loaf bread made for sale within this commonwealth, shall be sold by the pound avoirdupois; and every baker or other person offering the same for sale, shall keep at his or her house, or at such other place at which he or she shall at any time offer or expose for sale any such bread, sufficient scales and weights, lawfully regulated, for the purpose of weighing the same; and if any baker or other person shall sell or offer for sale any loaf bread in any other manner, the contract respecting the same shall be void, and the person offending against this act shall, on conviction, forfeit and pay the sum of ten dollars for every such offence, one-half to the use of the informer, and the other half to the use of this commonwealth; and it shall be the especial duty of the clerk of the market, in any place where such officer is appointed, to discover and prosecute all persons offending against this act.^(a)

ACT 18 MARCH 1775. Purd. 697.

SECT. 8. The clerks of the several markets within this province, now in office, and all such clerks as shall hereafter be appointed, before they enter upon the execution of their office, shall take the following oath or affirmation, before some magistrate or justice of the city, borough or county wherein they shall reside, viz.: "*That he will well and truly, to the best of his skill and judgment, do and perform all things enjoined and required of him as clerk of the market, by the laws of this province.*"

ACT 8 APRIL 1848. Purd. 491.

SECT. 1. It shall not be lawful for any person within the counties of Bucks, Montgomery, Philadelphia and Delaware, and the city of Philadelphia, to sell Indian corn meal in any other way than by weight; and any person who shall sell Indian corn meal by measure, or in any other way than by weight, shall be liable, for each and every offence, to a fine of five dollars, which may be recovered before any alderman or justice of the peace, as sums of like amount are by law recoverable; one half whereof shall go to the informer, and the other half to the use of the city or county wherein such conviction takes place: *Provided*, That nothing herein contained shall be construed to prohibit the sale of Indian corn meal by the hogshead, barrel or half-barrel, as is now provided for by the inspection laws of this commonwealth.

II. WARRANT AGAINST A BAKER FOR SELLING LOAF BREAD, &c.

BERKS COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of H—, in the County of Berks, greeting:

WHEREAS, J. L., clerk of the market within the borough of H—, in the county of

(a) The enactments of this law are clearly for the public good; they may, without difficulty, be carried into full operation; a bounty is offered to the prosecutor; public officers are named, whose "especial duty" it is made, enforced by oath or affirmation, "to discover

and prosecute all persons offending against this act"—yet, with all these adequate provisions and powerful recommendations, this act has never been carried into effect! Ought it not to be enforced or repealed?

Berks, hath made information, on oath, before J. R., one of our justices of the peace in and for the said county, that G. G., of H— aforesaid, *baker*, doth not keep at his house, in H— aforesaid, where he offereth, or exposeth, loaf bread for sale, from time to time, sufficient scales and weights, lawfully regulated for the purpose of weighing the same, contrary to the act of assembly in such case made and provided; you are, therefore, hereby commanded to take the said G. G., and bring him before the said J. R. forthwith, to answer the premises, and further to be dealt with according to law. Witness the said J. R., at H— aforesaid, the first day of September, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL.]

When the defendant is brought before the magistrate, the witnesses should be examined, and if the charge be proved to the satisfaction of the justice, he should require bail for the appearance of the defendant, at the next court of quarter sessions, and if the bail be not given, the defendant should be committed.

Bribery.

I. Definition of bribery.

II. Provisions of the Penal Code.

I. **BRIBERY** is the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity. 1 Hawk. P. C. 168.

II. ACT 31 MARCH 1860. PURD. 226.

SECT. 48. If any person shall directly or indirectly, or by means of and through any artful and dishonest device whatever, give or offer to give any money, goods or other present or reward, or give or make any promise, contract or agreement, for the payment, delivery or alienation of any money, goods or other bribe, in order to obtain or influence the vote, opinion, verdict, award, judgment, decree or behavior of any member of the general assembly, or any officer of this commonwealth, judge, juror, justice, referee or arbitrator, in any bill, action, suit, complaint, indictment, controversy, matter or thing whatsoever, depending or which shall depend before him or them, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment by separate or solitary confinement at labor, not exceeding one year. And the member of assembly, or officer, judge, juror, justice, referee or arbitrator, who shall accept or receive, or agree to accept or receive such bribe, shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years.

SECT. 49. No witness shall be excused from testifying in any criminal proceeding, or in any investigation or inquiry before either branch of the general assembly, or any committee thereof, touching his knowledge of the aforesaid crimes, under any pretence or allegation whatsoever; but the evidence so given, or the facts divulged by him, shall not be used against him in any prosecution under this act: *Provided*, That the accused shall not be convicted on the testimony of an accomplice, unless the same be corroborated by other evidence, or the circumstances of the case.

SECT. 50. If any elector, authorized to vote at any public election, shall directly or indirectly accept or receive, from any person, any gift or reward in money, goods or other valuable thing, under an agreement or promise, express or implied, that such elector shall give his vote for any particular candidate or candidates at such election, or shall accept or receive the promise of any person that he shall thereafter receive any gift or reward in money, goods or other valuable thing, any office, appointment or employment, public or private, or any personal or pecuniary advantage whatsoever, under such an agreement or promise, express or implied, such elector shall be guilty of a misdemeanor, and shall, on conviction of either of the said offences, be sentenced

to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding six months.

SECT. 51. Any person who shall, directly or indirectly, give, or offer to give, any such gift or reward to any such elector, with the intent to induce him to vote for any particular candidate or candidates at such election, or shall directly or indirectly procure or agree to give any such gift or reward to such elector, with the intent aforesaid, or shall, with the intent to influence or intimidate such elector to give his vote for any particular candidate or candidates at such election, give, offer or promise to give such elector any office, place, appointment or employment, or threaten such elector with dismissal or discharge from any office, place, appointment or employment, public or private, then held by him, in case of his refusal to vote for any particular candidate or candidates at such election, the person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding two years.

Building Associations.

I. Nature of building associations.
II. Acts of assembly.

III. Judicial decisions.

I. A BUILDING ASSOCIATION is a society, incorporated or otherwise, composed entirely of one class of stockholders; and its assets or property is represented by stock. Its original capital is derived from the monthly instalments or dues paid on account of each share of stock by the holder thereof; which is generally one dollar for each share of the ultimate par value of \$200, or in that proportion. And the chief sources of profit by means of which the association is enabled to work out the ultimate value of the shares, in a given number of years, is obtained from loaning the accumulated monthly instalments of dues and profits to such of the stockholders only as may, under the rules, borrow the same.

The members consist of two descriptions of persons; the non-borrowing class, composed of those who do not avail themselves of the privilege of borrowing in advance the ultimate value of their shares, but continue paying their monthly dues, until such time as from the earnings of the association they are entitled to receive the par value of their-shares in cash; and the borrowing class, composed of those who avail themselves, from time to time, of this privilege, and thus anticipate the ultimate value of their stock, paying a premium for the present use of it, as well as legal interest, monthly, in addition to their regular monthly dues, until the ultimate result is reached and the loan is paid and cancelled by the value of the stock.

At each monthly meeting of the association, after the receipt of the monthly dues, interest and fines, the amount on hand, subject to loan, is announced; it is then put up to competition, and awarded to the party who bids the highest premium for the use of the money; for this he gives a mortgage on real estate to secure the punctual payment of his dues and interest (and the principal also in case of default), which mortgage is cancelled on the winding up of the association.

It will thus be seen that the sources of profit consist of the premiums deducted from the loans, when made; the monthly interest paid; besides fines charged upon dues and interest, when in arrear, and the profit on withdrawals of stock before the ultimate result is reached. These, with the payment of the monthly dues, constitute the income of the association; and it is easily perceived, that by the monthly compounding of interest upon these items, the profits are largely increased; so that the ultimate par value of the stock will generally be reached, and the association wound up, in from eight to ten years, according to the amount of the premiums given for the anticipated loan thereof.

II. ACT OF 12 APRIL 1859. Purd. 129.

SECT. 1. At any time when ten or more persons may desire to form a mutual saving fund, loan or building association, under the provisions of this act, they shall make application to the court of common pleas of the proper county, in the manner and at such times as are prescribed by the 13th section of an act passed the 13th day of October, in the year of our Lord 1840, entitled "An act relating to orphans' courts, and for other purposes;" and upon compliance with the provisions of the said section of said act, the said court shall be and hereby is fully empowered to grant acts or charters of incorporation to said associations; and the 13th, 14th and 15th sections of the aforesaid act of assembly are hereby extended to and made a part of this act, with regard to said associations, corporations or bodies politic in law: *Provided*, That no charter granted under or by virtue of the provisions of this act, be for a longer period than twenty years.

SECT. 2. The capital stock of any corporation created by virtue of this act, shall at no time consist of more than two thousand five hundred shares, of two hundred dollars each, the instalments on which stock are to be paid at such time and place as the by-laws shall appoint; no periodical payment to be made exceeding two dollars on each share; every share of stock shall be subject to a lien for the payment of unpaid instalments and other charges incurred thereon, under the provisions of the charter and by-laws, and the by-laws may prescribe the form and manner of enforcing such lien; new shares of stock may be issued in lieu of the shares withdrawn or forfeited; the stock may be issued in one or in successive series, in such amount as the board of directors or the stockholders may determine; and any stockholder wishing to withdraw from the said corporation shall have power to do so, by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, and such proportion of the profits as the by-laws may determine, less all fines and other charges: *Provided*, That at no time shall more than one-half of the funds in the treasury of the corporation be applicable to the demands of withdrawing stockholders, without the consent of the board of directors, and that no stockholder shall be entitled to withdraw whose stock is held in pledge for security. Upon the death of a stockholder, his or her legal representatives shall be entitled to receive the full amount paid in by him or her, and legal interest thereon, first deducting all charges that may be due on the stock; no fines shall be charged to a deceased member's account from and after his or her decease, unless the legal representatives of such decedent assume the future payments on the stock.

SECT. 3. The number, titles, functions and compensation of the officers of any corporation created by virtue of this act, their terms of office, the times of their elections, as well as the qualifications of electors, and the ratio and manner of voting, and the periodical meetings of the said corporation, shall be determined by the by-laws.

SECT. 4. The said officers shall hold stated meetings, at which the money in the treasury, if over two hundred dollars, shall be offered for loan, in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan, shall be entitled to receive a loan of two hundred dollars or more, for each share of stock held by such stockholder: *Provided*, That a stockholder may borrow such fractional part of two hundred dollars as the by-laws may provide, and good and ample security shall be given by the borrower to secure the repayment of the loan; in case the borrower shall neglect to offer security, or shall offer security that is not approved by the board of directors by such time as the by-laws may prescribe, he or she shall be charged with one month's interest, together with any expenses incurred, and the money shall be resold at the next stated meeting; in case of non-payment of instalments or interest by borrowing stockholders, for the space of six months, payment of principal and interest, without deducting the premium paid or interest thereon, may be enforced by proceeding on their securities according to law.

SECT. 5. A borrower may repay a loan at any time, and in case of the repayment thereof before the expiration of the eighth year after the organization of the corporation, there shall be refunded to such borrower one-eighth of the premium paid

every year of the said eight years then unexpired; and in case of recovery of the same by process of law, when the amount collected by or distributed to the said corporation shall exceed the amount of loan taken by the borrower, with interest and charges, the money shall be reloaned at the next stated meeting, and the excess recovered beyond the amount required to pay the loan, with interest and charges, shall be returned to the borrower from whom the money was collected, or his or her legal representatives: *Provided*, That in case the said corporation shall have sold its stock in series, such reloan shall be made only to the stockholders of the same series: *And provided*, That if the premium offered for the reloan shall be less than that originally given by the defaulting borrower, the amount of the original premium only shall be paid over by the said corporation: *And provided*, That such defaulting borrower may, at any time after the said reloaning, demand of the said corporation the amount required to be paid to a stockholder withdrawing his stock, saving and excepting, however, to the said corporation, the right to retain so much or the whole thereof as may be requisite to save it from loss, in case the amount recovered shall not suffice to pay the reloan.

SECT. 6. No premiums, fines or interest on such premiums, that may accrue to the said corporation, according to the provisions of this act, shall be deemed usurious; and the same may be collected as debts of like amount are now by law collected in this commonwealth.

SECT. 7. No corporation or association created under this act, shall cease or suffer from neglect, on the part of the incorporators, to elect officers at the time mentioned in their charter or by-laws; and all officers elected by such corporation shall hold their offices until their successors are duly elected.

SECT. 8. The charters of incorporation heretofore granted by the courts of common pleas of the several counties of the commonwealth to mutual saving fund, loan, and building associations, under the authority of the act of April 1850 and its supplements, are hereby declared to be legal and valid. And it is hereby declared that the true intent and meaning of the said acts was to authorize the incorporation of companies or associations with power to loan or advance to the stockholders thereof the moneys accumulated from time to time, and to secure the repayment of such moneys, and the performance of the other conditions upon which said loans were made, by bond and mortgage or other security, as well as with power to purchase or erect houses for the benefit of their stockholders, and that the premiums received by the said associations, for the preference or priority of such loans, should not be deemed usurious: *Provided*, That nothing herein contained shall be construed to affect cases adjudicated under the said acts, or shall be applied to or construed to affect any cause or suit now brought, or that may be pending in any court in this commonwealth; nor shall any suit be permitted to be discontinued or renewed, so as to come within the provisions of this act: *And provided further*, That in case of non-payment of instalments or interest, by borrowing stockholders, within six months, payment of principal and interest, without deducting the premium and interest thereon, may be enforced by proceeding on their securities according to law; and the amount collected shall be applied as directed by section five of this act, unless the charter or by-laws of the said corporation otherwise provide.

SECT. 9. Any savings fund, loan or building association, incorporated by or under any other act or acts of assembly of this commonwealth, is hereby authorized and empowered to purchase, at any sheriff's or other judicial sale, or at any other public or private, any real estate upon which such association may have or hold any mortgage, judgment, lien or other incumbrance, or ground-rent, or in which said association may have an interest; and the real estate so purchased, or in which that such association may hold or be entitled to at the passage of this act, shall be sold, convey, lease or mortgage at pleasure, to any person or persons whatsoever; and all sales of real estate heretofore made by such associations, to any person or persons not members of the association so selling, are hereby confirmed and made valid.

SECT. 10. All mortgages heretofore given to mutual saving fund, loan and building associations by their corporate names, before they obtained their charters from the proper courts, be and the same are hereby declared good and valid, to all intents and purposes, as though they had been made after the said charters were obtained.

ACT OF 7 MARCH 1853. Purd. 131.

SECT. 1. It shall be lawful for all land and building associations now incorporated under existing laws, who have heretofore purchased or contracted to purchase any lands, to hold such lands in fee-simple either in their corporate capacity or by trustee, and to grant, bargain and sell the same or any part thereof, to their stockholders or others in fee-simple, with or without the reservation of ground-rents, and also to confirm unto the purchasers in fee-simple all lands heretofore conveyed by them.

SECT. 2. All land and building associations hereafter incorporated under existing laws, shall have full power to purchase lands and to sell and convey the same or any part thereof to their stockholders or others in fee-simple, with or without the reservation of ground-rents: *Provided*, That the sales of lands by said associations hereafter incorporated to others than their stockholders, shall be confined to such lands as may have been purchased or contracted for at the original formation of the association: *And provided further*, That the quantity of land purchased by any one of said associations hereafter incorporated, shall not in the whole exceed fifty acres: *And provided also*, That in all cases the lands shall be disposed of within the ten years from the date of the incorporation of such associations respectively.

SECT. 3. Should any of the associations now or hereafter incorporated deem it necessary or expedient to purchase adjoining lands, for the purpose of squaring their grounds in conformity with the streets running through or touching their lands, they are hereby fully authorized to make such purchases, and are invested with all the powers as regards the sale and conveyance in fee-simple of the same given by this act over the grounds squared by such purchases.

SECT. 4. All land and building associations are hereby authorized to make sale of and assign or extinguish to any person or persons the ground-rents created as aforesaid.

SECT. 5. Any savings fund and loan association (a) incorporated by or under any act or acts of assembly of this commonwealth, is hereby authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association shall then have or hold any mortgage, judgment, lien or other incumbrance, and the real estate so purchased as any other that such association may hold or be entitled to at the passage of this act, to sell, convey, lease or mortgage at pleasure, to any member of such association.

ACT OF 30 APRIL 1864. Purd. 1317.

SECT. 1. *Whereas*, under the powers conferred by act of assembly upon the court of common pleas for the city and county of Philadelphia, many savings fund, building and loan associations, have been incorporated, for a limited term of years, which, in some cases, has now expired, and in others is rapidly approaching completion: *And whereas*, some of these associations have been compelled to purchase real estate upon which they have had claims, and others may hereafter be likewise compelled to purchase real estate to save themselves from loss: *And whereas*, in some instances, the term for which the decree of incorporation has been granted has expired, while the title to such real estate has remained in such associations, and it has been doubted whether a good title could be made or given to such real estate, after the expiration of the term for which such incorporation has been granted; to quiet such doubts, and to give full effect to the purposes and intents of such charters and powers granted, therefore, *Be it enacted*, That in all cases, where any savings fund, building or loan association, incorporated as aforesaid, may have become seised or possessed of any real estate, or entitled to the same, and the term for which the charter may have been granted, shall have expired, without their having made conveyance thereof, or of any part thereof, it shall and may be lawful, for such association, to sell and dispose of such real estate, and make title therefor, as fully and as effectually, as if their charter had not expired; and the officers, last elected, shall continue in office, until all the affairs of such association shall have been settled; and in case of the death, resignation or refusal of any officer to act, such

(a) Extended to land and building associations, by act 18 April 1853, § 8. P. L. 496.

association shall have power and authority to elect another to such office thereby vacated.

ACT OF 18 FEBRUARY 1869. Purd. 1541.

SECT. 1. On the petition of any twelve or more citizens of Pennsylvania, the court of common pleas of the county of Philadelphia shall have all powers conferred by the acts relating to loan and building associations, to incorporate them and their associates as a perpetual corporation, for the purposes following, to wit: to purchase, hold and build upon and sell in fee-simple, houses and lots in the city of Philadelphia, and also to make loans on bonds and mortgages to others to build and improve, and the same to sell and assign, and to borrow moneys upon bonds and mortgages or otherwise for said purposes; and in making sales, or leases, or loans on mortgages, it shall be lawful for such corporation and borrowers of them to agree upon, and insert in the deeds of conveyance, a condition against the use of any granted or leased premises for the sale of any intoxicating liquors, or unlawful immoral purposes, the carrying on any noxious or unhealthful business, with right of re-entry for breach of such condition: *Provided*, That no corporation, chartered under this act, shall have a greater capital than one-half million of dollars, and shall stipulate by their articles to devote their capital to improve or promote the improvement of parts of said city most needing physical, healthful and moral reform, which shall be defined and prescribed in the charter, and not exceed eight main squares, and shall apply all their profits over their expenses, and a return of eight per centum per annum to the shareholders to and for the construction of substantial stone, or brick, or iron habitations for homes for respectable persons of limited means, either as lessees or purchasers: *And provided*, That the said court shall be satisfied of the benevolent purposes of the petitioners; and that the legislature may at any time repeal this act, and such charters, if the powers hereby granted should be found prejudicial to the community, but in manner to do no injustice to the corporators.

ACT OF 26 APRIL 1869. Purd. 1542.

SECT. 1. All building, saving and loan associations may bring and maintain suits, and carry on those already brought, in their corporate names, on all judgments, bonds, mortgages, notes or other evidences of debt or obligations due them, or for monthly dues, interest or any demand owing to them, and proceed to judgment and execution, notwithstanding their charter may have expired; and the officers last elected, or the survivors of them, shall be the officers to represent said corporations for such purpose; and if no officer survive, the stockholders may elect others under their by-laws.

SECT. 2. This act shall only be construed so as to enable said associations to collect up and divide their assets and wind up their affairs, and not to allow them to transact new business: *Provided*, That this act shall only apply to the city of Philadelphia.

III. The privileges granted to building associations, are not discounting privileges within the constitutional prohibition. 11 C. 223, 225.

By act of 26 April 1855, the shares held by shareholders in all incorporated land and building associations, are to be deemed personal property. Purd. 129 n.

The 6th section of the act of 1859 is a re-enactment of the act of 8 May 1855. That act had no retroactive force. Its effect was to render valid contracts for advances to members of building associations, on which a premium had been given, as a means of securing and enforcing payment of the contributions of the members to whom such advances had been made. But where the association elected to deprive the party of his membership, for default in making payment of his dues, and treated the transaction as a loan, they could only recover the amount actually advanced, with legal interest thereon, after giving credit for the amount paid in by the party to whom such loan was made. 2 C. 269. 6 C. 465. It seems, that the act of 1859 has made no change in the law, in this respect. 5 Wr. 478.

The act of 1859 has no effect upon loans contracted with a building association prior to its passage. 3 Wr. 156. 5 Wr. 478. It is unconstitutional, so far as it affects prior contracts. 3 Wr. 137, 154, 160.

A purchaser at sheriff's sale of the defendant's equity of redemption, subject to a building association mortgage, may take defence on the ground of usury in its creation : he is entitled to credit for all stock payments made by the member ; and the premiums and fines cannot be recovered. 6 C. 465, 471.

A member, however, is under an obligation to contribute his share of the necessary expenses of the association ; hence, after his membership ceases, the association may recover, on his mortgage, the sum loaned, with legal interest, and his proportionate share of expenses incurred during his membership. 8 Wr. 383.

Payments to stock are not, *ipso facto*, payments to the mortgage-debt, though the mortgagor or the association may so apply them ; hence, where the debtor has notified the association not to credit them to the mortgage, a purchaser at sheriff's sale cannot compel an application of the stock in reduction of the mortgage. 10 Wr. 493.

When a stockholder borrows, and assigns his stock to the association, as collateral, and then makes a second loan, and assigns the stock again to the association, as collateral for the second loan, he cannot apply the payments on the stock to the first loan ; it is in the option of the association to apply the stock payments to either loan. 11 Wr. 233.

A stockholder cancelling his stock under an agreement, is not liable for dues under the original subscription. 14 Wr. 32.

The receipt of payments on account of instalments due on the plaintiff's shares of stock, after a recovery on the mortgage, will estop the company from denying the existence of the stock. 11 C. 463.

A mortgage conditioned for the repayment of a loan, and also of the monthly dues, is not dischargeable on payment of the loan with interest. 11 Wr. 352.

If a borrowing member, being desirous of paying off his loan, is compelled, in order to obtain satisfaction of his mortgage, to pay more than the sum loaned with legal interest, he may recover back the excess in an action against the association. 11 C. 470.

Inasmuch as the act of 1859 confers no privileges on any associations except those incorporated under its provisions, it is of the utmost importance that a charter of incorporation should in all cases be applied for. Whatever may be the effect of that act upon loans made to members, it is certain, that no unincorporated association can, in any court, recover more than the actual amount loaned, with interest, and that the taking of premiums by such associations is wholly illegal. This caution is given, because, in some cases, a few prominent members, desirous of obtaining the entire control of the affairs of an association, as trustees and officers, combine to prevent an application for a charter, and persuade their less intelligent fellow-members that such an act is entirely unnecessary.

Burglary.

- I. Provisions of the Penal Code. III. Warrant for a burglar.
 II. Judicial decisions relating to burglary.

I. ACT 31 MARCH 1860. Purd. 239.

SECT. 135. If any person shall, by night, wilfully and maliciously break or enter into the state capitol, or other public building belonging to the commonwealth, or to any city or county thereof, or to any body corporate, society or association, or into any church, meeting-house or dwelling-house, or out-house, parcel of said dwelling-house, with an intent to kill, rob, steal or commit a rape, or any felony whatever, whether the felonious intent be executed or not, the person so offending shall, on conviction, be adjudged guilty of felonious burglary, and be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.

SECT. 136. If any person shall, in the day time, break and enter any dwelling-house, shop, warehouse, store, mill, barn, stable, out-house or other building, or wilfully and maliciously, either by day or by night, without breaking, enter the same with intent to commit any felony whatever therein, the person so offending shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding four years.

The 179th section provides that on all convictions for burglary, &c., the defendant shall, in addition to the punishment prescribed for such offence, be adjudged to restore to the owner the property taken, or to pay the value of the same, or so much thereof as may not be restored: *Provided*, That the party to whom restitution is to be awarded shall not be thereby rendered incompetent as a witness on the trial of the offender.

II. There must be both a *breaking* and an *entry* to complete this offence. 1 Hawk. 130.

The following acts amount to an actual breaking, viz.: opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock on the leaf of a window, or unlatching the door that is only latched. 1 H. P. C. c. 38.

But if a man leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary; yet if he afterwards unlock an inner, or chamber door, it is so. 4 Bl. Com. 176.

But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit. *Ibid*.

So also to knock at a door, and upon opening it to rush in with a felonious intent; or, under the pretence of taking lodgings, to fall upon the landlord and rob him, these acts have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be thus trifled with. *Ibid*. 177.

And so if a servant opens and enters his master's chamber-door with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door with such evil intent, it is burglary. Nay, if a servant conspires with a robber, and lets him into the house by night, this is burglary in both. *Ibid*.

As for the entry, any, the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. *Ibid*.

Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town, though neither the prosecutor nor his family had ever lodged in the house in which the crime is charged to have been committed, but merely visited it occasionally. 3 R. 207.

If there be daylight or twilight enough, begun or left, whereby the countenance of a person may be reasonably discerned, a breaking and entry is not burglary, by the common law. 7 Dane's Ab. 134.

To constitute the crime of burglary there must be an intent to commit a *felony*; therefore, a breaking and entering a dwelling-house, in the night time, with intent to commit *adultery*, is not burglary. 16 Verm. 551.

The general rule is, that if an out-house be so near the dwelling-house that it is used with the dwelling-house as appurtenant to it, though not within the same enclosure, burglary may be committed in it. But if there be no common entrance, and the buildings be distinct, the offence does not exist. Whart. Cr. L. § 1561.

Breaking and entering a store-house, not parcel of a dwelling-house, is not burglary at common law, or under the Pennsylvania statute. 10 P. F. Sm. 103.

The 136th section of the criminal code applies to cases partaking of the nature of burglary, when the breaking is in the day-time. Ibid.

III. A WARRANT TO APPREHEND A BURGLAR.

BERKS COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of L—, in the County of Berks, greeting:

WHEREAS, J. L., of the township of L—, in the county of Berks, hath this day made information, upon oath, before J. R., one of our justices of the peace in and for the said county, that yesterday, in the night, the dwelling-house of him, the said J. L., at L— township aforesaid, was feloniously and burglariously broken open and entered, and one silver coffee-pot, of the value of forty dollars, (a) of the goods and chattels of him the said J. L., feloniously and burglariously stolen, taken and carried away from thence, and that he hath just cause to suspect, and doth suspect, that G. B., of the same township, weaver, the said felony and burglary did commit. These are, therefore, to command you forthwith to take the said G. B., and bring him before the said J. R., to answer the said complaint, and further to be dealt with according to law. Witness the said J. R., at L— township aforesaid, the second day of September, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL]

Burial Grounds.

ACT 31 MARCH 1860. Purd. 225.

SECT. 47. Any person who shall wilfully and maliciously destroy, mutilate, deface, injure or remove any tomb, monument, gravestone or other edifice, placed in any cemetery or graveyard appropriated to and used for the interment of human beings, in this commonwealth; or shall wilfully and maliciously injure, destroy or remove any fence, railing or other work for the protection or ornament of such places of interment; or shall wilfully open any tomb, vault or grave, within the same, and clandestinely remove any body or remains therefrom; or maliciously destroy any tree or shrubbery growing in such cemetery or graveyard; shall be guilty of a misdemeanor, and on conviction of either of the said offences, be sentenced to undergo an imprisonment not exceeding one year, or to pay a fine not exceeding one hundred dollars, or both, or either, at the discretion of the court.

(a) If the offence be burglary alone, unattended with larceny, the warrant may be varied accordingly.

Cattle.

ACT OF 12 APRIL 1866. Purd. 1417.

SECT. 1. It shall not be lawful for any person who may own any cattle or sheep, affected by the disease known as the pleuro-pneumonia, or other contagious or infectious disease, to sell or otherwise dispose of any cattle, either alive or slaughtered, from the premises where such disease is known to exist, nor for a period of two months after such disease shall have disappeared from said premises.

SECT. 2. No cattle or sheep shall be allowed to run at large in any township or borough where any contagious disease prevails; and the constables of such townships are hereby authorized and required to take up and confine any cattle so found running at large, until called for, and until all costs are paid; and in townships where there are no constables it shall be the duty of the township clerk to perform this service; and the said officers shall be entitled to receive one dollar for each head of cattle so taken up; and any officer who shall refuse to perform the duties of this act shall be liable to a fine of ten dollars.

SECT. 3. Any person offending against the provisions of the first section of this act shall be guilty of a misdemeanor, and upon conviction, be sentenced to pay a fine not exceeding five hundred dollars, or undergo an imprisonment not exceeding six months.

Of Writs of Certiorari, to Justices of the Peace.

I. An essay on the nature and effect of the writ of certiorari, the legal provisions relating to it, and the return to be

made by the magistrate.
II. Judicial authorities as to the writ of certiorari.

I. It frequently happens that a party is prevented by law from appealing from the magistrate's judgment or proceeding; as where the amount is below five dollars thirty-three cents, or where the twenty days allowed for an appeal have elapsed. In these and other cases the only remedy is by *certiorari*. Where the magistrate's proceedings are erroneous and illegal on the face of his record, this remedy may be resorted to successfully, and sometimes is, in preference to an appeal. It is a subject of deep regret that, notwithstanding the terms of the preliminary affidavit, this writ is so frequently taken merely for the purpose of delay or of annoyance to the other party. In a majority of cases, the original judgments are affirmed by the court without a color of objection being offered by the exceptant; or, if exceptions be filed, he fails to appear in person or by counsel, on the argument day, to sustain them.

A *certiorari* is a writ of error in every respect but form; its only office being to remove the proceedings for the inspection of the court. 1 R. 321. 3 P. R. 24. 9 Barr 216. It is essentially a writ of error, applicable only to proceedings not according to the course of the common law. 11 C. 419. It issues, by virtue of the provisions of the act of 20th March 1810 (Purd. 412) from the court of common pleas to a justice of the peace, for the purpose of reviewing the regularity of his proceedings in a civil case. Its office is simply to bring up the record for review; and the common pleas only examines to see if the justice acquired jurisdiction, and acted, during the whole proceedings, within the limits of the jurisdiction thus acquired. 6 N. Y. 312. Being a writ of error, in everything but form, to entitle the party suing it out to a *supersedeas*, he must give security; which may be taken by the prothonotary. 2 Phila. 68.

In civil suits before a justice of the peace under the act of 1810, the power of

the supreme court to remove the proceedings, by *certiorari*, is taken away, by the 24th section of that act. Purd. 412. And in such cases the judgment of a justice is only reviewable by the court of common pleas; and the 22d section of the same act provides, that the judgment of the court of common pleas shall be final in all proceedings so removed, and that no writ of error shall issue thereon. Purd. 412. The supreme court cannot review the decision of the common pleas, even if erroneous. 7 Wr. 111. This, however, only applies to a judgment on a *certiorari* issued under the act of 1810; where a subsequent act confers jurisdiction on justices of the peace, to proceed in a different manner from that directed in that act, the judgment of the common pleas on *certiorari* may be re-examined by the supreme court. 11 H. 521. 1 C. 134. It does not apply to the proceedings of two justices under the landlord and tenant law. 4 B. 185. 3 S. & R. 95. But it does apply to a proceeding under the stray law. 2 R. 20. And to an action to recover a penalty for a breach of ordinance. 5 R. 119.

In order to obtain a writ of *certiorari*, the party aggrieved, his agent or attorney, must make an affidavit, which may be sworn to before the prothonotary, that it is not sued out for the purpose of delay, but that in his opinion the cause of action was not cognisable before a justice; or, that the proceedings proposed to be removed, are, to the best of his knowledge, unjust and illegal, and if not removed, will oblige him to pay more money (or to receive less from his opponent) than is justly due. Purd. 413. The affidavit must substantially follow the words of the act. 1 Br. 217. 1 T. & H. Pr. 712. See Graydon's Forms 38. The party must also give security, by recognisance, in double the amount of the judgment, conditioned for the payment of the debt, interest and costs, in case the judgment be affirmed, or the writ of *certiorari* be discontinued or non-prossed. 2 Phila. R. 68.

The writ issues, of course, on filing the requisite affidavit and recognisance, the necessity for a special allowance of it by one of the judges having been dispensed with by the act of 26th April 1855. Purd. 412. It is directed to the alderman or justice by whom the judgment has been rendered, and commands him "to certify and send before the court the plea, with all things touching the same, so full and entire as before him they remain, together with the writ itself, that they may further cause to be done thereupon that which is right, and according to the law and constitution of this commonwealth ought." And on his failure to comply with its command, the court may compel obedience by an attachment.

The writ having been duly issued by the prothonotary, and delivered to the magistrate, it becomes his duty, although the twenty days may have expired, to certify the whole proceedings had before him, by sending the original precepts or writs, a transcript from his docket of the proceedings had before him, and the execution or executions, if any have been issued. If the entire record be not returned, the party may allege *diminution of record*, and the court will grant a rule on the magistrate to send up that part which is wanting. He is liable to attachment if that rule be disregarded. After arranging all the process and the copy of his own proceedings, in order of time, and duly certified, the magistrate should fasten them to the writ of *certiorari*, so as to enclose them within it, leaving the indorsement of the writ exhibited; he may then write the return on the writ, thus:

"To the Honorable the Judges within named, the plea within mentioned, with all things touching the same so full and entire as before me they remain, I hereby respectfully certify and send, as within I am commanded, together with this writ."

A. B., Alderman.

It is the duty of the party excepting, to see to the return of the writ. He should therefore call on the magistrate and obtain the record and file it in the prothonotary's office in season for the day appointed by the court for the argument of such matters. In some of the courts, the rule requires the record to be returned, and exceptions to be filed by a stated time, prior to the argument day; in default of which the *certiorari* will be dismissed. No other return than that of the record can be legally made. The magistrate cannot, for instance, inquire into the fact of the death of parties to the suit, and return such fact in lieu of that which he is required to furnish. Such a return would subject him to an attachment. 1 W. 307. These peremptory rules are based upon the 25th section of the act of 1810.

which obliges the court to decide thereon at the *term* to which the proceedings are returnable. *Purd.* 414.

By the 21st section of the act of 1810, *no judgment* can be set aside on *certiorari*, unless it be issued within twenty days after judgment rendered, and served within five days thereafter. If this provision be not observed, the court will not look into the judgment, even if it do not *appear* from the record that the summons was served, if within the twenty days the defendant had knowledge of the proceedings, and applied to have the judgment opened. 1 *Ash.* 135. But if it be apparent on the face of the record that the summons was *not* served in the *manner* directed by the act of 1810, and the defendant do not appear, the court will reverse the proceedings, on *certiorari*, notwithstanding more than twenty days may have elapsed before the issuing of the writ: where there is no *legal* service of the process on the defendant, he is not in court, and all the subsequent proceedings are erroneous and void. *Offerman v. Downey*, Com. Pleas, Phila. October 1849. *Tryon v. Keller*, Com. Pleas, Phila. 2 October 1852. 3 *Am. L. R.* 248. 3 *Pitts. Leg. J.* 301. 7 *H.* 495. 4 *N. Y.* 296, 883. But in such case, the party must satisfy the court that his application was made within twenty days after the fact of the entry of the judgment has come to his knowledge. *Campbell v. Penn District*, Com. Pleas, Phila. 19 March 1853. 1 *Ash.* 135. 3 *Phila.* 258. 21 *Leg. Int.* 340. 2 *Luz. Leg. Obs.* 28. The fact that notice was not given may be proved by parol. 7 *H.* 495. A judgment obtained by any trick or fraud ought to be reversed, if the *certiorari* be taken within a reasonable time after it is discovered. *Ibid.* So also, where it appears on the face of the record, that the justice had no *jurisdiction*, the court will reverse, notwithstanding the lapse of more than twenty days. This proviso of the act of 1810, only applies to civil suits, and an action for a penalty for a breach of ordinance is not included. 12 *S. & R.* 53.

Formerly the court would not travel into the merits of the original matter, but took the case as stated on the magistrate's return. 2 *D.* 114. But now, to prevent injustice, the evidence given before him will, under special circumstances of fraud or gross injustice, be inquired into. 5 *Binn.* 30. 2 *Wh. Dig.* 133, pl. 250.

Where there is reason to suspect partiality or corrupt practice on the part of the justice, as where he refuses to hear material testimony, the court will permit parol evidence to be introduced. So, where one justice re-examines what has been already determined by another. 1 *Ash.* 215. But, in general, parol evidence is inadmissible, if the proceedings appear to be regular on their face, and the justice has acted within the sphere of his jurisdiction. *Ibid.* 51, 64. The parol evidence must relate to the conduct of the justice; not to that of the party. 1 *P. F. Sm.* 48. Or to the merits of the case. 10 *P. F. Sm.* 107. If, from the whole facts, a fair presumption arises that the justice refused to grant a continuance prayed for, because he believed the party was guilty of laches, &c., the court will not impute bad motives to him. *Ibid.*

The act referred to provides that there shall be no reversal for want of *formality* in the magistrate's proceedings, if it shall appear, on the face thereof, that the defendant confessed a judgment for any sum within the jurisdiction of the justice; or that a precept issued in the name of the commonwealth, requiring the defendant to appear before him on *some day certain*, or directing the constable to bring the defendant forthwith before him, agreeably to the provisions of the act; and that the constable having served the writ, judgment was rendered on the day fixed, or some other day to which the case was postponed by the justice, with the knowledge of the parties.

As regards the day of appearance and judgment, it should be stated on the justice's docket; but if the day of appearance be mentioned, and then the entry proceed to state that the case was examined and judgment rendered, the court will presume that judgment was given on that day. 5 *Binn.* 29. The magistrate is not bound to enter on his docket the evidence on which his judgment is founded—it will be presumed that it was on legal proof. *Ibid.* 31. He need only state the *demand* and the *kind* of evidence produced to support the claim, whether upon bond, note, penal or single bill, writing obligatory, book debt, damages on assumption, or whatever it may be, so as to enable the court to ascertain the grounds of the controversy, and his decision thereon. 1 *Br.* 209. See Act 1810, § 4. *Purd.*

600. A. 27. But if he should, unnecessarily, so enter it, and it be found insufficient to support the judgment, it will be reversed. So, where the evidence is not the legal evidence which the law calls for, the court would probably set aside the proceedings, where the party had no appeal. But where he has ample remedy by appeal, and, neglecting it, enters bail for the stay of execution, the court will not interpose. 1 Y. 251. 4 Y. 436.

Where it appears on the face of the record that the magistrate has exceeded his jurisdiction, by giving judgment and issuing execution for a greater sum than the act of assembly allows, the court will consider the whole as a nullity, and discharge a defendant committed under such judgment. 1 D. 135. But where his jurisdiction evidently appears on the face of the record, the settled rule has been to form no presumption against the accuracy of the proceedings, (5 Binn. 32,) and his judgment though erroneous is binding, until reversed, on *certiorari* or appeal. 9 S. & R. 12. 3 Pittsburgh Leg. J. 301.

As justices have not jurisdiction in *all* cases of contract, it ought to appear upon their proceedings what is the *nature* of the contract on which the action is founded—and the judgment will be reversed if his jurisdiction does not appear from the record. 1 Br. 339. 1 Phila. R. 518. In an action for trespass to real estate, it need not appear on the record, that the estate was in the county where the action arose. 3 Penn. L. J. 425. See 1 Phila. R. 516. 5 Ibid. 222. In an action on a bond, it is no objection to his jurisdiction that the *penalty* exceeds \$100, if the *real debt* be not. 1 M. 270.

No *execution* can be set aside on *certiorari*, for informality, if it appear on the face of the same, that it issued in the name of the commonwealth after the expiration of the proper period of time; and for the sum for which judgment had been rendered together with interest thereon and costs; and a day mentioned on which return is to be made to the execution by the constable; and that the cause of action shall have been cognisable before a justice of the peace.

Whatever may be the objections to the execution, it cannot be set aside on *certiorari*, unless the latter be sued out and served within twenty days after the execution issued, if the justice had jurisdiction of the cause of action.

On the affirmance of a judgment on *certiorari*, the record is not remitted to the magistrate; but execution issues at once from the common pleas for the debt, interest, and costs, (or for the costs only, as the case may be,) without referring the cause again to the justice. 1 D. 400. 3 P. R. 24. The party in whose favor the judgment has been affirmed, may also take a *scire facias* against the bail, who is liable without any previous process against the principal. 6 S. & R. 573.

When, however, the *certiorari* is *non-prossed*, the record must remitted to the justice to be proceeded in. It never was the practice here or in England to treat a *non-pros* as a final judgment, and in this respect there is no difference between a writ of error and a *certiorari*. The practice has been general, if not universal, to collect the debt in such case by an execution from the justice. 3 P. R. 24.

The costs in the event of a second action being brought, and a trial had, after a reversal of the prior judgment on a *certiorari*, are provided for by the twenty-fifth section of the act of 1810, already mentioned. It directs, that when the plaintiff removes and reverses the justice's proceedings, and on a second trial before him, or any other justice, if judgment shall not be obtained for a sum equal to or greater than the original judgment, the plaintiff shall pay all costs accrued on the second trial, as well as those which accrued at the court, including any fees, not exceeding four dollars, which the defendant may have given his attorney in such trial, together with fifty cents per day to the defendant while attending court in defence of the proceedings; and where the defendant removes and reverses the judgment, and it shall appear that he attended the trial before the justice, or had *legal notice* to attend the same, and on a final trial being had as aforesaid, the plaintiff shall obtain judgment for a sum equal to or greater than the original judgment, the defendant shall pay all costs accrued on the second trial before the justice of the peace, as well as those which accrued at the court before whom the proceedings have been set aside, including any fees which the plaintiff may have given to any attorney, not exceeding four dollars, to defend the proceedings of the justice, together with fifty cents per day while attending at court on the same; which costs shall be recovered

before any justice of the peace, in the same manner as sums of a similar amount are recoverable.

The right to recover the costs on a writ of *certiorari* depends on the relative amount recovered or abated by the subsequent judgment: therefore, upon the reversal, on *certiorari*, of an execution, on the ground that no judgment had been entered by the justice on an award of referees, and the judgment is subsequently entered, and the money recovered, the costs of the *certiorari* cannot be recovered by the defendant in error from the plaintiff in error. 4 W. 450. A judgment of reversal on *certiorari* does not carry costs. *Bartram v. Atkinson*, Com. Pleas, Phila. 1858.

II. [In addition to the cases referred to in the text, it is deemed advisable to submit other authorities in the language of the reporters.]

The entry of an ineffectual appeal is no bar to a *certiorari* within the time required by law. 2 Phila. 215.

The defendant cannot have both an appeal and a *certiorari*. Where an appeal is not a mere nullity, the entry of it is ground for quashing a *certiorari* subsequently issued; and a *certiorari* regularly issued and served, bars a subsequent appeal. If a defendant appeal and *certiorari* on the same day, and file and argue exceptions upon the *certiorari*, his appeal must be dismissed. 1 Brewst. 406.

If the return (to a *certiorari*) be false, the justice is liable to an action at the instance of the injured party. If the magistrate shall have acted unjustly, an information will be granted against him. 2 D. 114.

The 21st section of the act of 20th March 1810, which provides that "no judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same be issued within twenty days after the judgment was rendered," applies only to civil actions. 12 S. & R. 53.

Where on *certiorari* the record of the justice stated the cause of action to have been "a contract," but what was the nature of the contract did not appear, the proceedings were reversed. 1 Br. 339.

A *certiorari* does not lie to a justice of the peace to remove proceedings had before him under the act of the 16th of April 1807, in relation to stray cattle. 2 R. 29.

If the judgment of a justice of the peace be affirmed on *certiorari*, the practice is to have execution from the common pleas. In the case of a *non-pros*, the record is remitted to the justice who issues execution. 3 P. R. 21.

Where the defendant does not appear before the justice, it must appear that the summons was served in the manner directed by the act of 1810, or the court will reverse the proceedings on *certiorari*. The following returns have been held insufficient, viz.: "*personally served*;" or "*served a copy on defendant*;" or, "*copy served personally*;" or, "*left a copy at defendant's boarding-house*." Com. Pleas, Phila., November 14th 1848. The manner of service must be "by producing the original summons to the defendant, and informing him of the contents thereof; or leaving a copy at his dwelling-house, in the presence of one or more of his family or neighbors." *Purd.* 594. See 2 Pars. 282, 285. 6 H. 120. 1 Phila. R. 519. 3 Pittsburgh Leg. J. 301. 8 *Ibid.* 164.

A *certiorari* operates as a stay of proceedings, unless the judgment complained of has been begun to be executed. 13 Wend. 664. But an execution under which a levy has been made, is not superseded by a *certiorari* afterwards sued out. 9 Johns. 66. 2 Hill 9.

The court will notice a substantial and fatal error in the proceedings, though not specially assigned, when it is deemed essential for the purposes of justice. 2 P. 265.

A *certiorari* brings up nothing but the record; the evidence is not before the court. 11 P. F. Sm. 491.

Common Carriers.

- I. Who are common carriers.
II. Liabilities of common carriers.

- III. Lien of common carriers.
IV. Carriers of passengers.

I. WHO ARE COMMON CARRIERS.

ALL persons carrying goods for hire, as masters and owners of ships, hoymen, lightermen, stage-coachmen, and the like, come under the denomination of common carriers. Selw. N. P. 358. 1 Bouv. Inst. 410.

It has been determined that any person undertaking, for hire, to carry the goods of *all persons* indifferently, is, as to the liability imposed, to be considered a *common carrier*. 1 Salk. 249. 2 Greenl. Ev. § 208. 8 C. 208.

A person may be a common carrier of money, as well as of other property. 11 Johns. 107.

Owners of steamboats carrying freight and parcels for hire are common carriers and subject to their liabilities. 3 Wend. 158. So of a company using steamboats and railroads. 18 Wend. 611. So of boatmen and other freighters for hire, on navigable rivers and canals. 2 Bailey 421.

Ferrymen are liable as common carriers, and they are the legal judges when it is safe to pass over or not. 2 N. & M. 17. But the owner of a ferry is not liable for losses in crossing, if it be rented and in possession of the tenant. Minor 366.

A wagoner who carries goods for hire thereby contracts the responsibility of a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment. 1 W. & S. 285.

One who holds himself forth to the public to carry for hire, is a common carrier, as much in his first trip, as in any subsequent one. 1 C. 120.

II. LIABILITY OF COMMON CARRIERS.

A common carrier is bound to receive and carry all goods offered for transportation, and is liable to an action in case of refusal without sufficient cause. An express company engaged in the business of transporting small packages has as good a right to the benefits of a railroad as the owners of the packages possess in person. And a contract giving to one express company the exclusive right of transportation in passenger trains is illegal and void. 12 H. 378, 381.

Common carriers are liable for every injury which happens to goods intrusted to their care, unless it be caused by act of God, inevitable accident or the enemies of the land. 6 Johns. 107. 1 Pars. Cont. 634.

Common carriers are liable for every injury happening to property intrusted to their care, unless it be caused by inevitable accident, by public enemies or by the act of the owner of the property. 8 S. & R. 533. And this rule extends as well to carriers by water as to carriers by land. 10 Johns. 1. See 2 Binn. 74.

In an action by a common carrier against the consignee, to recover the price of carrying, the defendant may set up, as a defence, negligence or want of skill in the carrier, by which the goods were deteriorated in value. 5 W. 446.

Where a parcel is delivered to a driver of a stage-coach to be carried, the master and not the servant, is responsible. Bul. N. P. 71.

It is well settled that, if a common carrier, by whom goods are sent to be delivered to A., sells them to B., the sale vests no property in the purchaser. 3 W. 178. 4 S. & R. 500.

Notice that "all baggage is at the owner's risk," though brought to the knowledge of the passengers, will not excuse a steamboat and railroad company from paying for the loss of baggage. 5 R. 179. But see 6 W. & S. 495.

It seems to be settled in Pennsylvania, that carriers may, by special contract, limit their responsibility, though many learned judges have expressed some regret that the validity of *notices* restricting their liability was ever recognised. 5 R. 179. 1 W. 87. 6 W. & S. 495.

But such carriers cannot, by any special notice or agreement, free themselves from *all* responsibility, particularly where there is gross negligence or fraud, nor from the

exercise of ordinary care. *Ibid.* Such a contract does not relieve them from ordinary care in the performance of their duty. 6 C. 242. 8 C. 208. Its effect, if brought home to the party, is only to change the responsibility of the carrier from that of a common carrier, to that of an ordinary bailee for hire. 8 C. 208.

When a common carrier claims an exemption from the responsibility which the rule of law casts upon him, on the plea of special notice, he must show not only that the notice was brought home to the bailor, but also that the terms of the notice were clear and explicit, and not liable to the charge of ambiguity or doubt. 5 R. 179. 9 W. 87. 6 W. & S. 495. 4 H. 67. 2 Greenl. Ev. § 216. 8 C. 208.

A common carrier is answerable for the loss of a box or parcel, though he be ignorant of its contents, or they be ever so valuable, unless he make a special acceptance. But if the consignor of goods studiously conceal from the captain of a ship, or misrepresent the value or nature of the goods shipped, the ship-owner is not liable if the goods be purloined on the voyage, though the wrongdoer would be. 3 W. & S. 21.

Tender by a common carrier to a consignee of goods intrusted to his care, must be reasonable in respect to time, place and manner, and this is a question for the jury [or the justice, as the case may be]. If the goods be tendered after hours of business, or when the consignee is unable to receive them, such tender will not discharge the carrier. 5 W. & S. 123. 3 N. Y. 322.

In an action on the case against a common carrier for not delivering goods according to consignment, the value of the goods sent is the lowest measure of damages. 5 W. & S. 435.

In such action, a previous demand of the goods is not necessary to the plaintiff's right to recover. *Ibid.*

The responsibility of a carrier by rail lasts until delivery to the consignee, or until the responsibility of another party begins. 10 P. F. Sm. 109.

III. LIEN OF COMMON CARRIERS.

It is laid down, as a general rule, that whenever any one is *obliged* to receive goods, to perform any duty on them, he has a *lien* on them at common law; for, as that imposes the burden, it also gives him the power of retaining for his indemnity. L. Raym. 752. 1 C. 120.

Yet this *lien* extends only to the carriage price of the particular goods on which the lien is due. Any further lien, for a general balance, must be founded on a general usage of trade, or on a particular contract, to that effect, between the parties. *Jeremy on Carriers* 70.

One not a common carrier, but who specially undertakes to carry a particular load for hire, has no lien for freight, unless he reserve it by agreement. 1 C. 120.

See tit. "Lien."

IV. CARRIERS OF PASSENGERS.

It shall be the duty of the owner or owners of any railroad, steamboat or other conveyance for the transportation of passengers, to provide each agent, who may be authorized to sell tickets, or other certificates entitling the holder to travel upon any railroad, steamboat or other public conveyance, with a certificate, setting forth the authority of such agent to make such sales; which certificate shall be duly attested by the corporate seal, if such there be, of the owner of such railroad, steamboat or other public conveyance, and also by the signatures of the owner, or officer whose name is signed upon the tickets or coupons, which such agents may sell. Act 6 May 1863, § 1. *Purd.* 1294.

It shall not be lawful for any person, not possessed of such authority, so evidenced, to sell, barter or transfer, for any consideration whatever, the whole, or any part, of any ticket or tickets, passes, or other evidences of the holder's title to travel on any railroad, steamboat or other public conveyance, whether the same be situated, operated or owned within or without the limits of this commonwealth. *Ibid.* § 2.

Any person or persons, violating the provisions of the second section of this act, shall be deemed guilty of misdemeanor, and shall be liable to be punished, by a fine not exceeding five hundred dollars, and by imprisonment not exceeding one year,

or either or both, in the discretion of the court in which such person or persons shall be convicted. Ibid. § 3.

It shall be the duty of every agent, who shall be authorized to sell tickets, or parts of tickets, or other evidences of the holder's title to travel, to exhibit to any person desiring to purchase a ticket, or to any officer of the law, who may request him, the certificate of his authority thus to sell, and to keep said certificate posted in a conspicuous place in his office, for the information of travellers. Ibid. § 4.

It shall be the duty of the owner or owners of railroad, steamboat and other public conveyances, to provide for the redemption of the whole or any parts or coupons of any ticket or tickets, as they may have sold, as the purchaser, for any reason, has not used, and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket, and the cost of a ticket between the points for which the proportion of said ticket was actually used; and the sale, by any person, of the unused portion of any ticket, otherwise than by the presentation of the same for redemption, as provided for in this section, shall be deemed to be a violation of the provisions of this act, and shall be punished as is hereinbefore provided: *Provided*, That this act shall not prohibit any person who has purchased a ticket from any agent, authorized by this act, with the *bona fide* intention of travelling upon the same, from selling any part of the same to any other person, if such person travels upon the same. Ibid. § 5.

Any railroad or railway corporation, within this commonwealth, that shall exclude, or allow to be excluded, by their agents, conductors or employees, from any of their passenger cars, any person or persons, on account of color or race, or that shall refuse to carry in any of their cars, thus set apart, any person or persons, on account of color or race, or that shall, for such reason, compel or attempt to compel any person or persons, to occupy any particular part of any of their cars, set apart for the accommodation of people as passengers, shall be liable, in an action of debt, to the person thereby injured or aggrieved in the sum of five hundred dollars, the same to be recovered in an action of debt as like amounts are now by law recoverable. Act 22 March 1867, § 1. Purd. 1476.

Any agent, conductor or employee of any railroad or railway corporation, within this commonwealth, who shall exclude, allow to be excluded, or assist in the exclusion, from any of their cars, set apart for the accommodation of passengers, any person or persons, on account of color or race, or who shall refuse to carry such person or persons, on account of color or race, or who shall throw any car or cars from the track, thereby preventing persons from riding, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine not exceeding five hundred dollars, nor less than one hundred dollars, or be imprisoned for a term not exceeding three months, nor less than thirty days, or both, at the discretion of the court. Ibid. § 2.

Independently of this act, the separation of black and white passengers in a public conveyance be the subject of a sound regulation to secure order, promote comfort, preserve the peace and maintain the rights of both carriers and passengers. 5 P. F. Sm. 210. Whether this act enables a negro to force his way into a ladies' car from which white gentlemen are excluded, is a question yet to be determined.

Each passenger upon a railroad, shall have the right to have carried in the car or place provided for that purpose, in the train in which he or she may be a passenger, his or her personal clothing, not exceeding, inclusive of the trunk or box in which it may be contained, one hundred pounds in weight, and three hundred dollars in value. Act 11 April 1867, § 1. Purd. 1477.

No railroad company shall, under any circumstances, be liable for loss or damage to any baggage or property belonging to any such passenger, beyond the said sum of three hundred dollars, unless it shall be proven that the excess in value thereof over that sum, was truly declared to the agents of the company, at the time of its delivery for transportation, and the sum charged by the railroad company for such transportation over and above passage fare was paid: *Provided, however*, That the said declaration shall not relieve the claimant from proving the actual value of the articles alleged to have been lost or damaged; but in no event shall there be any recovery beyond the value thus declared. Ibid. § 2.

Color of Pass.

No railroad company providing a car or other place for the deposit of passengers' baggage shall, under any circumstances, be liable for loss of, or damage to, any articles or property whatsoever, not there deposited by the passenger, or which are placed by him or her in the car in which he or she is to be transported. Ibid. § 3.

No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction. Act 15 April 1851, § 18. Purd. 754.

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned. Ibid. § 19.

The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in the case of intestacy, and that without liability to creditors. Act 26 April 1855, § 1. Purd. 754.

The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter. Ibid. § 2.

If any person shall be maimed or otherwise injured in person, or injured in property, through or by reason of the wanton and furious driving or racing, or by reason of the gross negligence or wilful misconduct of the driver of any public stage, mail coach, coachee, carriage or car, employed in the conveyance of passengers; or through or by reason of the gross negligence or wilful misconduct of any engineer or conductor of any locomotive engine or train of railroad cars or carriages; or any captain or other officer of any steamboat employed in the conveyance of passengers or of goods, wares, merchandise or produce of any description; such driver, engineer, conductor, captain or officer, shall, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement, or by simple imprisonment, not exceeding five years: *Provided*, That the provisions of this act shall not interfere with the civil remedies against the proprietors and others, to which the injured party may by law be now entitled. Act 31 March 1860, § 29. Purd. 222.

When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee: *Provided*, That this section shall not apply to passengers. Act 4 April 1868, § 1. Purd. 1521.

In all actions now or hereafter instituted against common carriers, or corporations owning, operating or using a railroad as a public highway, whereon steam or other motive power is used, to recover for loss and damage sustained and arising either from personal injuries or loss of life, and for which, by law, such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained, not exceeding, in case of personal injury, the sum of three thousand dollars, (a) nor, in case of loss of life, the sum of five thousand dollars. Ibid. § 2.

If any person or persons in the service or employ of a railroad or other transportation company, doing business in this state, shall refuse or neglect to obey any rule or regulation of such company, or, by reason of negligence or wilful misconduct, (b) shall fail to observe any precaution or rule, which it was his duty to

(a) This part of the act is unconstitutional so far as it sought to affect pending cases. 25 Leg. Int. 332.

(b) This act punishes both negligence and wilful misconduct; they are distinct offences. 26 Leg. Int. 380.

obey and observe, and injury or death to any person or persons shall thereby result, such person or persons so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not exceeding five thousand dollars, and to undergo an imprisonment in the county jail or in the state penitentiary not exceeding five years: *Provided*, That nothing in this act shall be construed to be a bar to a trial and conviction for any other or higher offence, or to relieve such person or persons from liability in a civil action for such damages as may have been sustained. Act 23 March 1865, § 1. Purd. 1410.

It shall be the duty of the prosecuting attorney of the city or county where any such injuries may have happened, as soon as he shall have notice of the same, to take immediate action and legal measures for the apprehension and arrest of the person or persons who may be charged with causing the injuries as aforesaid, and to direct *subpoenas* to issue from any justice of the peace to witnesses, to appear and testify on the part of the commonwealth touching such offences charged as aforesaid, and to prosecute the offenders as in other cases of misdemeanor: *And provided further*, That no conviction of the employees shall relieve the company from any liability for any such injuries, or death. *Ibid.* § 2.

If a person take his place in a stage-coach, and pay at the time only *part* of the fare as a deposit, the proprietor is at liberty to fill up his place with another passenger, if the first party be not at the inn, ready, when the coach sets off. 1 *Rep. N. P.* 27.

But if at the time of taking his place he pays the *whole* fare, the proprietor cannot dispose of his place; for the passenger may take it at any stage of the journey he thinks proper, and which may be most convenient. *Ibid.*

Coach owners are not liable for injuries which passengers may sustain from inevitable accidents, as from the oversetting of the coach, from the horses taking fright, there not being any negligence in the driver. 1 *Selwyn, N.* P. 417.

Carriers of passengers are bound to carry all passengers who offer themselves, against whose personal character and conduct there are no just objections, provided they have sufficient accommodations. They have no more right to refuse a passenger, than an innkeeper has to turn away a guest. 1 *Bouv. Inst.* 417. 2 *Sumn.* 221.

Railroad companies are answerable for the direct and immediate consequences of errors committed by themselves, or caused by the negligence of themselves or their agents; but not for perils to which a passenger exposes himself by his own rashness or folly. 11 *H.* 147.

Where injury is the result of mutual and concurring negligence in the parties, no action for damages will lie. 12 *H.* 465.

When a railroad company undertakes the transportation of a passenger for an agreed price, the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch and roadworthy; that means have been taken beforehand to guard against every apparent danger that may beset the passenger; and that the servants in charge are tried, sober and competent men. 6 *C.* 234. 1 *Bouv. Inst.* 417.

When a passenger is injured, without fault on his part, the law raises, *prima facie*, a presumption of negligence, and throws on the company the burden of proving that it did not exist. 6 *C.* 234. 18 *Pitts. L. J.* 21.

A railroad company undertaking the carriage of passengers to an intermediate point on their road, is bound to stop there a sufficient length of time to enable all the passengers to alight; and if a passenger be injured in consequence of the starting of the train before a sufficient time has been given to alight, the company is liable in damages. 8 *C.* 292.

If a passenger be injured in consequence of his disregard of the necessary regulations of the company, in regard to the mode of alighting from their cars, they are not liable, even though the negligence of their servants concurred in causing the mischief. 9 *C.* 318.

Under the act 26 April 1855, the damages to be recovered by the surviving relatives for an injury resulting in death, are confined to such as are capable of a pecuniary estimate; nothing is to be allowed for the mental sufferings of the survivors, or the corporal sufferings of the injured party. 9 *C.* 318. And, it seems,

that the act 4 April 1868, has not changed the law in this respect. In such cases, the amount of damages must be left mainly to the sound sense and deliberate judgment of the jury, applied to all the facts and circumstances of the case. 5 Wall. 90.

By act 4 April 1868, no suit against any passenger railway company (whose route is wholly within the county of Philadelphia) for damages for injuries or death, shall be brought, unless within six months from the time the right of action shall accrue. Purd. 1518.

Common Law.

THE common law and the statute law flow originally from the same fountain—the legislature. The statute law being the will of the legislature remaining on record in writing: the common law, nothing else but statutes anciently written, but which have been worn out by time. All the laws of England began by consent of the legislature; and whether it be now law by custom, by usage or by writing, it is the same thing.—WILMOT, C. J. 2 Wils. 348–51.

The “common law” mentioned in the 7th art. of the amendments of the constitution of the United States is the common law of England, and not that of any individual state. 1 Gall. 20.

The constitution and laws of the United States are predicated in the existence of the common law. 1 Bald. 558.

The common law of England has always been in force in Pennsylvania. 1 D. 67. And it can only be changed by legislative enactment, clearly indicating an intention to work a change. The presumption always is, that no change is intended. 18 Leg. Int. 21.

In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the direction of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect. Purd. 41, 248. For the decisions on this statute, see tit. “Acts of Assembly,” II.

The common law is in many particulars much more extensive and important than the statute. It is often denounced, yet it is the great guardian of our rights. In many respects it is so sacred, that what is the common law of England, is, in this country, placed beyond legislative interference, by being incorporated in the constitutions of the different states. It was brought here by the colonists, and was considered the birthright of the people. Wherever the conquests of England reach, to whatever quarter her colonies extend, the common law goes with them. That it was brought here, and that we inherit it, was never doubted. 1 Phila. R. 536.

Common Scold.

THE offence of being a common scold is indictable, and may be punished by fine and imprisonment at the discretion of the court. 12 S. & R. 220. 2 P. F. Sm. 243. 3 Cr. C. C. 618, 620.

The punishment of the *ducking stool* cannot be inflicted in Pennsylvania. Ibid.

The revised Penal Code provides that every offence whatever, not thereby specially provided for, may be punished as heretofore. Purd. 247.

Compounding Offences.

If any person having a knowledge of the actual commission of any misprision of treason, murder, manslaughter, rape, sodomy, buggery, arson, forgery, counterfeiting or passing counterfeit money or notes, burglary, housebreaking, robbery, larceny, receiving stolen goods or other property by persons knowing them to be stolen, kidnapping, bribery, perjury or subornation of perjury, shall take money, goods, chattels, lands or other reward, or promise thereof, to compound or conceal, or upon agreement to compound or conceal, the crimes aforesaid, every person so offending shall be guilty of a misdemeanor, and on conviction thereof, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding three years. Act 31 March 1860, § 10. *Purd.* 218.

This section, which embraces the misprision of felony, and the theft-bote of the common law, by which these crimes were punished by fine and imprisonment, is essentially new to our statute law. The only existing statutory punishment applicable to this class of crimes, is that found in the 32d section of the act of the 31st of May 1718, 1 Sm. 123, which makes any person who shall agree or compound, or take satisfaction for any stealing or goods stolen, subject to forfeit twice the value of the sums agreed for or taken. The concealment of any of the infamous crimes embraced in this section, for the consideration of money, or property given or paid, as the price of such concealment, is a crime made so base from the motives which have induced it, as to render it the proper subject of penal infliction. Simple concealment, from mistaken notions of pity and compassion, or generous forgiveness, are not embraced in the enactment. Report on the Penal Code 13.

Though the bare taking again of a man's own goods which have been stolen, without favor shown to the thief, is no offence, (*Hawk. P. C. b. 1, c. 59, § 7*), yet, where he either takes back the goods, or receives other amends on condition of not prosecuting, this is a misdemeanor punishable by fine and imprisonment. *Ibid.* § 5. An agreement to put an end to an indictment for a misdemeanor is unlawful, (2 Wils. 841,) unless it be with the consent of the court. Compounding informations on penal statutes is an offence at common law. 4 Bl. Com. 136. Somewhat analogous to the offence of compounding felony is that of misprision of felony. *Rosc. Cr. Ev.* 311.

The law permits the compromise of an offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action; but if the offence be of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution of it. 2 Williams 307. 5 Am. L. R. 420. A note given in settlement of a prosecution for obtaining money by false pretences, is valid and binding; it is competent for the prosecutor to compound such offence, which is but a misdemeanor. 2 Leg. Gaz. 204.

In all cases where a person shall, on the complaint of another, be bound by recognisance to appear, or shall, for want of security, be committed, or shall be indicted for an assault and battery or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by action, if the party complaining shall appear before the magistrate who may have taken recognisance or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate, in his discretion, to discharge the recognisance which may have been taken for the appearance of the defendant, or in case of committal, to discharge the prisoner, or for the court also, where such proceeding has been returned to the court, in their discretion, to order a *nolle prosequi* to be entered on the indictment, as the case may require, upon payment of costs: *Provided*, That this act shall not extend to any assault and battery, or other misdemeanor, committed by or on any officer or minister of justice. Act 31 March 1860, § 9. *Purd.* 251.

Concealed Weapons.

ACT 13 MAY 1850. Purd. 181.

SECT. 14. Hereafter, any persons within the limits of the city and county of Philadelphia, who shall carry any fire-arms, slung-shot or other deadly weapon concealed upon his person, with the intent therewith unlawfully and maliciously to do injury to any other person, shall be deemed guilty of a misdemeanor, and upon the conviction thereof, shall be sentenced to undergo solitary confinement at hard labor in the prison of said county for a period of not less than one month, nor more than one year, at the discretion of the court; and the jury trying the case may infer such intent as aforesaid, from the fact of the said defendant carrying such weapons in the manner as aforesaid. (a)

The act of 3d May 1850, for establishing a uniform system of police in Philadelphia, provides that when any persons, to the number of twelve or more, shall be therein unlawfully, riotously and tumultuously assembled, and shall refuse to disperse, after proclamation made, they shall be deemed guilty of a misdemeanor, and, on conviction, sentenced to solitary confinement at hard labor in the county prison for not less than one month, nor more than two years; and that any person arrested, upon whose person, or in whose possession, shall be found fire-arms, or any other deadly weapon, shall be deemed guilty of an intention to riot, whether said fire-arms or deadly weapon shall be used or not, unless the contrary can be satisfactorily established, and punished accordingly. Purd. 181.

ACT 8 APRIL 1851. Purd. 181.

SECT. 4. Any person who shall wilfully and maliciously carry any pistol, gun, cut-knife, slung-shot or deadly weapon in the borough of York, shall be deemed guilty of felony, and being thereof convicted shall be sentenced to undergo an imprisonment at hard labor for a term not less than six months nor more than one year, and shall give security for future good behavior for such sum and for such time as the court before whom such conviction shall take place may fix; and any person or persons who shall otherwise offend against the provisions of this section shall be fined in a sum not exceeding one hundred dollars, for the use of the borough of York, or be imprisoned for a term not exceeding one year, or both, at the discretion of the court, or may be held to bail for future good behavior.

It has been held, in Kentucky, that a law prohibiting the carrying of concealed weapons is unconstitutional, being in violation of that section of the Bill of Rights, which declares "that the right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned." 2 Litt. 90. The court there said, "that whatever restrains the full and complete exercise of the right is a violation of the constitution. Such laws, however, have been sustained in Alabama. 1 Ala. 12; in Indiana, 2 Blackf. 229; in Georgia, 1 Kelly 243; and in Texas, 24 Texas 34. But in Georgia, such a law was held to be unconstitutional, in so far as it prohibited the carrying of a pistol, or other weapon, *openly*. 1 Kelly 243.

(c) The act 5 May 1864 punishes this offence when committed in the county of Luzerne. March 1866 extends its provisions to the county of Luzerne. Purd. 1419. Anykill. Purd. 1321. And the act 16

Conspiracy.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. PURD. 238.

SECT. 127. If any two or more persons shall conspire or agree, falsely and maliciously, to charge or indict any other person, or cause or procure him to be charged or indicted, in any court of criminal jurisdiction, the person so offending shall be guilty of a misdemeanor, and on conviction be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, either at labor by separate or solitary confinement, or to simple imprisonment, not exceeding three years, at the discretion of the court.

SECT. 128. If any two or more persons shall falsely and maliciously conspire, and agree to cheat and defraud any person, or body corporate, of his or their moneys, goods, chattels or other property, or to do any other dishonest, malicious and unlawful act, to the prejudice of another, they shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding two years.

II. The offence of conspiracy, according to all the authorities, consists, not in the *accomplishment* of any unlawful or injurious purpose, nor in any one act moving towards that purpose; but in the actual concert and agreement of two or more persons to effect something, which being so concerted and agreed, the law regards as the object of an indictable conspiracy. Whart. Cr. L. § 2291 n. 2 P. 341.

The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or a lawful act for an unlawful purpose. And the offence is complete when the confederacy is made. 2 Mass. 837.

All who accede to a conspiracy after it is formed, and while it is in execution, and all who, with knowledge of the facts, concur in the plans originally formed, and aid in executing them, are fellow-conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them. They commit an offence when they become parties to the transaction, or further the original plan. 4 Wend. 259. 1 Greenl. Ev. § 111, 233. 2 Ibid. § 90. Bright. R. 143.

A combination is a conspiracy in law, whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. Every association, therefore, is criminal, whose object is to raise or depress the price of labor beyond what it would bring if it were left without artificial excitement. Whart. Cr. L. § 2291 n. 1 Jour. Juris. 225. Bright. R. 36. 2 P. 59.

A confederacy to assist a female infant to escape from her father's control, with a view to marry her against his will, or to seduce her, is indictable at common law. Wh. Cr. L. § 2317. 8 Burr. 1434. 1 Eng. L. & Eq. 585. 2 H. 228.

A conspiracy to publish a libel, or to defame by spoken words not actionable, would be equally a subject of prosecution by indictment. 8 Barr 239, per GIBSON, C. J.

A conspiracy to commit an assault and battery is indictable. 5 C. 296.

A conspiracy entered into to induce and procure others to do an act prohibited, under a penalty, by statute, is an indictable offence, whether the object were effected or not. 11 H. 355.

All conspiracies to injure others, by preventing, obstructing or defeating the course of public justice, by fabricating or suppressing evidence, are indictable. 2 Hill 282.

A conspiracy is in its nature a joint offence; less than two persons cannot be accused of it; and where this offence is charged, the court cannot award a separate trial. 2 Ash. 31.

A man and his wife, being in law but one person, cannot be convicted of the same conspiracy, unless other parties are charged. Whart. Cr. L. § 2343.

The wife of one conspirator is not a competent witness either for or against the others. 2 Ash. 31.

An indictment lies for any conspiracy to vex or annoy another—for instance, to hiss a play or an actor, right or wrong. 2 Campb. 369. 8 Barr 240, per GIBSON, C. J.

To constitute a conspiracy, the purpose to be effected by it must be unlawful, either in respect of its nature, or in respect of the means to be employed for its accomplishment; and the intended act, where it has not a common law name to import its nature, must, in order to show its illegality, be set forth in the indictment. 5 Barr 65.

Where concert is part of a criminal act, it is not the subject of indictment as a conspiracy to commit the act. There is no such offence as a conspiracy between a man and a woman to commit adultery. 2 H. 226.

Constables.

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| I. Of their antiquity and general duties. | VI. Duties in regard to elections. |
| II. Of their election and qualification. | VII. Actions against constables. |
| III. Appointment of deputies. | VIII. Miscellaneous provisions. |
| IV. Removal for misconduct, &c. | IX. Judicial decisions. |
| V. Duties and liabilities in civil cases. | X. Forms of process. |

I. OF THE ANTIQUITY AND GENERAL DUTIES OF CONSTABLES.

IF the great antiquity of the office, or the extensive powers intrusted to him who exercises it, could inspire men faithfully, and with a single eye to the public weal, to discharge the duties of any office, then would the duties of the office of constable be certainly discharged with uprightness and a conscientious determination to command public respect and confidence. All the old English law books are full of the early appointment and confidence reposed in this officer. So entirely is the origin of the office lost in the mists of antiquity, that the learned, who delight in devoting themselves to such inquiries, have been unable to determine whether the origin of the word constable was to be ascribed to the Saxon language, or to that of the eastern empire. The later writers incline to the latter opinion. Which of them, or whether either of them, is right, is, comparatively to ascertaining the rights and duties of the office, a matter of little moment. He is acknowledged by the law to be "one of the most ancient officers in the realm for the conservation of the peace." 4 Inst. 265.

Lord Bacon observes that though the high constable's authority hath the more ample circuit, "yet I do not find," says he, "that the petty constable is subordinate to the high constable, or to be ordered or commanded by him." "The original and proper authority of a high constable, as such, seems to be," says Burns, "the very same and no other within his hundred as that of the petty constable within his vill (village), and therein most probably he is coeval with the petty constable." "Every high and petty constable are, by the common law, conservators of the peace." 2 Hawk. P. C. 98. Dalt. c. 1. He may arrest any person without a warrant who shall make an affray or assault upon another, *in the presence of the constable*: and if it be inconvenient to take him before a justice, he may take him to prison until he shall find surety of the peace. But he may not arrest any man, *on the complaint of another*, without he has a warrant. In the discharge of these highly responsible duties, the constable should be especially careful never to permit his feelings to be enlisted, or his passion aroused. Let him so conduct himself that every sensible bystander shall be disposed to take part with him, and he may be sure that he is faithfully discharging his duty.

It is no inconsiderable evidence of the confidence and authority reposed in a constable, that "if he shall be assaulted in the execution of his office, *he need not go back to the wall*, as private persons are bound to do; and, if in the striving

together the constable kills the assailant, it is no felony; but, if the constable is killed, it shall be considered premeditated murder." H. P. C. 37. The necessity of a constable being temperate in all his habits, is manifest from the power reposed in him. A habit of drunkenness from liquor, or passion, should disqualify any man from being elected constable. The peace and safety of the community are greatly endangered when committed to the care of a constable of quick temper, violent passions, or habits of intoxication. In this commonwealth, where the people elect the constable from among themselves, the election of such a constable is a reproach to the whole community. Every man, woman and child, in the district, is interested in the election of an honest, active and conscientious man as constable. "He should be honest to execute his office truly, without malice, affection or partiality—he should have knowledge to know what he ought to do, and ability, as well in estate as body, that he may intend and execute his office, when need is, diligently, and not for impotence or poverty neglect it." Aged persons, incapable by weakness, should never be elected to do the duties of this arduous office.

In Pennsylvania, the constable exercises all the common law rights and privileges which that officer exercises in England, except, which is very rare, where they have been modified by our constitution or laws. In addition, constables in Pennsylvania have many civil duties imposed upon them by acts of assembly, which are unknown to such officers in England. The sheriff is the executive officer of the courts where he attends, so is the constable the executive officer of the alderman or justice of the peace where he attends. He is bound to serve all legal process which the magistrate shall issue, and he is punishable if he do not serve it, unless he be able to show that he was otherwise officially engaged at the time he was called upon to execute the process.

In case of resistance by a defendant to a constable, in the execution of civil process issued by a justice of the peace, he has the same power as the sheriff to raise the power of the county for his assistance. There is as much reason why constables, in enforcing the law, should be invested with the power necessary to put down resistance and preserve the peace, as there can be in the case of sheriffs. Acquiescence in the laws is the duty of every citizen; and in a government of laws, such as ours emphatically is, it is the duty of every citizen to aid in their execution. If a person refuse to assist the constable, when required, on resistance being made, he is indictable for such refusal. 5 Wh. 437, 440.

II. ELECTION AND QUALIFICATION OF CONSTABLES.

The several acts that have been passed relating to the election of constables in the different boroughs, (a) wards (b) and townships, (c) in the several counties in this commonwealth, shall be so altered and construed as that each of the electors of each borough, ward and township, shall annually (d) vote for only so many candidates for the office of constable as there shall be persons required to fill said office in their respective boroughs, wards or townships; the candidates receiving the highest number of votes shall be declared elected; and all existing laws inconsistent with this section be and they are hereby repealed. Act 9 April 1849, § 3. Purd. 181.

No person shall be eligible to any township office unless he be an elector of the township for which he shall be chosen. Act 15 April 1834, § 84. Purd. 963.

The election for the said township officers shall be held during the same hours, and by the persons appointed to hold the election of inspectors and assessors, on the third Friday in March of every year, except in the counties of Bradford, Susquehanna, Potter, McKean, Clearfield, Lycoming, Wayne and Pike, the township elections of which shall be held on the third Friday in February of every year. (e) Act 2 July 1839, § 53. Purd. 963.

(a) Each borough to elect one, by act 8 April 1851, § 16. Purd. 119.

(b) Each ward in the city of Philadelphia to elect two, by act 2 February 1854, § 26. P. L. 36. By act 25 March 1858, the number of constables in the city of Philadelphia, is to be the same as that of aldermen; and whenever the number of aldermen is in-

creased, the number of constables is to be also increased. P. L. 185.

(c) Each township to elect one by act 15 April 1834. Purd. 182.

(d) To be elected for five years, in Philadelphia, by act 18 March 1864. P. L. 60.

(e) The act 17 April 1869, § 13, provides that all elections for city, ward, borough,

The acting constable in every ward, town, township or district in this commonwealth shall, within six days after the election for a constable or constables has been held, give notice in writing to the person or persons who shall be chosen of his or their election to the said office; and if such acting constable shall neglect so to do, he shall forfeit to the commonwealth the penalty of sixty dollars. Act 1 March 1799, § 6. Purd. 182.

It shall be the duty of every person elected to the office of constable in any township, to appear on the first day of next court of quarter sessions of the same county, to accept or decline such office; and if any person so elected and duly notified thereof, shall neglect or refuse so to appear, he shall forfeit to the township the sum of forty dollars, to be levied by order of the court. Act 15 April 1834, § 107. Purd. 182.

The court to which a return as aforesaid shall be made, shall appoint [one of] the persons returned to be constable of the township for the term of one year from the date of his appointment, and until a successor shall be duly appointed, if it shall appear to the satisfaction of the court that he possesses a freehold estate in his own right, clear of all incumbrances, of the value of at least one thousand dollars, or if he does not possess such freehold estate, he shall give bond with at least one sufficient surety, to be approved of by the court, in the sum and manner hereinafter directed. Ibid. § 108.

If the electors of any township shall fail to elect [two] persons for the said office, or if [both of] the persons returned should be incompetent with respect to estate or unable to give the required security, or should refuse to take upon themselves the said office, or in the event of a vacancy in the office, by death or otherwise, it shall be the duty of the said court to appoint some other respectable person possessing a freehold estate of the value aforesaid, or who shall give the security required, to serve as constable until the next annual election, and until a successor be duly appointed. Ibid. § 109.

If any person who shall be duly elected and appointed a constable, or who shall be appointed as such by the court in the cases hereinbefore mentioned, and who shall possess a freehold estate of the value aforesaid, shall refuse or neglect to take upon himself the said office, or shall not procure a deputy to undertake the duties thereof, he shall be fined by the court in the sum of forty dollars, for the use of the proper township. Ibid. § 110.

Provided, That no person shall be liable to the penalty aforesaid who shall have served personally or by deputy in the office of constable of the same township within fifteen years of his said election or appointment, or having been elected or appointed within that period shall have paid the penalty aforesaid. Ibid. § 111.

The bond to be given by a constable shall be in such sum not less than five hundred dollars, nor more than three thousand dollars, as the court shall direct, and shall be taken by the clerk of the court (a) in the name of the commonwealth, with conditions (b) for the just and faithful discharge by the said constable of all duties of his office; and such bond shall be held in trust for the use and benefit of all persons who may sustain injury from him in his official capacity by reason of neglect of duty, (c) and for the like purposes and uses as sheriffs' bonds are given and held. (d) Ibid. § 112.

township and election officers, shall hereafter be held on the second Tuesday of October, subject to all the provisions of the laws regulating the election of such officers, not inconsistent with that act; and that the persons elected to such offices at that time shall take their places at the expiration of the terms of the persons holding the same at the time of such election. Purd. 1557. By act 31 March 1870, § 9, the regular elections for mayor, councilmen, municipal and ward officers of the city of Allegheny are to be held on the second Tuesday of December. P. L. 718. And by act 31 March 1870, such officers are to be elected in the city of Pittsburgh on the first Tuesday of December. P. L. 731.

(a) If it be found among the records of the office in its proper place, though no entry of

the approving and filing of it be shown, it will be presumed. 7 Barr 241. See 2 S. & R. 420.

(b) A condition that a constable shall "execute all writs and process to him directed," is not greater than required by law. 7 Barr 240.

(c) A party aggrieved may either bring suit on the bond, or proceed against the constable under the 19th section of the act 20 March 1810. 6 S. & R. 245. 8 S. & R. 414. 3 W. 208. 4 W. 217.

(d) The sureties are liable for the act of the officer in levying upon the goods of a stranger. 6 W. & S. 513. 5 B. 184. For money collected under a landlord's warrant. 4 P. L. J. 180. And for money collected on a warrant against the constable of an adjoining township. 7 S. & R. 349. A judgment

Suits against the sureties mentioned in the 3d section of this act shall not be sustained, unless the same be instituted within three years after the date of such obligation. Act 29 March 1824, § 4. Purd. 182.

In every case in which any pecuniary penalty or forfeiture is imposed by this act, the proceedings for the recovery of the same shall be by indictment in the court of quarter sessions of the proper county, or to be recovered as debts of equivalent amount are by law recoverable, unless herein otherwise specially provided: *Provided always*, That aldermen or justices of the peace shall not have jurisdiction of any suit or action, for the recovery of any penalty imposed by this act for official misconduct, and that such suit or action, when brought in the court of common pleas of the proper county, shall have a preference for trial over all other actions. Act 15 April 1834, § 115. Purd. 182.

Nothing in this act contained shall be so construed as to repeal any special provision heretofore made by law, for any city, borough, district or township in this commonwealth. Ibid. § 116.

III. APPOINTMENT OF DEPUTIES.

No deputy (a) shall be appointed by any constable, either by general or partial deputation, without the approbation of the court of quarter sessions of the proper county first had and obtained, except the same be made specially, in some civil suit or proceeding, at the request and risk of the plaintiff or his agent. Act 15 April 1834, § 113. Purd. 182.

In the event of the death, inability or refusal to act of his deputy, the constable of any township may, with the approbation of any one of the judges of the court of quarter sessions of the same county, appoint another deputy, with full authority (b) to act as such until the next regular sessions of such court, and, for the acts of such deputy, (c) the constable and his sureties shall be liable as in other cases, and in every such case the constable shall file a written copy of such deputation in the office of the clerk of the court of quarter sessions of such county. Ibid. § 114.

IV. REMOVAL FOR MISCONDUCT, ETC.

The courts of quarter sessions of each county shall have full power, on petition of any surety of any constable, setting forth the complaint, and verified by affidavit, to inquire into official conduct of such constable, and in all cases where said court shall be satisfied that from habits of intemperance or neglect of duty, any constable is unfit and incompetent to discharge his official duties, it shall be lawful for said courts, respectively, to decree the removal of such constable from office, unless such constable gives such additional surety as the court may direct, and to appoint a suitable person to fill the vacancy who shall have a freehold estate worth at least one thousand dollars beyond incumbrance, or give security, as in other cases of constables, to continue in office until the next succeeding election for constable, and until a successor be duly qualified; and in all cases where any constable, elected or appointed, shall not have given security, and has so neglected his business, or the situation of his estate is such as to render it unsafe to intrust him with the execution of official duties, the said courts shall also have power to require such constable to give security in the same sum and in the same manner required by law from other constables who have not such estate as exempts them from giving security, and such security thus given shall be for the same uses and as valid in law as the security given by said other constables, and in default of giving such

against the constable for official misconduct, is conclusive against the sureties as to the misconduct and the extent of the damage. 17 S. & R. 354. 8 W. 398. 5 Wh. 144. 7 Barr 240. But they may take advantage of any defence personal to themselves. 17 S. & R. 354.

(a) A constable who has appointed a deputy, is still capable to act and execute process. 3 P. R. 236.

(b) A general deputy of a constable when

so appointed can execute all process. 3 P. R. 236.

(c) A constable would be liable for the misfeasance of a deputy who derived his authority from a special deputation made by his deputy. 9 W. 439. But one who employs a special constable, deputed at his own instance, must bear the consequences of his misfeasance, as that of any other servant employed by him. Ibid.

security within such time as the said court shall adjudge reasonable, said court shall decree the removal of such constable from office, and fill the vacancy in the same manner as is provided herein for cases of constables incompetent to act from habits of intemperance. Act 27 May 1841, § 14. Purd. 183.

V. THEIR DUTIES AND LIABILITIES IN CIVIL CASES.

Every justice of the peace rendering judgment as aforesaid, shall receive the amount of the judgment, if offered by the defendant or his agent, before execution, and pay the same over to the plaintiff or his agent when required; for which service he shall, if exceeding five dollars and thirty-three cents, be allowed [twenty-five cents] by the defendant, in addition to his usual fees; (a) and if the said justice shall neglect or refuse to pay over on demand the money so received, to the plaintiff or his agent, such neglect or refusal shall be a misdemeanor in office; and if the amount of the judgment is not paid to the justice as aforesaid, he shall grant execution, if required by the plaintiff or his agent, thereupon, if for a sum not exceeding five dollars and thirty-three cents, forthwith, and for any further sum, after the time limited for the stay of the same; which execution shall be directed to the constable of the ward, district or township where the defendant resides, or the next constable most convenient to the defendant, (b) commanding him to levy the debt or demand, and costs, on the defendant's goods and chattels; and by virtue thereof shall, within the space of twenty days next following, expose the same to sale, by public vendue, (c) having given due notice of the same by at least three advertisements, (d) put up at the most public places in his township, ward or district, returning the overplus, if any, to the defendant; [and for want of sufficient distress, to take the body of such defendant into custody, and him or her convey to the common jail of the county; and the sheriff or keeper of such jail is hereby directed to receive the person or persons so taken in execution, and him, her or them safely keep, until the sum recovered and interest thereon accrued from the date of the judgment, together with costs, be fully paid, and in default of such keeping to be liable to answer the damage to the party injured, as is by law provided in case of escapes;] (e) or in case no goods and chattels can be found, and the defendant be possessed of lands or tenements, the plaintiff may waive imprisoning the defendant, and proceed by a transcript to the prothonotary aforesaid: *Provided*, That executions against executors or administrators shall only be for the assets of the deceased. Act 20 March 1810, § 11. Purd. 183.

In all cases where a constable levies an execution issued from a justice of the peace, he shall indorse the goods or chattels so levied on the execution or schedule thereto annexed, which levy shall be a lien on such chattels for twenty days after levying the same, and no longer; and the constable making such levy is hereby authorized and empowered to take a bail-bond in the following or like words, viz.: *"We, A. B. and C. D., or either of us, are held and firmly bound unto E. F., constable, in the sum of —, upon condition that the said A. B. shall deliver unto E. F. aforesaid the following goods and chattels —, on the — day of —, at the*

(a) For the fees allowed for this service by the present fee-bills, see ante p. 107, note A.

(b) It is the universal practice for justices to issue their warrants and executions to any constable within the county. 7 S. & R. 353-4. And the sureties of such constable are responsible for their due execution. Ibid. A warrant issued to —, constable, if executed by the proper constable, is good. 6 B. 123. The justice is to judge who is the constable most convenient to the defendant. 18 S. & R. 386. But a sale by a constable of one township, under an execution directed to the constable of another township, passes no title to the property; he is a mere trespasser. 8 Barr 349. And the sureties are only responsible where the execution is delivered to him in

his official capacity by the justice. 2 Barr 49.

(c) A sale to the plaintiff, no person but the constable being present, is illegal and void. 8 H. 90. A constable has no right to conduct a sale under an execution in a public street, to the obstruction of the people: such act is indictable as a public nuisance. 18 S. & R. 408. It is his duty to deliver possession to the purchaser, but having done so, his duty in reference to the goods is at an end. 2 Phila. R. 89.

(d) If he sell any portion of the goods without levy or advertisement, he is liable. 1 Barr 238.

(e) Since the act to abolish imprisonment for debt, no execution can issue against the body in cases of contract.

house of —, which is taken in execution at the suit of G. H. against A. B., or pay the amount of the said execution with costs. Witness our hands and seals this — day of —." But if the said defendant shall not deliver the chattels so specified in such bond, or pay the amount of such execution, the constable may then proceed to the sale of such goods or chattels so levied, *Provided*, the lien created by such levy be not expired; but should the lien be expired, the justice may issue an *alias* execution, which may be proceeded on as aforesaid, or the constable taking such bond may assign it to the plaintiff, who may recover the same before any justice of the peace without stay of execution: *Provided always*, That any constable taking such bail shall be accountable to the plaintiff for the sufficiency thereof, notwithstanding such assignment. *Ibid.* § 18.

Whenever a constable shall levy on the goods and chattels of a defendant as is directed by the 11th section of the act to which this is a supplement, he shall indorse the time of such levy on the execution, and no execution issued by a justice of the peace shall be a lien on the property of the defendant before levy made thereon. Act 28 March 1820, § 4. *Purd.* 184.

In all cases where any constable shall collect or receive the debt, interest and costs, or any part thereof of any execution, it shall be his duty to make out and deliver to the defendant or defendants in such execution a bill of particulars of his fees and charges, together with a receipt, signed by him for the same, if paid; and if any constable shall neglect or refuse, upon application to him made by the party interested, to give such bill or receipt, he shall, for such neglect or refusal, forfeit and pay the sum of ten dollars, to be recovered in the manner and for the use prescribed in the act to which this is a supplement. Act 28 March 1820, § 3. *Purd.* 184.

On the delivery of an execution to any constable, an account shall be stated in the docket of the justice, and also on the back of the execution, of the debt, interest, and costs; from which the said constable shall not be discharged, but by producing to the justice, on or before the return day (a) of the execution, the receipt of the plaintiff, or such other return as may be sufficient (b) in law; and in case of a false return, or in case he does not produce the plaintiff's receipt, on the return day, or make such other return as may be deemed sufficient by the justice, he shall issue a summons directed for service to a constable, or to some other fit person who shall consent to serve the same, and having so consented, by accepting of such process, shall be bound to execute the same, under a penalty of twenty dollars, to be recovered as other fines are recoverable by this act; but should not a constable, or other fit person conveniently be found to serve the process as aforesaid, the justice shall direct it to a supervisor of the highways of the township, ward or district, where such constable resides, whose duty it shall be to serve the same under the penalty aforesaid; commanding the constable to appear before him on such day as shall be mentioned in the said summons, not exceeding eight days from the date thereof, and then and there show cause why an execution should not issue against him for the amount of the first above-mentioned execution; and if the said constable either neglects to appear, on the day mentioned in such summons, or does not show sufficient cause (c) why the execution should not issue against him, then the justice

(a) The mere omission to return the execution within twenty days, will not render the constable liable, if he have sufficient cause for the delay. 6 W. & S. 534.

(b) Of the sufficiency of the return, the justice must judge in the first instance, but his decision is subject to review; and the return must be in writing. 5 W. & S. 457. 8 W. 220. 4 Wh. 56. And see 1 Ash. 26, 160. 1 M. 210. The constable cannot discharge the defendant from liability, by the settlement of an account of previous money transactions with himself, and passing receipts, no money being actually paid. 2 R. 199.

(c) It is a good defence that the judgment was paid before the execution issued; but

the issuing of a subsequent execution does not discharge the constable from the liability incurred. 2 W. & S. 229. In an action against a constable for an insufficient return, it is not competent for him to prove that the property levied on did not belong to the defendant in the execution. If he have reason to doubt about the ownership of it, he may require the plaintiff to indemnify him; and if he refuse to sell, not having done so, he becomes liable. 8 W. 220. The plaintiff is not bound to offer an indemnity before it is required by the officer; nor will every frivolous objection protect him, as he will be liable for a false return, unless there was reasonable ground for apprehension that he would be endangered by

shall enter judgment against such constable, for the amount of the first above-mentioned execution, together with costs, on which judgment there shall be no stay of execution, and upon application of the plaintiff or his agent, the said justice shall issue an execution against the constable for the amount of such judgment, which execution may be directed to any constable of the county, or other fit person accepting thereof, or to a supervisor, as aforesaid, whose duty it shall be to execute the same: *Provided always*, That nothing in this act contained shall in any manner impair or alter the proceeding as heretofore established with regard to insolvent debtors, and their discharge on a full surrender of their property. Act 20 March 1810, § 12. Purd. 184.

So much of the act entitled "An act to amend and consolidate with its supplements, the act entitled 'An act for the recovery of debts and demands not exceeding one hundred dollars before a justice of the peace, and for the election of constables, and for other purposes,'" passed the 20th of March 1810, as provides that the justice shall enter judgment against a constable for the amount of an execution together with costs, on which judgment there shall be no stay of execution, shall not be construed to deprive the constable of the right of appeal (a) to the court of common pleas of the proper county, upon such conditions and under like limitations, as in the case of other defendants. Act 13 October 1840, § 12. Purd. 184.

In all cases where judgment shall be rendered by an alderman or justice of the peace, against any constable in this commonwealth, under the 12th section of the act to which this is a further supplement, in addition to the remedies provided by the existing laws, it shall be lawful for the plaintiff or plaintiffs, his, her or their legal representatives, to take out a transcript of such judgment, and file the same in the office of the prothonotary of the court of common pleas of the proper county; and it shall be the duty of the prothonotary, (b) at the request of such plaintiff or plaintiffs, to issue a *feri facias* or *capias ad satisfaciendum*, against such constable, to be proceeded in as in other cases; or the said plaintiffs may apply to the court of common pleas, who shall have power to issue an attachment against such constable: *Provided*, That such proceedings shall in no case be deemed or construed to exonerate the surety or sureties of such constable. Act 29 March 1824, § 2. Purd. 184.

Where any constable shall refuse or neglect to pay over to the defendant or defendants, his or their agent or legal representatives, the overplus money which he or his deputy may have made or received upon any execution or executions, then and in such case the party or parties aggrieved, may apply to the alderman or justice of the peace who issued the process, who shall thereupon proceed against such constable in the manner prescribed by the 12th section of the act to which this is a supplement, in cases where the constable makes a false return, or neglects to return the execution; and if upon such proceedings, the justice shall receive the overplus money, or if it shall be voluntarily paid to him at any time by the constable, he shall, in either case, pay over the same to the defendant or defendants, or his or their agent or legal representatives, without any fee for making such payment. Act 28 March 1820, § 2. Purd. 185.

If any constable shall receive money by virtue of an execution or other process, the levy and sale. *Ibid*. If he refuse to receive a bond of indemnity on the ground that the security is insufficient, and declare that he will not proceed unless certain persons named by him are given as sureties, this is equivalent to a refusal to execute the writ, and dispenses with the tender of further security. 2 Phila. R. 288. If he have accepted indemnity from the plaintiff under a claim to the property levied on made by a third party, he is bound to proceed, and is estopped from showing that the goods did not belong to the defendant. 2 H. 610. And where the execution has not been returned within the time limited, it is incompetent for the constable to

prove that the defendant had no property, or that the defendant's wife had died the night before he proceeded to execute the writ, in consequence of which, through feelings of humanity, he failed to execute it. 7 Leg. Int. 188. 8 Am. L. J. 129. Nor can the constable disobey the execution, where the justice's proceedings are irregular; as where the justice had proceeded by attachment, without taking a legal bond. 11 Leg. Int. 128-7.

(a) The plaintiff as well as the constable is entitled to an appeal. 4 W. & S. 278.

(b) A previous execution by the justice is not necessary. 8 W. 278.

and shall neglect or refuse upon application to him made by the party interested, to pay the amount thereof to the party entitled to receive the same, or to his, her or their agent or legal representatives: he shall be deemed guilty of a misdemeanor in office, and upon conviction thereof in the court of general quarter sessions of the peace of the proper county, he shall be sentenced to pay, at the discretion of the court, a fine of not less than twenty dollars, nor exceeding one hundred dollars, and shall stand committed until the money so withheld shall be paid, together with the interest, fine and costs, and moreover, shall, for seven years thereafter, be incapable of holding the office of constable, or the appointment of deputy-constable. Ibid. § 7.

Any constable who has or may hereafter give security agreeably to law for the faithful performance of the duties of his office, and afterwards, on neglecting or refusing to perform such duties, shall have judgment rendered against him for such neglect or refusal, and on being prosecuted for the recovery of such judgment, becomes insolvent,^(a) abandons his country, or from any other reason it becomes impracticable for such judgment or judgments to be recovered from such constable as aforesaid, or where a constable makes such default, and abandons his country before judgments are had against him, then and in such cases only the justice^(b) before whom the judgment or judgments stand unpaid shall be and is hereby authorized and empowered to issue a *scire facias*, and proceed against such bail^(c) for the recovery of judgments had as aforesaid, in the manner that constables are now suable, saving only the right of appeal to such sureties. Act 20 March 1810, § 19. Purd. 185.

In all cases where any constable has been or shall be intrusted with the execution of any process, for the collection of money, and by neglect of duty has failed or shall fail to collect the same, by means whereof the bail or security for such constable shall be compelled to pay the amount of any judgment or judgments; such payment shall vest in the person or persons paying as aforesaid, the equitable interest in such judgment or judgments, and the amount due upon any such judgment or judgments may be collected in the name of the plaintiff or plaintiffs for the use of such person or persons.^(d) Act 24 April 1829, § 3. Purd. 185.

It shall not be lawful for any deputy-constable, or any person or persons at his direction or request, and for his use either directly or indirectly, to purchase any goods, wares or merchandise taken in execution and sold by the principal of such deputy-constable; nor shall it be lawful for any constable, or for any person at his request and for his use, in any township, city or district in which there are more constables than one, to purchase any goods, wares or merchandise taken in execution and sold by any other constable within such township, city or district; and if any constable, deputy-constable or other person shall be convicted before the justices of the court of general quarter sessions of the peace of offending against or violating any of the provisions of this section, he, she or they so offending, upon conviction thereof, shall forfeit and pay, at the discretion of the court, any sum not less than twenty dollars nor exceeding one hundred dollars, the one half whereof shall be paid to the person informing, and the other half to the use of this commonwealth, and moreover, shall for seven years thereafter be incapable of holding the office of constable or the appointment of deputy-constable. Act 28 March 1820, § 6. Purd. 185.

No sheriff, constable or other officer shall sell or dispose of, by way of vendue, at any place or places, within two miles of the statehouse, in the city of Philadelphia, or within the chartered limits of the city of Pittsburgh, any lands, tenements,

(a) His insolvency may be established by parol evidence. 7 W. 292. 8 W. 398. The law, in such case, requires no higher standard of diligence than the ordinary application of its own process. 5 C. 178. But a return of *nulla bona*, to an execution issued by the justice, is not, in itself, sufficient evidence of insolvency, as he may have real estate. 7 W. 298. 6 C. 210.

(b) The jurisdiction of justices, under this

section, is not taken away by the acts giving jurisdiction to the common pleas in suits on constables' bonds. 6 S. & R. 245. 8 S. & R. 414. 8 W. 208. 4 W. 217.

(c) The constable need not be joined. 3 W. 208.

(d) The constable who, through neglect of duty, becomes liable for, and is compelled to pay the amount of an execution, has no such right. 6 W. 228. 7 W. 258

goods or chattels, other than such as are taken in execution and liable to be sold by order of law, or distrained for rent in arrears; and if any sheriff or constable or other officer fraudulently or wilfully violate or evade this provision of this act, it shall be deemed to be a misdemeanor in office, for which the offender may be prosecuted by indictment, in any court of competent jurisdiction. Act 1 April 1826, § 7. *Purd.* 185.

In all suits which may hereafter be instituted in any court of this commonwealth, in which the sheriff of any county may be a party, (a) when there is no coroner in commission to serve process, it shall be lawful for any constable in the county where the process has been issued to serve the same, and to perform the duties in relation thereto, which coroners are authorized to do under the laws of this commonwealth. Act 22 April 1850, § 19. *Purd.* 186.

VI. THEIR DUTIES IN REGARD TO ELECTIONS.

It shall be the duty of the constable or constables of each township, ward and district, at least ten days before the day hereinafter appointed for the election of inspectors, to give public notice, by six or more printed or written advertisements affixed at as many of the most public places therein, of the time and place of holding such election. Act 2 July 1839, § 1. *Purd.* 186.

The constable or constables of every township within this commonwealth shall give public notice of the township elections, by ten or more printed or written advertisements, affixed at as many of the most public places therein, at least ten days before the election, and in every such advertisement they shall enumerate, designate and give notice as sheriffs of counties in cases of general elections are directed by the 1st and 2d divisions of the 13th section of the act to which this is a supplement; (b) and in case of the neglect, refusal, death or absence of the aforesaid constable or constables, the duties herein enjoined on them shall be performed by the supervisors or assessor of the proper township; but said supervisors or assessor of the proper township shall not be required to give more than five days' notice; and said elections shall be held and conducted under the regulations not inconsistent herewith, prescribed in the aforesaid act; but nothing in this act, or in the act to which this is a supplement, contained, shall be construed to prohibit a judge, inspector or clerk of election from being voted for to fill any township office, or render either or any of them ineligible to hold the same. Act 13 June 1840, § 2. *Purd.* 186.

Constables, supervisors or assessors, as the case may be, of any ward, township, incorporated district or borough, shall be allowed and paid, out of the county treasury, two dollars for advertising ward, township, district and borough elections; said constables shall also be allowed and paid, as aforesaid, twenty cents for delivering to each township officer a certificate of his election, as directed by this act, and the act to which this is a supplement. Act 13 June 1840, § 11. *Purd.* 186.

It shall be the duty of every mayor, sheriff, deputy-sheriff, alderman, justice of the peace, and constable or deputy-constable of every city, county and township or district within this commonwealth, whenever called upon by any officer of an election, or by any three qualified electors thereof, to clear any window or avenue to any window, at the place of the general election, which shall be obstructed (c) in such a way as to prevent voters from approaching the same, and on neglect or refusal to do, on such requisition, said officer shall be deemed guilty of a misdemeanor in office, and, on conviction, shall be fined in any sum not less than one hundred and not more than one thousand dollars; and it shall be the duty of the respective constables of each ward, district or township within this commonwealth, to be present in person or by deputy, at the place of holding such elections in said ward, district or township for the purpose of preserving the peace as aforesaid. Act 2 July 1839, § 111. *Purd.* 186.

(a) The act 10 April 1848, § 2, confers the same powers, in all cases, against the sheriff or his sureties, when there is no coroner in commission. P. L. 441.

(b) That is, he shall—1. Enumerate the

officers to be elected. 2. Designate the place at which the election is to be held.

(c) No portion of the people possess the right to gather round the polls and remain there in such numbers as to obstruct the

It shall be the duty of every peace officer, as aforesaid, who shall be present at any such disturbance at an election as is described in this act, to report the same to the next court of quarter sessions, and also the names of the witnesses who can prove the same; and it shall be the duty of the said court to cause indictments to be preferred before the grand jury against the persons so offending. Ibid. § 112.

If it shall be made appear to any court of quarter sessions of this commonwealth that any riot or disturbance occurred at the time and place of holding any election under this act, and the constables who are enjoined by law to attend at such elections have not given information thereof, according to the provisions of this act, it shall be the duty of said court to cause the officer or officers, so neglecting the duty aforesaid, to be proceeded against by indictment for a misdemeanor in office, and on conviction thereof the said officer shall be fined in any sum not exceeding one hundred dollars. Ibid. § 113.

It shall be the duty of the several courts of quarter sessions of this commonwealth, at the next term of said court after any election shall have been held under this act, to cause the respective constables in said county to be examined on oath as to whether any breaches of the peace took place at the election within their respective townships, wards or districts; and it shall be the duty of said constables respectively to make return thereof as part of their official return at said court. Ibid. § 114.

If the constables or supervisors of any township, ward or district shall neglect or refuse to perform the duties herein required of him or them, they shall respectively, on conviction, be fined in any sum not less than fifty nor more than one hundred dollars. (a) Ibid. § 97.

It shall be the duty of the said inspectors and judge to make out a certificate of the election of each township officer aforesaid, which shall be signed by them and delivered to the constable of the proper ward, district or township, and by him delivered to the said officer, or left at his usual place of abode within six days thereafter. Ibid. § 54.

Each and every constable of this commonwealth, except in the city and county of Philadelphia, who shall attend at the general and township elections in their several districts as required by law, shall receive for said services one dollar per day from the county fund. Act 31 March 1854, § 1. P. L. 250.

VII. ACTIONS AGAINST CONSTABLES.

No action shall be brought against any constable or officer, or any person or persons acting by his or their order, and in his aid, for anything done in obedience to any warrant under the hand and seal of any justice of the peace, (b) until demand hath been made, or left at the usual place of his abode, by the party or parties intending to bring such action, or by his, her or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, duly certified under his hand, and the same hath been neglected or refused for the space of six days after such demand; and in case, after such demand and compliance therewith, by showing the said warrant and giving a copy thereof, certified as aforesaid to the party demanding the same, any action shall be brought against such constable, or other person or persons acting in his aid, for any such cause as aforesaid, without making such justice or justices, who signed or sealed the said

approach of the electors; it is the duty of the constable, either at the request of the citizens, or under the direction of the officers of the election, to remove such obstruction, and open an avenue to the polls; in discharging his duty, he ought to give notice to the people to remove themselves, before proceeding to violent measures; but, having given such notice, he has the right to use as much force as may be necessary to accomplish the object, and every citizen who is called on to assist him is bound to do so. *Com. v. Hamilton*, Lancaster Q. S. 22 January 1849, *Lewis*, P.

J. MS.

(a) By § 128, to be recovered by indictment in the quarter sessions; and all prosecutions to be commenced within one year.

(b) Trespass against a constable for seizing and selling plaintiff's goods, under an execution out of his district, is within the act. 11 S. & R. 185. But not an action for an escape. 8 Barr 405. Or for taking the goods of A. under a warrant to levy on the goods of B. 5 P. L. J. 181. See 1 Br. 848. Or for taking illegal fees under color of an execution. *Keller v. Hammer*, Brightly on Costs 159.

warrant, defendant or defendants, on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect or defects of jurisdiction in such justice or justices; (a) and if such action be brought jointly against such justice or justices, and also against such constable or other officer, or person or persons acting in his or their aid as aforesaid, then, on proof of such warrant, (b) the jury shall find for such constable or other officer, and person or persons so acting as aforesaid, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the justice or justices, in such case the plaintiff or plaintiffs shall recover his, her or their costs against him or them, to be taxed in such manner, by the proper officer, as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants, for whom such verdict shall be found as aforesaid: *Provided always*, That where the plaintiff, in any such action against any such justice of the peace, shall obtain a verdict, in case the justices before whom the cause shall be tried, shall, in open court, certify on the back of the record that the injury for which such action was brought, was wilfully and maliciously committed, the plaintiff shall be entitled to have and receive double costs of suit. Act 21 March 1772, § 6. *Purd.* 187.

Provided always, That no action shall be brought against any justice of the peace for anything done in the execution of his office, or against any constable or other officer, or person or persons acting as aforesaid, unless commenced within six months after the act committed. (c) *Ibid.* § 7.

In all cases where any alderman or justice of the peace of this commonwealth shall issue a summons, warrant of arrest or execution in any civil suit against any constable or constables for any debt or demand alleged to be due by him or them, in his or their individual or private capacity, he shall direct such summons, warrant of arrest or execution to any other constable in the city or county in which the said justice may reside, who shall be authorized and bound to serve or execute the same in the manner prescribed by the act to which this is a supplement, under a penalty of twenty dollars, to be recovered as other fines are recoverable by the same act; and if the constable to whom such process shall be directed, shall neglect or refuse to make return of the same, or having made the money or any part of it, upon the execution, refuses or neglects to pay over or account for the same, he shall be proceeded against in like manner, and be subject to like proceedings as constables in other cases are liable to, agreeably to the provisions contained in the 11th section of the act to which this is a supplement. Act 28 March 1820, § 1. *Purd.* 187.

VIII. MISCELLANEOUS PROVISIONS.

The constables of the respective wards and townships shall make return of retailers of liquors, as now provided by law; and in addition thereto it shall be the duty of every such constable, at each term of the court of quarter sessions of the respective counties, to make return on oath or affirmation, whether within his knowledge there is any place within his bailiwick kept and maintained in violation of this act, and it shall be the especial duty of the judges of all said courts to see that this return is faithfully made; and if any person shall make known in writing, with his or her name subscribed thereto, to such constable, the name or names of any one who shall have violated this act, with the names of witnesses who can prove the fact, it shall be his duty to make return thereof on oath or affirmation to the court, and upon his wilful failure to do so, he shall be deemed guilty of a misdemeanor, and upon indictment and conviction shall pay a fine of fifty dollars,

(a) Where a constable has pursued his errand, he can be affected with want of jurisdiction in the magistrate, only where he is alone, having, after a proper demand, failed to furnish a copy of the warrant for the space of six days. 5 S. & R. 302. 1 B. 3 B. 219. A misrecital in the body of an execution does not render it void, nor is

the constable a trespasser in executing it; he is justified under the provisions of this act. 2 W. 424.

(b) It seems the warrant may be given in evidence under the general issue. 3 B. 218.

(c) The limitation may be taken advantage of, under the general issue. 9 S. & R. 14.

and be subject to imprisonment at the discretion of the court, of not less than ten nor more than thirty days. Act 31 March 1856, § 33. Purd. 187.

No prosecutor or informer in any prosecution for the illegal sale of intoxicating liquors, shall receive any portion of the fine imposed on the defendant in any case where such prosecutor or informer is a witness for the commonwealth; and in every case of the conviction of a person returned by a constable, such constable shall receive two dollars, to be taxed in the costs. Act 20 April 1858, § 12. Purd. 666.

No person who keeps in his store or wareroom any hogsheads, stand casks or liquor pipes, or who keeps a grocery store, shall receive license to vend intoxicating liquor by less measure than one quart; and constables are hereby required to make return of all persons engaged in the sale of spirituous, vinous, malt or brewed liquors in their respective districts, who shall have in their places of business any of the articles aforesaid, naming them and the location of their respective places of business; and if any such person shall have a license to vend such liquors by less measure than one quart, the court may, on investigation, revoke the same; but such persons may, on complying with the laws on the subject, obtain license to sell by no less measure than one quart. Ibid. § 13.

The several constables of this commonwealth, shall be allowed fifty cents each, for one day, for making their several returns to each quarter sessions of the peace of the proper county, and three cents per mile, each mile circular, counting from the residence of the constable to the court-house, to be paid out of the county funds. (a) Act 2 January 1827, § 1. 9 Sm. 253.

It shall be the duty of the judges of the several courts of quarter sessions, oyer and terminer, and common pleas within this commonwealth, after the constables shall have made their returns on the first day of the sessions, to ascertain the number of constables attending, and to select a sufficient number to attend during the term of the said court, and to discharge the other constables, and to select for every court thereafter until a new election of constables shall be held: *Provided*, That no constable shall be obliged to serve more than one week at any one time, until the whole list shall have been gone through; and when an adjourned court shall be held, it shall be the duty of the sheriff to give notice to the constable or constables, selected by the judges to attend at the said adjourned court. Act 21 January 1813, § 1. Purd. 188.

It shall be the duty of the clerk or prothonotary of any of the said courts, as the case may be, to certify the name or names of the constable or constables, and the number of days each constable shall have attended, to the commissioners of the proper county, who shall thereupon draw their warrant on the county treasurer in behalf of the said constable or constables, [for one dollar for each and every day he or they shall have respectively attended;] *Provided*, That the said constables shall not be allowed pay for the day on which they shall make their returns to the court of general quarter sessions of the peace. Ibid. § 2.

The judges of the several courts of this commonwealth shall have power to appoint a crier for the respective court, and so many tipstaves or constables as may be necessary to attend upon the court, and the said officers shall be paid by the respective county, such sums for each day's attendance as the said judges shall allow. Act 14 April 1834, § 78. Purd. 188.

By act of 8 May 1854, § 31, the board of directors or controllers, of any school district, in the event of their failure, from any reason, to procure a collector of school taxes, may appoint to that office the constable of the school district, who shall forfeit for every refusal to execute the same, by proof thereof being made before any alderman or justice of the peace, the sum of fifty dollars, which shall be added to the school fund of the proper district. Purd. 172.

IX. POWERS AND DUTIES.—A constable is not bound to execute a warrant which has been issued without an oath to justify it, but merely on common rumor of the party's guilt. 3 Binn. 38.

If a warrant appear on the face of it to be *illegal*, a constable is not bound to execute it. 3 Binn. 43. 2 Am. L. R. 484.

(a) By the fee-bill of 1868, they are entitled to \$1.50 for making their returns, and to six cents mileage for each mile circular. Purd. 1504.

The same rules of law which govern sheriffs in the execution of process from the higher courts govern the constables in the execution of a justice's process, except where some statute intervenes. 2 Cow. 421.

The provisions of the act of assembly, in relation to the constable who is to serve process, are only directory, and the justice is to judge who is "the constable most convenient to the defendant." 12 S. & R. 336.

A constable who has an execution put into his hands against a defendant cannot discharge such defendant from his liability to the plaintiff by settling an account with him, for money transactions heretofore had between them, and passing receipts, no money being actually paid. 2 R. 199.

In case of resistance by a defendant to a constable in the service of a *capias ad respondendum* [a warrant] for debt, issued by a justice of the peace under the act of the 20th of March 1810, the constable may raise the power of the county for his assistance, in the same manner as the sheriff may, on writs of meane process to him directed, and a person refusing to assist the constable when required, on assistance being made, is indictable for such refusal. 5 Wh. 437.

A constable is not bound to go up and down with an offender to get sureties, but he may keep him till sureties come to him, and then he is at liberty to go to any justice of the peace, provided it be not too far off, and the constable consent to it. Wood's Inst. 86.

Constables have no right to obstruct the passage of a public street, by holding poles upon the pavement, of furniture, &c., taken in execution. 13 S. & R. 403.

The keeper of the prison is bound to receive a person arrested and brought to him by a constable, and charged with a breach of the peace in his presence. 8 S. R. 47.

A general authority from a justice to a constable to alter the date of executions, instead of renewing them, or to fill up, or to alter process, is void. 10 Johns. 95.

In Pennsylvania, a *deputy* constable may execute a domestic attachment, though he be directed to the constable: such is the proper direction. 3 P. R. 230.

It is the duty of a constable to whom an execution is delivered, in all cases, to march for property before he takes the body of the defendant. 4 Wend. 639.

A constable having an execution in his hands took an obligation from a stranger conditioned for the payment of the debt, interest and costs of the execution, or the delivery of property to satisfy the same, at a certain time and place; upon failure to do either, it was held, that although void as a statutory obligation, yet an action could lie on it, at common law, in the name of the constable, to the use of the plaintiff in the execution. 5 W. 468.

A constable has no right to take upon himself to decide whether a defendant against whom he has an execution was discharged under the insolvent laws; it is his duty to arrest, and the party may obtain relief in the regular way. Com. Pleas, Phila. 1833.

If an execution issued by a justice of the peace be set aside on *certiorari*, there can be no recovery on a bond taken by a constable for the delivery of property seized on such execution. 7 W. 353.

A constable's return to an execution must be made in writing. 5 W. & S. 457.

One who employs a special constable, deputed at his own instance, must bear the consequence of his misfeasance, as he would that of any other servant employed by him. 9 W. 439.

A constable is bound to pursue, search for and arrest offenders, without other compensation than his legal fees, and cannot recover a reward for arresting a person against whom a warrant has been placed in his hands. 10 Barr 39. 5 Am. L. 98.

The refusal, without sufficient excuse, to assist a constable in preventing the escape of a person in his custody, is an indictable offence. 6 Blackf. 277.

A sheriff [or constable] who has legally levied an execution on property bound by a lien, has a right to discharge the lien, in order to get possession; for his writ gives him every implied power which may be necessary to the execution of it. 1 L. 215.

But if he levy on the goods of a stranger, he is not entitled to give in evidence in mitigation of damages, a payment out of the proceeds of sale of a bill for the freight of the goods levied on. *Ibid.*

A constable has no right to remove property which has been levied on by another constable, and whilst it is subject to the first levy; the right to the proceeds, however, is determinable by law. 3 H 144.

A constable does not become a trespasser, by reason of the irregularity of the proceedings before the justice, if the latter had jurisdiction of the subject-matter. 11 Leg. Int. 126.

Liability.—A constable neglecting to make return of his execution to the justice, on, or before the return day thereof, is *absolutely* fixed for the debt and costs. 1 Ash. 160.

But, if the constable do not return it in consequence of the request of the plaintiff, it is "sufficient cause" for not rendering judgment against him. *Ibid.* 160.

A justice of the peace has power to *supersede* an execution issued by him, and such *supersedeas* will exonerate the constable from liability. 1 P. R. 61.

A constable is not liable to the plaintiff for not serving an execution issued by a justice where the justice has gone to the constable and withdrawn it, in consequence of a *certiorari* delivered to him, though no bail was entered on taking out the *certiorari*. 2 R. 147.

A constable is liable for an *escape* without proof of negligence or misconduct on his part. 4 W. 215.

A constable who, through neglect of duty, becomes liable for and pays the amount of an execution directed to him, cannot recover the same from the original defendant. 6 W. 228. 7 W. 853.

A constable's return to an execution that he had levied, and that the property was "not sold by J. T. H. becoming responsible for the consequences:" *held* to be insufficient. In an action against the constable for such insufficiency, it is not competent for him to prove that the property did not belong to the defendant in the execution. If he has reason to doubt about the ownership, he may require the plaintiff to indemnify him: and if he refuses to sell, *not having done so*, he becomes liable. 8 W. 220. ["In delivering the opinion of the court, Judge ROGERS says, It has been nowhere held that the plaintiff is bound to offer an indemnity, before it is required by the officer; nor will every frivolous objection protect the officer, as he would be liable to an action for a false return, unless there was reasonable ground for apprehension that he would be endangered by the levy and sale. When there is reasonable cause of doubt, he may protect himself by demanding adequate security, and this is all he can require."] 8 W. 222. 3 Am. L. J. 129. 2 H. 510.

If, without searching for property, a constable immediately arrest the defendant, he does it at his peril, and he is liable, if it appear that with reasonable diligence he might have found property to attach. He has a reasonable time to search for property. If the defendant declare he has no property, the constable may arrest him at once. 4 Wend. 639.

A constable would be liable for the misfeasance of a deputy who derived his authority from a special deputation made by his deputy. 9 W. 439.

A constable against whom a judgment has been rendered for neglect of duty in not returning an execution, is entitled to an appeal, by the act of 13 October 1840. *Purd.* 184.

If a constable, by reason of negligence, become liable for the amount of an execution placed in his hands, the issuing of a subsequent execution is not a relinquishment by the plaintiff of his right to recover from the constable. 2 W. & S. 229.

The mere omission of a constable to return his execution within twenty days, does not fix him for the amount of the debt, if he have sufficient reason for the delay. 6 W. & S. 534.

An action against a constable for an escape, is not within the limitation of the act of 1772. That act protects the officer when acting in obedience to his warrant; not against the consequences of wilful misconduct. 8 Barr 405.

A constable who levies upon and sells property exempted from execution, is liable

to an action, although the time when the contract (upon which the judgment was founded) was made, was not indorsed upon the execution. 7 Yerg. 88.

If a constable persist in selling the property of a defendant, upon an execution issued upon a judgment that has been appealed from, and the execution revoked by the justice, he is a trespasser as much as if he had no process in his hands. 3 C. 199.

A constable against whom execution is issued upon a judgment obtained for official misconduct or negligence, is not entitled to the benefit of the exemption laws. 5 C. 176.

Liability of Sureties.—One who has been aggrieved by the official misconduct of a constable may either bring suit in the common pleas against the constable and his surety on the official bond, or he may proceed against the constable alone in the first instance, before a justice of the peace, and *afterwards* against the surety in the manner prescribed by the 19th section of the act of 20th March 1810. 6 S. & R. 245.

A judgment against a constable for official misconduct is conclusive against his sureties as to his misconduct, and the extent of damages sustained by the plaintiff; but they may take advantage of any defence personal to themselves. 17 S. & R. 354. 8 W. 398. 5 Wh. 144. 2 Barr 49. 1 J. 52.

The jurisdiction of a justice to proceed by *scire facias* against the bail of a delinquent constable, under the 19th section of the act of 20th March 1810, is not taken away by the 3d section of the act of 29th March 1824. 8 W. 208.

Nor is it necessary that the constable should be joined with the sureties in such *scire facias*. 3 W. 208.

If a judgment be rendered against a constable for neglect of duty, by a justice of the peace, a transcript thereof may be filed in the court of common pleas, and a *fiere facias* be issued thereon without an execution having previously issued from the justice. 3 W. 278.

In an action against the sureties of a constable upon his official bond to recover the amount of a judgment for which the constable became liable, the judgment previously obtained against the constable himself is conclusive evidence of the liability of the sureties. 8 W. 398.

In order to recover against the sureties of a constable, it is not necessary that the constable should have been discharged as an insolvent debtor; it is sufficient that it be proved by parol that he was insolvent. *Ibid*.

Under the act of 20th March 1810, a judgment against a constable for the amount of an execution is conclusive upon his sureties. 5 Wh. 144.

In an action thereupon against the sureties of a constable, to recover the amount of such judgment, it was held that evidence was not admissible to show that the constable had lent the money to the plaintiff. *Ibid*.

The sureties of a constable are liable for the act of the officer in levying upon the goods of a stranger. 6 W. & S. 513.

To recover from the bail of a defaulting constable, the plaintiff must show that he used reasonable and ordinary diligence to collect it from the principal; or that such legal process would have been fruitless by reason of the insolvency of the constable. 5 C. 176.

No action can be maintained against the sureties on a constable's bond, unless brought within three years from its date. 9 C. 199.

X. FORMS OF PROCESS TO ENFORCE A FAITHFUL DISCHARGE OF THE DUTIES OF THE OFFICE OF CONSTABLE.

FORM OF WARRANT AGAINST A PERSON ELECTED, OR APPOINTED, A CONSTABLE, WHO NEGLECTS, OR REFUSES, TO DISCHARGE THE DUTIES OF THE OFFICE.

YORK COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of York, in the said county, greeting:

WHEREAS, A. B., of the township of N—, in the said county, hath been duly elected and appointed (or "hath been duly appointed") constable of the said township, but refuses, or neglects, to take upon himself the said office, or to undertake the duties of the same. These are, therefore, to command you to take the said A. B., and bring him before

J. R., one of our justices of the peace in and for the said county, to answer the premises, and further to be dealt with according to law. Witness the said J. R., at York aforesaid, the fifth day of May, A. D. 1860. J. R., Justice of the Peace. [SEAL.]

FORM OF A SUMMONS AGAINST A CONSTABLE, WHO HAS NEGLECTED, OR REFUSED, TO MAKE RETURN TO AN EXECUTION.

MONROE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of P—— Township, in the county of Monroe, greeting:

WHEREAS, J. R., one of the justices of the peace in and for the county of Monroe, lately, that is to say, on the first day of April, A. D. 1860, issued an execution directed to W. X., constable of N—— township, in the said county, for a debt of ten dollars and fifty cents, together with fifteen cents interest, and one dollar twenty-five cents costs of suit, wherein O. P. is plaintiff, and Q. R. is defendant, which execution was made returnable on or before the 20th of April, A. D. 1860. And, although the said execution came to the hands of the said W. X., constable, yet, he hath not made return thereof, according to law. Therefore, we command you, that you summon the said W. X. to appear before our said justice, on the tenth day of May instant, at nine o'clock in the forenoon, at his office in P—— township, then and there to show cause why judgment shall not be rendered, and an execution issue against him for the amount of the above-mentioned execution. Witness the said J. R., at P—— township aforesaid, the fourth day of May, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

EXECUTION AGAINST A CONSTABLE ON A JUDGMENT, FOR NOT HAVING MADE RETURN TO AN EXECUTION.

MONROE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of P—— township, in the County of Monroe, greeting:

WHEREAS O. P. hath obtained judgment, before J. R., one of our justices of the peace in and for the said county, against W. X., constable of N—— township in the county of Monroe, for a debt of eleven dollars and thirty-five cents, (being the amount of an execution in the hands of the said constable, against a certain Q. R., wherein the said O. P. is the plaintiff,) together with one dollar and twenty cents costs of suit; and the said W. X. having hitherto neglected to comply with the said judgment, we command you, that of the goods and chattels of the said W. X., you levy the debt and costs aforesaid, and for want of sufficient distress, that you take the body of the said W. X., and convey him to the common jail of the said county, there to be kept until the debt and costs aforesaid be fully paid, or he be otherwise discharged by due course of law. Make return hereof to our said justice on or before the 30th day of May, A. D. 1860.

Witness the said J. R., at P—— aforesaid, the 10th day of May, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

WARRANT AGAINST A CONSTABLE FOR NEGLECT OF DUTY.

BEAVER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of L—— Township, in the county of Beaver, greeting:

WHEREAS, on the tenth day of May last, a warrant issued by J. R., one of our justices of the peace in and for the county of Beaver, was directed and delivered to C. D., constable of H——, in the said county, wherein the said constable was commanded to take a certain H. S., and carry him before the said J. R. forthwith, to answer for a certain larceny in stealing and carrying away the goods and chattels of S. B.; and, whereas, the said C. D. hath neglected, or refused, to execute the said warrant, and the said H. S. hath absconded, as it is said. These are, therefore, to command you to take the said C. D., and bring him before the said J. R. forthwith, to answer for the said neglect of duty, and further to be dealt with according to law. Witness the said J. R., at D—— aforesaid, the first day of June, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

FORM OF SUPERSEDEAS TO A CONSTABLE.

BUCKS COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of D—— Township, in the County of Bucks, and to each and every Constable in the said county, greeting:

FORASMUCH as T. D., of J—— township, in the said county, yeoman, hath this day entered into a recognisance, with sufficient sureties, before J. R., one of our justices of

the peace in and for the said county, for the appearance of the said T. D., at the next Court of Quarter Sessions of the Peace, to be held for the county aforesaid, to answer the complaint of L. S., made before A. B., one of the justices of the peace of the said county, for an assault and battery, committed on him by the said T. D. (or as the case may be.) These are, therefore, to command you, that you forbear to take, arrest, imprison or otherwise molest the said T. D. for the cause aforesaid; and if you have for that cause, and none other, taken and imprisoned the said T. D., that then you discharge and set at liberty the said T. D., without further delay, as you will answer the same at your peril. Given under the hand and seal of the said J. R., at D—, in the said county, the second day of May, A. D. 1860. J. R., Justice of the Peace. [SEAL.]

DISCHARGE TO BE SENT TO THE KEEPER OF THE COUNTY PRISON, OR A CONSTABLE.
COUNTY OF BUCKS, ss.

The Commonwealth of Pennsylvania,

To the Constable of A— township, or to the Keeper of the Prison of the County of Bucks:

The Commonwealth	{	Charged before J. R., one of our justices of the peace in and for the
ss.		said county, with having committed an assault and battery on C. D.
A. B.	}	Committed for a further hearing the tenth day of May 1869.

Discharge out of your custody [or deliver to P. C., constable of F— township] the body of the above-named defendant, if detained for no other cause than that above mentioned, and for so doing this shall be your sufficient warrant. Given under my hand and seal, this [tenth] day of [May,] A. D. 1869. J. R., Justice of the Peace. [SEAL.]

Contract.

I. Definition of a contract.

II. Consideration of a contract.

I. A CONTRACT is a covenant or agreement between two or more persons, with a lawful consideration or cause:—as, if a man sell his horse, or other things, to another, for a sum of money, or covenants, in consideration of £20, to make him the lease of a farm, &c. These are good contracts, because there is a *quid pro quo* (or one thing for another); but if a person make a promise to me that I shall have 20s., and that he will be debtor to me therefor, and after I demand the 20s., and he will not give it me, yet I shall never have an action to recover this 20s., because this promise (being without consideration) was no contract. Tom. Law Dic. 7. 1 Bouv. Inst. 222.

Express contracts are, where the terms of the agreement are openly uttered and avowed at the time the agreement is entered into. Implied contracts arise under circumstances which, according to the ordinary dealing and understanding of men, show a mutual intention to contract. Constructive contracts are fictions of law, adopted for the purpose of enforcing legal duties, by actions *ex contractu*, where no proper contract exists, express or implied. 5 C. 465.

Though a contract be formal and complete, yet, if understood by the parties as a jest, it is not binding. A. 261.

All contracts to change the course of trials, or the effects of trials, whether to obtain a liberation of a prisoner by money to the jailer, or to obtain a pardon by the use of money, directly or indirectly, must be void. 7 W. 155.

Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there be no prohibitory words in the statute. 1 Binn. 113. 6 W. 233. 1 Bouv. Inst. 296.

Where a contract is to restrain a party generally from carrying on trade throughout the state, it is unlawful and void; but if it be to restrain him only in a particular place, it is not so. 7 Cow. 307. 1 Bouv. Inst. 236.

A contract made on Sunday is void. 1 Binn. 171.

A contract based on a supposed state of things which had no existence in fact will be relieved against on the ground of *mistake*. 8 W. 492. 3 Barr 21.

Whenever there is a gross misrepresentation of facts relating to the subject of a contract, the contract is fraudulent and void. 4 D. 250.

Ignorance of the law does not affect contracts, nor excuse a party from the legal consequences of particular acts. 7 W. 372.

The *time* of a payment is part of a contract; and if no time be expressed in the agreement, the money is payable *immediately*. 8 Johns. 189.

What is a reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law. 2 Greenl. 249.

A contract to complete work *by* a certain time, means that it shall be done *before* that time. 3 P. R. 48.

The contract of a surety being without a beneficial consideration, is not to be extended beyond the strict technical import. 2 P. R. 27.

When a contract is *entire*, for the delivery of a number of specific articles, at a certain time and place, the vendee is not bound to receive a part; and though a part be delivered, he is not liable to pay for the same, if willing to accept and pay for the whole; but, if the vendee accept a part, he thereby disaffirms the *entirety* of the contract, and will be obliged to accept and pay for so many articles as are individually furnished according to the contract. 2 P. R. 63. 2 W. & S. 26.

When neither time nor place for delivery is stipulated, the rule is, that the articles are to be delivered at the place where they are at the *time* of sale; when the time of delivery is fixed by the contract, the vendor must seek the vendee at his residence, and there tender the articles. If the articles are cumbersome, the vendor must seek the vendee, when the delivery is to be to the vendee, a reasonable time before the day of delivery, and ask him to appoint a place of delivery. 3 W. & S. 295. 2 Greenl. Ev. § 610.

A contract to deliver specific articles of property to another, at a certain time and place, in discharge of a previous debt, is performed, and the debt satisfied by a *tender and delivery* of the property, at the time and place, although the payee did not attend to receive the property, and no action on the contract can afterwards be maintained against the debtor. 5 W. 262.

On a contract to deliver specific articles, *prima facie*, the debtor is to be the actor; and this is to be the presumption, until circumstances show the contrary. But even in such case, he is not bound to carry the property about seeking the creditor, in order to tender it to him; but he must ask the creditor to appoint a reasonable place to receive it. 7 C. 265.

Where one party intends to abandon or rescind a contract on the ground of a violation of it by the other, he must do so promptly and decidedly, on the first information of such breach. If he negotiate with the party, after knowledge of the breach, and permit him to proceed in the work, it is a *waiver* of his right to rescind the contract. 5 R. 69.

Where a contract is made for any building, of whatever size or dimensions, it becomes a law to the parties, and they are both bound by it; and whatever additions or alterations are made in such building, they form a new contract, either expressed or implied, without affecting the original contract, and must be paid for agreeably to such new contract. 2 Bay 401.

Where a person makes a contract with another, to perform certain services, for a definite period, at a stipulated salary, and continues in such service beyond the period agreed upon, in the absence of any new agreement, the presumption of law is, that the original rate of compensation was to be continued. 5 C. 184. 12 C. 367.

Contracts are governed by the *lex loci*, or the law of the place where they are made; and if valid there, they are to be adjudged valid everywhere, by the law of nations; but the remedy is according to the laws of the country where sued. The law of any foreign state, if relied on, must be proved before the court which is called on to decide—otherwise it cannot take notice of it. 2 Penn. Bl. 210.

The presumption of the law is, that a contract is intended to be performed in the place or country in which it is made, if there be not an express agreement or necessary implication that it is to be performed elsewhere; and, whenever such understand-

ing is not apparent, the law of the contract is the law of the place where it is made. 6 Wh. 117.

As a *general rule*, where a contract is entire, it is incumbent on the plaintiff to show a performance of all that was stipulated on his part, to be performed, and on failure so to do, he is not entitled to recover anything. 2 Gr. 278.

Where there has been a substantial and *bona fide* compliance, on the part of the plaintiff, with his contract, he shall not be precluded from a recovery of his compensation, on account of some slight imperfection, for which the defendant may be compensated in damages. *Ibid*.

II. CONSIDERATION OF A CONTRACT.—In order to give validity to a contract, it must be founded on a sufficient consideration. There must be something given in exchange—something that is mutual, or something which is the inducement to the contract; and it must be a thing which is lawful, and competent in value to sustain the assumption. A contract without a consideration is a *nude pact*, and not binding: whether the agreement be verbal or in writing, it is still a *nude pact*, and will not support an action, if a consideration be wanting. 2 Kent's Com. 463. 1 Bouv. Inst. 237.

When the interest of a man is promoted, though not at his request, and he afterwards deliberately engage to pay for it, the law very properly says he shall fulfil his promise. 1 Br. 109.

A consideration is sufficient, if it arise from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff, with the assent, express or implied, of the defendant, or by reason of any damage, or any suspension or forbearance of the plaintiff's right at law or in equity, or any possibility of loss, occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party undertaking. 2 W. 104.

A moral or equitable obligation is sufficient consideration for an assumption. 5 Binn. 33.

An adjournment of a suit in a justice's court is a sufficient consideration for an agreement. 1 Cow. 99.

Labor done and services rendered for one, without his request or privity, however beneficial or meritorious, as saving his property from the fire, affords no ground of action. 20 Johns. 28.

A request by a father that a physician will attend his son, who is of full age, and sick at his father's house, does not render the father liable to pay for the services rendered. 4 W. 247.

An agreement to forbear to sue, for a reasonable time, is a consideration certain enough upon which to sustain an action. 1 P. R. 383.

Forbearance, either limited or general, is a good consideration for a promise to pay the debt of a third person. 3 W. & S. 420.

In *assumpsit* on a promise to pay the debt of another in consideration of forbearance, the fact that the debt was not due at the time of the promise, or that it was voidable in consequence of the infancy of the debtor, or that it was barred by the act of limitation, furnishes no defence to the action. 5 W. & S. 476.

An undertaking to answer for the debt of another, though in writing, and signed by the defendant, is void, if no consideration between the plaintiff and defendant, either of forbearance or otherwise. 8 Johns. 29. Unless the undertaking be contemporaneous with the original debt. 5 Wh. 437. An injury to the party to whom the promise is made, or a benefit to the party promising, is sufficient consideration. 3 Johns. 100.

By act 26 April 1855, it is provided that no action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him authorized. But the act shall not apply to or affect any contract, the consideration of which shall be a less sum than twenty dollars. *Purd*. 497.

This statute does not apply to a direct promise to pay for work to be performed for another. The liability of the promisor in such case springs out of the performance of the promisee, and the consideration moves from the one directly to the other; consequently, it is not within the statute. 16 Leg. Int. 60. And see 1 Wr. 302. To bring a case within the act, the promisee must be the original creditor. 25 Law Rep. 676. 4 P. F. Sm. 118. If the old debt remain, the contract is not an original undertaking, and is therefore within the statute. 1 Wr. 52.

An agreement made between parties prior to or contemporaneously with the executing a written obligation as sureties, by which one promises to indemnify the other from loss, is not required to be in writing. 12 N. Y. 462.

A contract required to be in writing must appear with reasonable certainty, without recourse to parol proof, from the instrument itself, and parol testimony cannot be admitted either to contradict or to vary it. 4 Phila. 75. See 7 C. 259-60.

The authority as an agent by whom the contract is signed need not, under the act, be in writing, but may be proved by parol. It is well settled, however, that such agent must be a third person; and that the other party to the contract is incompetent to act as agent for the party intended to be charged. Ibid.

The consideration upon which the contract is made need not be expressed in the writing, but may be proved by parol. 9 Wr. 345.

Since the passage of this act, an indorser of a note, whose name is written before that of the payee, is liable as second indorser. 9 P. F. Sm. 144. 10 Ibid. 35.

Convicts.

I. Punishment for importing convicts.

II. Actions against convicts.

I. ACT 31 MARCH 1861. Purd. 193.

SECT. 71. If any master or commander of any ship, boat or other vessel, arriving from any foreign country, place or port, at any port, harbor or place within the commonwealth, shall knowingly bring with him any person, either as a passenger, working hand or otherwise, who shall have been convicted of any offence in a foreign country or place, which, if committed within this commonwealth, would have subjected the offender to imprisonment at labor, with intent to land such person or permit him to land, such master or commander shall be guilty of a misdemeanor, and on conviction thereof, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding one year.

II. ACT 31 MARCH 1860. Purd. 193.

SECT. 71. In all cases of felony heretofore committed, or which may hereafter be committed, it shall and may be lawful for any person injured or aggrieved by such felony, to have and maintain his action against the person or persons guilty of such felony, in like manner as if the offence committed had not been feloniously done, and in no case whatever, shall the action of the party injured, be deemed, taken or adjudged to be merged in the felony, or in any manner affected thereby.

Of the Coroner.

I. Of the office and duties of the coroner.

II. Forms used in the coroner's office.

I. THE coroner is an officer, so called, because he hath principally to do with the crown. 1 Bl. Com. 346. In this state coroners are elected by the citizens of the respective counties at the general election, and are commissioned by the governor. They hold their offices for the term of three years, if they so long behave themselves well, and until a successor be duly qualified; but they are re-eligible. Vacancies in the office are filled by an appointment by the governor, to continue until the next general election, or until a successor shall be chosen and qualified. Const. art. VI. § 1.

Coroners are required, by the act of 1834, before they are commissioned or execute any of the duties of the office, to enter into a recognisance, and become bound to a bond, with at least two sufficient sureties, in one-fourth of the sum required from the sheriff of the county, conditioned that they will "well and truly perform all and singular the duties to the said office of coroner appertaining." The sureties are to be approved by the judges of the court of common pleas; the recognisance is to be recorded; the names of the sureties are to be entered by the prothonotary upon his judgment docket; and the recognisance becomes a lien upon all the real estate of the coroner and his sureties, within the county; and it stands as security not only to the commonwealth, but to all persons whomsoever for the faithful discharge of the duties of the office. Purd. 893-5.

The office and power of the coroner are ministerial and judicial. The *ministerial* power of the coroner is only as a substitute for the sheriff. For when there is a vacancy in the office of sheriff, or when a just exception is taken to the sheriff, for suspicion of partiality, as that he is interested in the suit, or of kin either to the plaintiff or defendant, the process must be awarded to the coroner, in place of the sheriff, to be executed. And his duties in relation to the execution and return of such process, are precisely the same as those of the sheriff in other cases. Rob. Dig. 36.

The *judicial* duties of the coroner are principally prescribed by the statute of 4 Edward I., "concerning the office of the coroner." The chief of these duties is to inquire when any person is slain, or dies suddenly, or in prison, concerning the cause of his death; and for this purpose he must summon a jury, and hold an inquest, on view of the dead body; for if the body be not found, the coroner must sit. 1 Bl. Com. 348.

Justices of the peace ought to inform themselves in relation to the duties of the coroner, in this respect, inasmuch as it is provided by the act 27 May 1841, § 15, that in all cases where by law the coroner of any county is required to hold an inquest over a dead body, it shall be lawful for a justice of the peace of the proper county to hold the same where there is no lawfully appointed coroner, or he is absent from the county, unable to attend, or his office is held more than ten miles distant from the place where the death occurred or the body was found; and said justice shall have like power to select, summon and compel the attendance of jurors and witnesses, and shall receive like fees and tax like costs, and the inquest shall be like force and effect in law. *Provided*, That no fees or costs shall be allowed for said justice or inquest until the proceedings are submitted to the court of sessions of the proper county, and said court shall adjudge that there was reasonable cause for holding said inquest, and approve of the same." Purd. 609.(a)

Coroner in his *judicial* capacity cannot appoint a deputy. 1 Chit. 745.(b) The justice should bear in mind, that he has no power to hold an inquest over a dead body, except in the cases provided for in the statute. The prevalent notion

(a) The act of 19 April 1856, provides that no section shall not hereafter authorize the holding of an inquest by a justice of the peace in the county of Allegheny, except in cases where it is impracticable to obtain the personal attendance of the coroner, after due notice given to him, or reasonable and proper

efforts made to give him notice of the death, and of the necessity of his official attendance. P. L. 740.

(b) The coroners of Lancaster, Northampton, Schuylkill and Chester counties have been authorized to appoint deputies by special statutes.

that a justice of the peace has concurrent power to inquire into the circumstances of a sudden or violent death, upon view of the body, is without authority in the law. The statute of 4 Edw. I. commands the coroner *alone* to go to the place where any one is slain or has suddenly died; and by warrant to the bailiffs or constables, to summon a jury from the neighboring towns, to inquire into the manner of the killing, or the circumstances of the death. From the words of the statute it results that the coroner's jurisdiction is a special one, and that no one else can take an inquisition in the manner prescribed. 6 Wh. 272. Except in the cases enumerated in the act of 1841.

The statute of 4 Edw. I. being wholly directory and in affirmance of the common law, the coroner is not thereby restrained from any branch of his power, nor excused from any part of his duty, not mentioned in it, which was incident to his office before and therefore, though the statute mentions only inquiries of the death of persons slain, drowned or suddenly dead, yet the coroner ought also to inquire of the death of those who die in prison. 2 Hawk. P. C. c. 47. Rob. Dig. 104. But by the act 29 Marc. 1819, the coroner of Philadelphia county is not to hold an inquest on the body of any prisoner who may die in the common jail of that county, unless required by the inspectors, or in cases of death by violence. Purd. 506. And by act 16 April 1845, he is prohibited from holding an inquest on the body of any deceased person, unless he shall have died of violent death. Purd. 897.

The subjects of inquiry for a coroner's inquest are cases of sudden and violent deaths, whether they take place from the visitation of God; by misfortune (as if sudden death ensue in consequence of a fall or other casualty); by suicide; or by the hand of another, whether by murder, manslaughter, in self defence or by accident. But he is only to hold an inquest where there has been a *violent and unnatural death*, or reasonable suspicion of such a death; an accident superinducing disease and death, at the end of days and weeks, is not a case for an inquest. There ought at least to be a reasonable suspicion that the party came to his death by violent and unnatural means; for if the death, however sudden, was from fever or other visitation of God, there is no occasion for the coroner's interference. 1 East P. C. 382. 2 Hale P. C. 62. Where, however, death occurs from any violence done to a person by another, although such violence may not suddenly terminate the life of the party injured, it is still the duty of the coroner to hold an inquest. 2 Gr. 262.

An inquisition of death, by the oath of lawful men of the county, is sufficient without saying they were of the next town, so that it appear at what place, and by what jurors, by name, it was taken, and that such jurors were sworn. At the present day they are selected and summoned by the coroner himself or his deputies. The number of jurors on a coroner's inquest was not fixed by the common law. But by the act 16 May 1857, it is provided that the number shall not be more than six to attend any one inquest. Purd. 897.

It is clearly agreed, that the inquest must be taken *on the view of the dead body*, and an inquest taken otherwise by a coroner, is void; therefore, where the body cannot be found, or is so far decayed that a view can be of no service, no inquisition can be taken by the coroner.

If the body be buried before the coroner comes, he ought to take it up and take his view thereof, within any reasonable time after such interment; but if he should take an inquest after a body hath been so long buried, that it may reasonably be presumed that the view of it could be of no manner of use for the information of the jurors, the court into which the inquisition is returned, will, in their discretion, refuse to receive or file it, upon affidavit of the whole circumstances of the proceeding. Yet the court refused in one case to quash an indictment taken a year after the body had been buried, for *factum valet, quod fieri non debuit*.

It is not necessary that the inquisition be taken at the very same place where the body was viewed; and it hath been resolved, that an inquisition taken at D., on the view of the body lying dead at L., may be good.

The jury must be sworn, and charged by the coroner to inquire, upon view of the body, how the party came by his death, whether by murder or misfortune, *felonia de se*. If slain, it is to be inquired where slain, by whom, and by what means or instrument; whether slain in the place where the body lies or not, of what length, depth and breadth are the wounds; in what part of the body inflicted, and generally

concerning all the circumstances of the party's death. The inquest are also to inquire of all accessories *before* the fact, but they cannot inquire of accessories *after* the fact. If persons who are found guilty by the inquest be taken, the coroner may and must commit them to the sheriff, who is to confine them in prison. And by the statute 1 & 2 Philip & Mary, c. 13, the coroner is to take the examinations against the principal and accessories *before* the fact, and put them in writing, and bind over the witnesses by recognisance to the next jail delivery, and then to return the inquisition, examinations and recognisances. The coroner's inquest must have all the evidence offered to them on oath, whether against or in favor of the accused, for it is not so much an accusation or indictment, as an inquest of office. Rob. Dig. 104-5.

In order to aid him in the performance of his duty, the coroner has authority to order a *post mortem* examination, at the public charge; and the surgeon employed by him for that purpose, where the amount of compensation is not fixed by law, (a) is entitled to a *reasonable* compensation from the county for his services. The coroner has authority to pledge the responsibility of the county for the compensation of all auxiliary services which are necessary to the proper execution of his office, and which he could by no other means command. When his duty requires him to disinter a body for instance, he cannot be expected to do it with his own hands, or by hands paid for with his own means. True, he is entitled to fees, but they are given for particular acts of official duty; not as a fund for contingent expenses. 3 Barr 462-5. 4 Ibid. 270.

The coroner is the proper judge of the necessity of holding an inquest and making a *post mortem* examination. It is sufficient for the surgeon summoned to aid him in it, to know that the proper officer of the county requires his services, and that he has power, by his contract, to bind the county for the payment of a reasonable compensation for them. 2 C. 156. The county commissioners have no power to appoint a surgeon to perform such services, so as to preclude the coroner from selecting a proper person in his discretion. 10 C. 301.

The fees of the coroner are fixed by the act 28 March 1814, Purd. 459, as follows: (b)

<i>Fees of the coroner.</i> —Viewing a dead body	\$2.75
Summoning and qualifying an inquest, drawing and returning inquisition	1.37½
Summoning and qualifying each witness	25

To be paid out of the goods, chattels, lands or tenements of the slayer (in case of murder or manslaughter), if any he hath, otherwise by the county, with mileage from the court-house to the place of viewing the body.

Executing any process or writs of any kind, the same fees as are allowed to the sheriff, and the same mileage.

II. FORMS USED IN THE CORONER'S OFFICE.

1. PRECEPT TO SUMMON A JURY.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Dauphin:

We command you, immediately upon sight hereof, to summon and warn six good and lawful men, of — aforesaid, whose names are hereto annexed, to be and appear before Simeon Dunn, Esquire, coroner of the said county, at —, in the county aforesaid, at — o'clock — of this day; then and there to inquire of, do and execute all things as on our behalf shall be lawfully given them in charge, touching the death of C.

(a) In Lancaster county, the compensation for such service is fixed at \$10, unless increased by the county commissioners, by the act of 3 April 1852. Purd. 459. This act was extended to Blair county, on the 15 April 1853; to Indiana county, on the 14 March 1857; to Berks and Montgomery, on the 14 March 1860. Purd. 459. And to Washington, on the 2 April 1867. P. L. 677. By act of 19 April 1856, the compensation in

Northampton county is fixed at \$15, unless increased by the commissioners of the county. Purd. 459.

(b) See act of 9 March 1867, as to the fees of the coroner of Allegheny county. P. L. 382. This was extended to Schuylkill county, by act 26 March 1868, P. L. 495; and to Bucks county, by act 1 April 1868. P. L. 554. The fees of the coroner of Cambria county are fixed by act 21 March 1868. P. L. 412.

D. And be you then and there, to certify what you shall have done in the premises, and further to do and execute what in our behalf shall be then and there enjoined you.

Given under the hand and seal of our said Coroner, at —, the — day of —, A. D. 1862. SIMON DUNN, Coroner. [SEAL.]

2. OATH [OR AFFIRMATION] OF FOREMAN.

You do swear, [or "solemnly, sincerely and truly declare and affirm,"] that you will diligently inquire and true presentment make, on the behalf of the Commonwealth, here and in what manner C. D., [or "a person unknown," as the case may be,] here lying dead, came to his death; and of such other matters relating to the same as shall be lawfully required of you, according to the evidence offered to you or arising from the inspection of the body. So help you God, [or, "And so you affirm."]

After the foreman is sworn [or affirmed], the rest may be sworn [or affirmed] together, as follows:

"You and every of you do swear, [or affirm,] that such oath [or affirmation] as your foreman hath for his part taken, you and every of you shall well and truly observe and keep on your parts respectively. So help you God," [or "And so you affirm."]

3. SUBPENA.

The Commonwealth of Pennsylvania,

To T. B., D. O., K. M., and S. P., greeting:

We command you and every of you that, all business and excuses whatsoever being laid aside, you do in your proper persons appear before A. B., Esquire, Coroner of the county of Dauphin, and an inquest now sitting at —, in the said county, to testify the truth and give such information and evidence as you and every of you shall know touching the manner in which C. D., [or "a certain person unknown,"] there lying dead, came to his death; and touching all other matters in relation to which you shall be examined. And this you are in no wise to omit, under the penalty that may ensue.

Witness the hand and seal of the said A. B., at —, the — day of —, A. D. 1862.

A. B., Coroner. [SEAL.]

4. OATH OF A WITNESS ON A CORONER'S INQUEST.

You do swear that the evidence you shall give to this inquest, touching the death of C. D., [or "the person whose body has been viewed,"] shall be the truth, the whole truth and nothing but the truth, so help you God.

5. INQUISITION OF MURDER.

Commonwealth of Pennsylvania, } ss.
Dauphin County,

An inquisition indented and taken at —, in the county of Dauphin, the — day of — in the year of our Lord one thousand eight hundred and sixty-two, before me, Simon Dunn, Coroner of the county aforesaid, upon the view of the body of A. D., then and there lying dead, upon the oaths of C. D., E. F., &c., and solemn affirmations of K. L., M. N., &c., good and lawful men of the county aforesaid; who being sworn and affirmed to inquire, on the part of the Commonwealth, when, where, how and after what manner the said A. M. came to his death, do say, upon their oath and affirmation, that one A. M., late of — aforesaid, gentleman, [this word *gentleman*, and other words following, printed in italics should be varied according to the facts of the case,] not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the — day of —, in the year of our Lord one thousand eight hundred and sixty-two, at the — hour in the night of the same day, with force and arms, at —, in the county aforesaid, in and upon the aforesaid A. D., then and there being in the peace of God and of the said Commonwealth, feloniously, violently and of his malice aforethought, made an assault; so that the aforesaid A. M. then and there, with a certain sword, made of iron and steel, of the value of one dollar, which he, the said A. M., then and there held in his right hand, did strike and pierce the aforesaid A. D., in and upon the left part of the belly of the said A. D., a little above the navel of the said A. D., then and there violently, feloniously, voluntarily and of his malice aforethought, struck and pierced, and gave to the said A. D., then and there, with sword aforesaid, in and upon the aforesaid left part of the belly of the said A. D., a laceration above the navel of the said A. D., one mortal wound, of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the aforesaid A. D. then and there instantly died; so the said A. M. then and there feloniously killed and murdered the said A. D., against the peace and dignity of the Commonwealth of Pennsylvania.

And the said jurors further say, upon their oath and affirmation aforesaid, [as follows in this paragraph, or as the case may be,] that A. A., of —, *yeoman*, and B. A., of —, *man*, were feloniously present with drawn swords at the time of the murder and felony aforesaid, in form aforesaid committed; that is to say, on the said — day of —, in the year aforesaid, at — aforesaid, in the county aforesaid, at the *first hour of the night* of the same day; then and there comforting, abetting and aiding the said A. M. to do and commit the felony and murder aforesaid, in manner aforesaid, against the peace and unity of said Commonwealth.

In witness whereof, as well the aforesaid coroner as the jurors aforesaid, have to this inquisition put their hands and seals, on the day and year and at the place first above mentioned.

SIMEON DUNN, Coroner.

C. D.,

E. F., &c.

Jurors.

[SEAL.]
[SEAL.]
[SEAL.]

For other forms of inquisition, see Graydon's Forms 315-16, and Dunlop's Forms 33-6.

Corporations.

I. Creation of corporations, and corporate powers.

II. By-laws of corporations.

III. Suits by and against corporations.

IV. Forms of process.

V. Provisions of the Penal Code.

A CORPORATION is a body politic, or incorporated, so called as the persons are made into a body, and of capacity to take and grant, &c., or it is an assembly and coming together of many into one fellowship and brotherhood, whereof one is head and chief, and the rest are the body, and this head and body, knit together, make the corporation; also, it is constituted of several members, like unto the natural body, and framed by fiction of law to endure in perpetual succession (or for a certain limited time.) *Bac. Abr.*

Corporations in Pennsylvania are either created directly by act of assembly or by the courts, in accordance with certain principles, and for certain purposes laid down in a previous law, within the provisions of which certain persons associate; and it being certified by the proper authorities that the association have, in all respects, complied with the conditions and requirements of the law, they, the associations, are, for the purposes expressed in their articles of association, declared and acknowledged as a corporation, and granted the powers and immunities appertaining to such associations. *Purd.* 194-7.

A charter of incorporation cannot be declared void in a collateral suit: it can only be vacated by a *scire facias* to repeal it, or on a suit of *quo warranto* at the instance of the commonwealth. *1 R.* 426.

A corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. *15 Johns.* 358.

A statute restraining any person from doing certain acts, applies equally to corporations or bodies politic, although not mentioned. *Ibid.*

A corporation derives all its powers from its charter, and from it the duties, obligations and liabilities of its officers are to be collected. *3 P. R.* 502.

A corporation may, *without seal*, enter into a contract express, or even implied. *3 & R.* 16. *2 W. & S.* 74.

The seal of a corporation is *prima facie* evidence that the contract has been entered into by them. *6 S. & R.* 16.

II. BY-LAWS.

A corporation by charter cannot make by-laws inconsistent with the intentions, or counteracting the directions of their charter. *4 Burr.* 2204.

All by-laws, made by corporations, must be consistent with, and subordinate to, their constitution by charter. Bro. P. C. 329.

Corporations must show their power to pass by-laws, and bring themselves, by proof, within that power. 5 Cow. 462.

By-laws must be reasonable. Ibid. 10 Wend. 99. 27 Leg. Int. 125.

Municipal corporations have power, at common law, to make by-laws for the general good of the corporation. They must, however, be reasonable and for the common benefit, not in restraint of trade, nor imposing a burden without an apparent benefit. 2 J. 321.

An ordinance of a municipal corporation, prohibiting the opening of streets, for the purpose of laying gas mains, from the 1st of December to the 1st of March following, is a reasonable regulation, and binds a private corporation, chartered before the passage of the ordinance, and required to furnish gas and lay mains, &c., along the streets, within the chartered limits, on application from owners of property, whenever the profit would pay the interest on the expense. 2 J. 318.

But an ordinance prohibiting such corporation from opening a paved street, for the purpose of laying pipes from the main to the opposite side of the street, is unreasonable and void. Ibid. For other cases on the validity of city ordinances see 1 Y. 471. 2 Y. 493. 3 Y. 491. 11 Law Rep. 547.

Courts will not take judicial notice of the ordinances of a city; they must be proved as matters of fact. 11 Mis. 431.

A by-law, unless authorized by statute, can only be enforced by a certain pecuniary penalty: it cannot inflict a forfeiture. 5 Wr. 481-2.

III. SUITS BY AND AGAINST CORPORATIONS.

The act of 22d March 1817, § 6, provides "that in cases in which a corporation shall be a party in any suit, in any court or before any magistrate, all the proceedings," except as regulated by statute, "shall be the same as directed by law in other cases." Purd. 198.

Suits may be brought against corporations, by their corporate names, before any court or magistrate of competent jurisdiction, by summons, which may be served on the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation. (a) *Provided*, that no suit shall be sustained on any bank-note or notes payable to bearer or order on demand, unless demand shall have been first made for payment thereof, at their banking-house, office or treasury, and, in case of non-payment, interest shall be recoverable on the same from the time of making such demand. Act 22 March 1817, § 1. 6 Sm. 438.

In actions for damages occasioned by a trespass or injury done by a corporation if the officers aforesaid of such corporation, or any of them, shall not reside in the county in which such trespass or injury shall be committed, it shall be lawful to serve the summons upon any officer or agent of the corporation, at any office or place of business of the corporation within the county; or if there be no such office or place of business, it shall be lawful to serve the summons upon the president or other principal officer, cashier, treasurer, secretary or chief clerk, in any county or place where they may be found. Act 18 June 1836, § 42. Purd. 198.

Process may be served on the toll-gatherer of any corporation in the proper county, and next to the place where the damage shall have been committed. In case of such a service, reasonable notice of the suit must also be given to some one of the officers of the company. Act 16 March 1833. Purd. 198.

In the commencement of an action against a foreign corporation, process may be served upon any officer, agent or engineer of such corporation, either personally or by copy, or by leaving a *certified* copy thereof at the office, depot or usual place of business of such corporation. Act 21 March 1849. Purd. 199.

By the act of 15th April 1851, the provisions of the act of 1849 are extended to stage companies, and all joint stock companies, *not incorporated*, where the members of said companies do not reside within this commonwealth: provided, the service upon an agent shall be upon the principal agent having charge of the business of said company in the county where any office may be located. Purd. 199. See 8 Wr. 422.

(a) This provision is re-enacted by the act of 18 June 1836, excepting as to counties and townships. Purd. 198.

Whenever an act of assembly requires service to be made, by delivering a *certified or attested* copy, the constable is required to certify or attest the same to be a true copy, by writing at the foot thereof, the words "*a true copy*," and signing his name thereto, in attestation of the same. 8 P. L. J. 499. Bright. R. 67.

In any case where any insurance company or other corporation shall have an agency or transact any business in any county of this commonwealth, it shall and may be lawful to institute and commence an action against such insurance company or other corporation in such county, and the original writ may be served upon the president, cashier, agent, chief or any other clerk, or upon any directors or agent of such company or corporation within such county, and such service shall be good and valid in law to all intents and purposes. (a) Act 8 April 1851, § 6. Purd. 198.

When any action is commenced by any person against any corporation in any county in which the property of said corporation was wholly or in part situated, it shall be lawful, if the president, treasurer, secretary or chief clerk do not reside or cannot be found in such county, for the sheriff or officer to whom any process may be directed to serve the same on any manager or director in such county, and the service so made shall be deemed sufficient; and in case no director or manager can be found in such county, it shall be lawful for the sheriff or other officer to whom such process is directed to go into any county to serve the process aforesaid. Act 17 April 1856, § 1. Purd. 199.

On *certiorari*, parol evidence cannot be received, to alter or amend the constable's return. 3 Pittsburgh Leg. J. 301. If the constable return that he has served the agent of the defendant, the justice is not to inquire into the question of his agency; if the return be false in fact, the remedy of the defendant is against the constable. Phila. 41. 2 T. & H. Pr. 608.

In a suit by a corporation, under the plea of the general issue, the plaintiffs are not required to exhibit or prove their act of incorporation. The want of it must be pleaded in abatement, or specially in bar. 9 C. 358.

A foreign corporation may maintain an action in its own name, or that of its trustees, in the courts of Pennsylvania. 9 W. 126.

Assumpsit, trespass and trover will lie against a corporation. 9 S. & R. 94, 102.

Where a corporation are parties, or immediately interested in the question, no number of it can be a juror or witness. 1 Y. 480. 1 Greenl. Ev., § 331.

If any corporation, summoned as aforesaid, *shall not appear* by their officer, agent or attorney, at the time mentioned in said summons, then, or at any time afterwards, on proof of the service of the summons, by the oath or affirmation of the officer serving the same, *judgment by default* shall be rendered against said corporation for the sum which to the court or magistrate shall appear to be due. (b) Act 3 March 1817, § 2. 6 Sm. 439.

Execution against any corporate body, issued by a magistrate, shall be to levy the debt, interest and costs of the goods and chattels of said corporation, and execution out of any court shall be to levy as aforesaid of the goods and chattels, lands and tenements of such corporation; and any execution so issued and directed by any sheriff, constable or other proper officer, shall be served by the said officer upon the banking-house, or other principal office of the corporation, at their usual office hours, and demanding of the president, or other chief officer, cashier, treasurer, secretary or chief clerk, of said corporation, the amount of said execution with legal costs; and if the same is not forthwith paid in lawful money, or if no person can be found on whom demand may be made as aforesaid, then such sheriff, constable or other officer, is hereby authorized and required to seize any personal property of said corporation, sufficient for the debt, interest and costs; and if no sufficient personal property can be found as aforesaid, then in case of execution out of any court, the levy may be on the real estate of the corporation; and in case of execution issued by any magistrate as aforesaid, where no sufficient personal estate can be found as aforesaid, the plaintiff may file in the court of common pleas a transcript of the judgment as in other cases. *Provided*, That

(a) See act of 27 April 1857, for further provisions as to the service of process on insurance companies. Purd. 560. And see W. 422.

(b) The proceedings on the return of the summons, by default, or on hearing, should be the same, in all respects, against corporations as against individuals.

where execution shall be against a banking company, and other personal property cannot be found sufficient for the debt, interest and costs, if any current coin of gold, or silver, or copper, shall be found by such officer, he shall take so much as will satisfy the debt, interest and costs. *Ibid.* § 3.

Such real and personal property of a corporation as is necessary for the enjoyment of the corporate franchises, cannot be levied on and sold under an execution against it. 13 S. & R. 210. 9 W. & S. 27. 3 Phila. 173. 3 Wr. 337. 24 How. 257.

In case of appeal, *certiorari* or writ of error, by any corporation, the oath or affirmation required by law shall be made by the president or other chief officer of the corporation, or, in his absence, by the cashier, treasurer or secretary; and when any corporation (municipal corporations excepted) shall be sued, and shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of the debt, interest and costs, on affirmance of the judgment. Act 22 March 1817, § 4. *Purd.* 410.

The act of 15th March 1847 (*Purd.* 199), re-enacts the provision of the act of 1817, as to the bail to be given by corporations on appeal. And the act of 21st March 1849, further provides, that in case of a foreign corporation, the bail shall be absolute for the payment of such sum as shall finally be adjudged to be due to the plaintiff, with interest and costs thereon. *Purd.* 199.

Rules of reference, and all notices whatsoever, may, where a corporation is a party in any suit, be served on the president or other principal officer, or cashier, or secretary, or chief clerk of such corporation. Act 22 March 1817, § 5. *Purd.* 199.

In cases in which a corporation shall be a party in any suit in any court, or before any magistrate, all the proceedings, except as regulated by this act, shall be the same as directed by law in other similar cases. *Ibid.* § 6.

For the proceedings on an attachment in execution against a corporation, see tit. Attachment in Execution.

IV. SUMMONS AGAINST A CORPORATION.

MONROE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of D—, in the County of Monroe, greeting:

We command you, that you summon [the Bank of Tinicum] to appear before J. R., one of our justices of the peace in and for the said county, on the 10th of July 1860, at 10 o'clock, A. M., to answer A. B., on a plea of debt or demand, not exceeding one hundred dollars. Witness the said J. R., at M— aforesaid, the 4th day of July, A. D. one thousand eight hundred and sixty. J. R., Justice of the Peace. [SEAL.]

The Justice's office is in D— Township.

RECOGNISANCE OF BAIL ON APPEAL.

July 14th 1860.—Defendants appeal.—I am held in \$150, as *absolute* bail in this case, conditioned for the payment of the debt, interest and costs, by the defendants, on the affirmance of the judgment. J. M., Tinicum.

V. ACT 31 MARCH 1860. *Purd.* 229, 237.

SECT. 66. It shall not be lawful for any councilman, burgees, trustee, manager or director of any corporation, municipality or public institution, to be at the same time a treasurer, secretary or other officer, subordinate to the president and directors, who shall receive a salary therefrom, or be the surety of such officer, nor shall any member of any corporation or public institution, or any officer or agent thereof, be in anywise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to, or for the use of any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and his office or appointment thereunder, and shall be held guilty of a misdemeanor, and on conviction thereof be sentenced to pay a fine not exceeding five hundred dollars: *Provided*, That nothing in this section contained, shall pre-

vent a vice-president of any bank from being a director of such bank, or of receiving a salary as vice-president.

SECT. 67. Any person who shall contract for the sale, or sell any supplies or materials as aforesaid, and shall cause to be interested in any such contract or sale, any member, officer or agent of any corporation, municipality or institution, or give or offer to give any such person any reward or gratuity, to influence him or them in the discharge of their official duties, shall not be capable of recovering anything upon any contract or sale, in relation to which he may have so practised or attempted to practise corruptly, but the same shall be void, and such party shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars.

SECT. 68. If any officer of any municipal or other corporation, not authorized by law, shall be instrumental in, or shall consent to or connive at, the making or issuing of any note, bill, check, ticket or order, intended to be used as currency, he shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding one thousand dollars for each offence, and to undergo an imprisonment not exceeding six months.

SECT. 116. If any person, being an officer, director or member of any bank, or other body corporate or public company, shall fraudulently take, convert or apply to his own use, or the use of any other person, any of the money or other property of such bank, body corporate or company, or belonging to any person or persons, corporation or association, and deposited therein, or in possession thereof, he shall be guilty of a misdemeanor.

SECT. 117. If any person, being a director, officer or manager of any body corporate or public company, shall, as such, receive or possess himself of any money, or other property of such body corporate or public company, otherwise than in payment to him of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, he shall be guilty of a misdemeanor.

SECT. 118. If any director, manager, officer or member of any bank, or other body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate or falsify any of the books, papers, writings or securities belonging to the bank, body corporate or public company, of which he is a director, manager, officer or member, or shall make or concur in the making of any false entry, or any material omission in any book of accounts or other document, he shall be guilty of a misdemeanor.

SECT. 119. If any director, manager, officer or member of any bank, or other body corporate or public company, shall make, circulate or publish, or concur in making, circulating or publishing any written or printed statement or account, which he shall know to be false in any particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to such body corporate or public company, or to enter into any security for the benefit thereof, he shall be guilty of a misdemeanor.

SECT. 120. If any person shall receive any money, chattel or valuable security, which shall have been so fraudulently disposed of, as to render the party disposing thereof guilty of a misdemeanor, knowing the same to have been so fraudulently disposed of, he shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the party guilty of the principal misdemeanor shall, or shall not, have been previously convicted.

SECT. 121. Every person found guilty of a misdemeanor under either of the preceding sections of this title, wherein the nature and extent of the punishment is not specified, shall be sentenced to an imprisonment not exceeding two years, or be fined in any amount not exceeding one thousand dollars, or both or either, at the discretion of the court.

SECT. 122. Nothing herein contained shall affect any remedy at law or in equity, which any party aggrieved might have heretofore had, nor affect or prejudice any agreement entered into, or security given, by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

SECT. 123. No such trustee, banker, merchant, broker, attorney, agent, director, officer or member as aforesaid, shall be enabled or entitled to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court of law or equity, but no answer to any such bill, question or interrogatory, shall be admissible in evidence against such person charged with any of the said misdemeanors.

SECT. 124. The word "trustee" herein shall mean a trustee on some express trust created by deed, will or instrument in writing, and shall also include the heir, devisee and personal representative of any such trustee, and all executors, administrators and assignees; the word "property" shall include every description of real and personal property, money, debts and legacies, and all deeds and instruments relating or evidencing the title or right to recover or receive any money or goods, and shall also include not only such property as may have been the original subject of a trust, but any property in which the same may have been converted, and the proceeds thereof, respectively, or anything acquired by such proceeds.

A corporation is liable to indictment for a public nuisance. 10 P. F. Sm. 367.

ACT 22 APRIL 1863. Purd. 1296.

SECT. 1. It shall not be lawful for any saving-fund society or company, or any officer or agent thereof, within this commonwealth, to receive on deposit any sum or sums of money whatever, when such society or company has not assets sufficient, at their cash value, to pay all its debts and liabilities; and any officer or agent of any such society or company, who shall knowingly violate the provisions of this act, by receiving a deposit of any sum or sums of money, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be liable to a fine not exceeding one thousand dollars, and an imprisonment, in the jail of the proper county, for a term not exceeding three years, or both, or either, at the discretion of the court.

Costs.

I. How a justice should keep an account of costs.

III. Judicial opinions and authorities relating to costs.

II. How and when costs should be demanded.

I. IN the prosecution, and defence, of actions, the parties are necessarily put to certain expenses, or, as they are commonly called, *costs*; consisting of money paid to the government, to the officers of the courts, and to the counsel and attorneys for their fees, &c. Brightly on Costs 13.

Costs are distinguished from fees, on being an allowance to a *party* for expenses incurred in conducting his suit; whereas fees are a compensation to an *officer* for his services rendered in the progress of the course. 11 S. & R. 250.

No costs were recoverable, by either the plaintiff or defendant at common law; the right to recover them depends wholly on statute law, and therefore a party claiming to recover costs from his adversary must be able to point to the statute by which they are given; and hence it follows also, that statutes which give costs are not to be extended beyond the letter, but are to be construed strictly.

In suits before justices, the right to recover costs depends on the Statute of Gloucester, 6 Edw. I. ch. 1, and other British statutes upon this subject; and the amount of their fees is regulated by the acts of assembly of this commonwealth. These acts prescribe the amount which the justice is entitled to from the party for whom the services are rendered, and these, in general, may be recovered back from the unsuccessful party, but the successful party is not strictly bound by the fee bill, as to the amount of costs that he may recover; for there are other matters, such as the execution of a commission for the examination of witnesses, &c., which though not provided for by any fee bill, are yet considered costs which may be recovered from the unsuccessful party.

The 12th section of the act 20 March 1810, provides that "on the delivery of an execution to any constable, an account shall be stated, in the docket of the justice, and also on the back of the execution, of the debt, interest and costs."

It is recommended to every justice, to pay the same strict attention to the keeping an account of costs in the margin, as he does of the progress of the suit itself, in the body of his docket. Every act done by the justice should not only be noted on the docket, but the amount of costs, if any be incurred, should, without unnecessary delay, be entered in the margin; those of the justice being kept separate from those of the constable. To each entry should be affixed a mark, by which the justice should know whether the costs, so entered, have, or have not, been paid, and, if paid, whether paid by the plaintiff or defendant: and, also, when they were repaid by the justice to the person, plaintiff, defendant or constable, who may be entitled to receive them, or any part of them, on the settlement of the suit.

A straight line thus —, shall signify that the item of *costs*, to which it is affixed, has been paid by the *plaintiff*. A cross thus X shall declare the items of costs, to which it is placed, to have been paid by the *defendant*. The addition of a point, thus . shall show that the amount, which was paid, has been *paid* by the magistrate, *back* to the person from whom it had originally been received.

As this is a matter of some moment to the public, as well as to the justice, it may be well further to illustrate the plan thus recommended. The amount of costs to be paid being twenty-five cents, let it, if *not* paid, be put in figures, in the margin of his docket, thus 25; if paid by the *plaintiff*, let it be entered thus 25—If paid by the *defendant*, thus X. When the twenty-five cents are, on settlement of the case, repaid to the *plaintiff*, let the original entry have a point put over it thus —. If the twenty-five cents shall be paid back to the defendant, let the point be put over it thus X. The justice who will be particular in affixing these marks, trifling as they may seem, or any other he may think proper to adopt, will find that they will facilitate and give accuracy in the transaction of his business.

II. The justice is not authorized to demand and receive his costs until the duty shall be performed, for which he is entitled to the legal payment. Having, however, performed the duty required, he is entitled to his fee, and should ask it. Let him, as soon as he can, familiarize himself with the prices, or fees, which it has been the pleasure of the Legislature to put upon his services, and ask the person who ought to pay for what is apportioned for the services performed. The justice must take care to ask for no more than he is legally entitled to, nor should he ask for less. If he takes more, he is subjected to a penalty. If he takes less, he does himself wrong. In this, as in everything else, let him set an example of prompt and *strict* obedience to the laws. So soon as the costs are paid, let it be noted, in black and white, in such a manner as shall leave no room for future doubt or cavil. These are things which should, by all possible means, be avoided. If the costs paid shall be for the issuing of a process, previously to a docket-entry, it may, at the time, be noted by the justice on a corner of the process, in the manner above recommended; if for other services, such as subpoenas, swearing witnesses, or adjourning a case, let it be noted on the margin of the docket. Thus, when called upon, the justice is able, instantly, to state the whole amount of costs on the suit, such amounts as have been paid, and by whom paid, and the balance due.

It would be better in this, as in all other things, if the parties would attend to the law, and pay costs as they become due. By so doing, one avenue against misunderstanding or dispute between the justice and the parties would be closed.

This is important. If misunderstandings arise about costs, or about anything else, they will, necessarily, weaken that confidence and mutual respect which should be the basis of all intercourse in a magistrate's office.

Where justice is expected to be administered "without sale, denial or delay," care should be taken to exclude every thing, word or deed, which, in any wise, could excite doubt, or awaken suspicion. All should, in the common, but well understood phrase, be fair, honest and above board. There should be no whispering; nothing should be permitted to be done, which, even in the breast of the timid, should

awaken a fear that there was prejudice or partiality. "Let all things be conducted among us in such a manner that we provide things honest, not only before God, but also before men."

III. I have always considered it to be the general understanding that the *plaintiff is liable to the officers for their fees, in case they cannot be secured from the defendant.* 4 B. 172.

All the parties to a bill or note are liable for the amount due, although only *one satisfaction* can be recovered; yet *executions for costs* may be issued in all of them. 2 D. 115. 8 Johns. 356.

To entitle a party to the costs of his witnesses, and of the subpoena upon them, it is not necessary that their names should have been inserted in the subpoena by the prothonotary, [or the justice,] before delivering them to the party. *Ibid.* 276.

When the merits of a case have been heard, and the plaintiff is nonsuited, he will not be permitted to proceed in a second suit until the costs of the first are discharged. 1 Br. 38.

A rule for security of costs will be granted, *of course*, when the plaintiff resides out of the state. 1 Br. 256.

When arbitrators award in favor of the defendant, and the plaintiff appeals, if he recover, he is entitled to the costs which he paid, on entering his appeal, as well as those which accrued since. 13 S. & R. 109.

On an appeal from the judgment of a justice of the peace, the costs abide the event of the suit, and are to be paid by the unsuccessful party as in other cases. *Purd.* 600. See *tit. Appeals*.

On the taxation of costs, the plaintiff is competent to prove that he subpoenaed the witnesses, but not the fact of their attendance. *Stokes v. Deringer*, District Court, Phila., 2 October 1847.

The expenses of a witness who was subpoenaed, and actually attended at the trial of a cause, although he was never examined, ought to be allowed in the taxation of costs. 1 B. 46. 3 Y. 558.

So, ought the costs occasioned by the attendance of a material witness at the trial of the cause, if he was then examined, although such witness were not served with a subpoena. *Ibid.*

So likewise ought the costs of a witness who was actually subpoenaed, but never attended, if an attachment were issued against him. *Ibid.*

But the costs of a witness who was subpoenaed, but did not attend, and against whom no attachment was issued ought not to be allowed. *Stokes v. Deringer*, District Court, Phila., 2 October 1847.

A witness who attended before arbitrators at several adjourned meetings, after having been examined, but not discharged from attendance, and who was called to testify to the character of another witness for veracity, is entitled to be paid for each day's attendance, although he is not re-examined. *Brightly on Costs* 287-8.

Where a witness is subpoenaed in several causes between the same parties, or in several causes by the same plaintiffs against several defendants, or by several plaintiffs against the same defendant, which are tried at the same time, he is only entitled to be paid for his attendance in one suit. 15 S. & R. 21. 6 W. 331. 3 W. & S. 274. 3 Barr 267. 14 Leg. Int. 180.

Mileage is allowed to witnesses only for each mile circular in travelling from the line of the state, in the usual and ordinary route of travelling between the witnesses' place of residence, and the place of holding the court. 2 W. 189.

A witness from a distant county who attends on the trial of the cause, at the request of the party, is entitled to his allowance for mileage, although not subpoenaed until his arrival at the place of trial. *Brightly on Costs* 292.

The act of 31 March 1860, § 64, provides that in all cases of conviction of *any* crime, all costs shall be paid by the party convicted; but where such party shall have been discharged according to law, without payment of costs, the costs of prosecution shall be paid by the county. *Purd.* 261.

This act includes convictions by a justice of the peace for drunkenness or vagrancy. 4 C. 173. 5 C. 38. But the county is not liable to the justice for his costs, on a conviction for vagrancy, unless the defendant be sentenced to hard labor, and the commitment follow the sentence as recorded. 12 C. 349.

Counterfeiting.

- I. Counterfeiting coin.
- II. Counterfeiting bank notes.

- III. Counterfeiting public brands.
- IV. Counterfeiting trade marks.

I. OFFENCES AGAINST THE COIN.

Any person who shall falsely and fraudulently make or counterfeit any coin, resembling, or apparently intended to resemble any gold or silver coin, which is or shall be passing, or in circulation as money, within this commonwealth, shall be guilty of felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years; and every such offence shall be deemed complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected. Act 31 March 1860, § 156. *Purd.* 243.

If any person shall gild or silver, or shall with any wash or materials capable of producing the color of gold or silver, wash, color or case over any coin whatsoever, resembling, or apparently intended to resemble, or pass for any gold or silver coin, which is or shall be current in this commonwealth; or if any person shall gild or silver, or shall with any wash or materials capable of producing the color of gold or silver, wash, color or case over any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals, respectively, being of a fit size and figure to be coined, and with the intent that the same shall be coined into false and counterfeit coin, resembling, or apparently intended to resemble, or pass for any coin which is or shall be current in this commonwealth; or if any person shall gild, or shall with any wash or materials capable of producing the color of gold, wash, color or case over any silver coin, which is or shall be current as aforesaid, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any current gold or silver coin; or if any person shall gild or silver, or shall with any wash or materials capable of producing the color of gold or silver, wash, color or case over any copper coin, current in this commonwealth, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any gold or silver coin, current in this commonwealth; every such offender shall be guilty of felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. *Ibid.* § 157.

If any person shall impair, diminish or lighten any gold or silver coin, which is or shall be current in this commonwealth, with intent to make the coin so impaired, diminished or lightened, pass for gold or silver coin current as aforesaid, every such offender shall be guilty of felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years. *Ibid.* § 158.

If any person shall buy, sell, receive, pay or put off, or offer so to do, any false or counterfeit coin, resembling, or apparently intended to resemble, or pass for any gold or silver coin which is or shall be current in this commonwealth, at or for a lower rate or value than the same, by its denomination, imports, or was coined or counterfeited for; or if any person shall import into this commonwealth from any of the states of the Union, or from any foreign country, any false or counterfeit gold or silver coin, resembling, or apparently intended to resemble, or pass for any gold or silver coin which is or shall be current in this commonwealth, knowing the same to be false or counterfeit; every such offender shall be guilty of felony, and, being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. *Ibid.* § 159.

If any person shall tender, utter, pass or put off any false or counterfeit coin, resembling, or apparently intended to resemble, or pass for any gold or silver coin which is or shall be current in this commonwealth, knowing the same to be

false or counterfeit, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. *Ibid.* § 160.

If any person shall make or mend, or proceed to make or mend, buy or sell, hide or conceal or knowingly have in his house, custody or possession, any puncheon, matrix, die, stamp, mould, edger or cutting-engine, used or designed for coining or counterfeiting gold, silver or copper moneys, or any part of such tool or engine, with the knowledge that such tool and instrument is intended to be used in the false and fraudulent making, forging and counterfeiting of any gold, silver or copper coin which now is, or shall be current and passing in this state as money, or with the intent to use such tool or instrument for the fraudulent purpose aforesaid, or shall aid, abet, counsel or command the perpetration of either of the said offences, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not more than six years. *Ibid.* § 161.

If any person shall falsely make or counterfeit any coin, resembling, or apparently intended to resemble or pass for any copper, nickel or bronze coin, which is or may be current in this commonwealth; or if any person shall knowingly make or mend, or procure to be made or mended, or buy or sell, or shall knowingly have in his custody or possession any instrument, tool or engine adapted to, or intended for the counterfeiting of any such coin, current as aforesaid; or if any person shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any such coin, current as aforesaid, at or for a lower rate or value than the same, by its denomination imports, or was coined or counterfeited for; every such offender shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years. *Ibid.* § 162.

That where, upon the trial of any person charged with any offence enumerated in the seven preceding sections, it shall be necessary to prove any coin, produced in evidence against such person, to be false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any officer of the United States mint, but it shall be sufficient to prove the same false or counterfeit by the evidence of any other credible witness. *Ibid.* § 163.

The offence of counterfeiting the coin is not usually prosecuted in the courts of the commonwealth, inasmuch as the laws of the United States are much more complete and perfect. The jurisdiction of the courts of the United States over this offence is not, however, exclusive, inasmuch as the 4th section of the act of congress of 21st April 1806, re-enacted by the 26th section of the act of the 3d of March 1825 (1 Bright. U. S. Dig. 216), declares that nothing in these acts shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states over offences made punishable by these acts. In the cities of Philadelphia and Pittsburgh, where there are permanent courts of the United States, there is no difficulty in prosecuting the counterfeiting of the currency committed therein; but where this offence is committed at places distant from these centres of population, it is important that the local tribunals should possess adequate facilities to punish it, without putting the injured citizen to the inconvenience of attending the sessions of a remote tribunal; it was, obviously, this consideration which induced congress not to interfere with state jurisdiction. The case of *Fox v. The State of Ohio*, 5 How. 410, decides that state jurisdiction may be properly exercised over such crimes. Report on the Penal Code 38.

The power to provide for the punishment of counterfeiting the current coin of the United States, may be exercised by the several states concurrently with congress. 1 Doug. (Mich.) 207.

On an indictment for counterfeiting it must appear that it was the intention of the party, on making such coin, fraudulently to pass them as genuine. 5 McLean 208.

Proof of passing, or attempting to pass, counterfeit money, by an agent employed

by the defendant for that purpose, is the same as proving the acts to have been done by himself. 4 W. C. C. 733.

Proof of the fact that a quantity of spurious coins, with tools and instruments for the manufacture thereof, was found in the defendant's possession, will warrant the presumption of his guilty agency, unless negatived by other facts in the case. 5 McLean 23, 208.

On the trial of such an indictment, there must be proof to sustain the averment, that the coins alleged to have been made, were in the likeness and similitude of genuine coins. 5 McLean 24.

The jury should be satisfied that the resemblance of the forged to the genuine piece, is such as might deceive a person using ordinary caution. 4 W. C. C. 733.

If the spurious coin, from its incompleteness, or the defectiveness of its manufacture, is not fitted to deceive persons of the most ordinary caution and intelligence, the inference of a criminal intention in making it does not arise. 5 McLean 24.

But when the purpose and act are otherwise guilty, within the statute, the similitude suffices, if, according to the mode of use apparently designed, the piece would have had a probable tendency to mislead persons, whom it might be intended, *in this manner*, to defraud into a belief of its genuineness. 8 Phila. R. 426.

To utter a piece of counterfeit coin, is to offer it, whether it be taken or not. Thus, the prisoner, in payment for some goods at a store, put down on the counter a counterfeit shilling; the store-keeper took it up, and said it was bad; the prisoner then quitted the store, leaving the coin there: *Held*, that the prisoner had uttered the counterfeit shilling within the meaning of the statute. 1 Eng. L. & Eq. 588.

II. COUNTERFEITING BANK NOTES.

If any person shall falsely and fraudulently make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in the false making, forging or counterfeiting any bill or note, or imitation of, or purporting to be a bill or note issued by order of the president, directors and company of any bank incorporated by the laws of this commonwealth, or by the laws of any of the states or territories of the Union, or of the District of Columbia, or any order, check or draft on either of the said banks, or any cashier of the same; or if any person shall falsely alter, or cause to be falsely altered, or aid and abet in the falsely altering any bill or note issued by any of the said banks, or any check, order or draft on the same, or the cashier of any thereof; or shall pass, utter, publish or attempt to pass, utter or publish as true, any false, forged or counterfeit bill or note issued by any of the said banks, or by order of the president and directors of any thereof, or any false, forged or counterfeited order, check or draft, upon any of the said banks, or any cashier thereof, knowing the same to be falsely forged or counterfeited; or shall pass, utter or publish, or attempt to pass, utter or publish as true any falsely and fraudulently altered bill or note, issued by any of the said banks, or by order of the president and directors thereof, or any falsely altered order, check or draft on any of the said banks, or on any cashier thereof, knowing the same to be falsely altered, with intent to defraud any of the said banks, or any other body politic or person; or shall sell, utter or deliver, or cause to be sold, uttered or delivered, any forged or counterfeit note or bill in imitation, or purporting to be a bill or note issued by any of the said banks, or by order of the president and directors thereof, knowing the same to be false, forged and counterfeited; such offender shall be guilty of felony, and on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. Act 31 March 1860, § 164. *Purd.* 244.

If any person shall make, engrave or prepare, or cause to be made, engraved or prepared, or shall have in his custody or possession, any metallic or other plate or substance, either made, engraved or prepared after the similitude of any plate from which any notes or bills issued by any of the said banks shall have been printed or taken, or wherefrom and by means whereof notes or bills may be made, engraved or prepared after the similitude of notes or bills issued by any

such bank, with intent to use such plate or substance, or to cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by any of the said banks; or shall have in his custody or possession any note or notes, or blank note or notes, bill or bills, made, engraved, printed or otherwise prepared, after the similitude of any notes or bills issued by either of the said banks, with intent to pass, utter and publish such simulated notes, or to use such blanks, or cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said banks, or either of them; or shall have in his custody or possession any paper adapted to the making of bank notes or bills, and similar to the paper upon which any of the notes or bills of either of the said banks shall have been issued, with intent to use such paper, or cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by either of the said banks; such offender shall be guilty of felony, and be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. *Ibid.* § 165.

If any person shall fraudulently connect different parts of several bank notes, or other instruments, in such a manner as to produce one or more additional notes or instruments, with intent to pass or utter all or any thereof as genuine, or shall utter, publish or pass the same, or either of them, with the intent to defraud any person or body corporate, the said offence shall be deemed forgery or fraudulent uttering and publishing, in like manner, as if each of them had been falsely made, forged or counterfeited, and shall be punished accordingly. *Ibid.* § 166.

If any person shall have in his possession or under his custody, at the same time, ten or more similar false, forged, altered or counterfeited bank bills or notes, knowing the same to be false, forged, counterfeited or altered, with intent to utter or pass the same as true and genuine, or to sell the same, and thereby injure and defraud, or cause to injure and defraud, such offender shall, on conviction, be sentenced as in cases of forgery or fraudulently uttering and passing such notes. *Ibid.* § 167.

If any person shall fraudulently utter or pass any note or bill purporting to be the note or bill of a bank, company or association which never did in fact legally exist, knowing that the bank, company or association purporting to have issued the same never did legally exist, such offender shall, on conviction, be sentenced as in cases of uttering and publishing forged and counterfeited bank notes, knowing the same to be forged. *Ibid.* § 168.

Upon the trial of any indictment for making or passing, and uttering, any false forged or counterfeited coin, or bank note, the court may receive in evidence, to establish either the genuineness or falsity of such coin or note, the oaths or affirmations of witnesses who may, by experience and habit, have become expert in judging of the genuineness or otherwise, of such coin or paper, and such testimony may be submitted to the jury without first requiring proof of the handwriting or the other tests of genuineness, as the case may be, which have been heretofore required by law; and in prosecutions for either of the offences mentioned or described in the 164th, 165th, 166th, and 167th sections of the "Act to consolidate, revise and amend the penal laws of this commonwealth," the court shall not require the commonwealth to produce the charter of either of said banks, but the jury may find that fact upon other evidence, under the direction of the court. Act 31 March 1860, § 55. *Purd.* 260.

The falsely making, forging, altering or counterfeiting, or assisting or procuring the same to be done, or passing, uttering and publishing, or attempting to pass, utter or publish, any false, forged or counterfeit note, bill or check, or selling, uttering and delivering, or procuring the same to be done, or making, engraving or preparing, or having in possession, with intent to use, any plate, from which any counterfeit note may be printed, or having in possession any forged, counterfeited or altered note or paper adapted to the making of bank notes, with intent to use, or suffer to be used, in forging or counterfeiting, or fraudulently connecting different parts of any notes, with intent to fraudulently pass the same, or having in possession ten or more similar false, forged, altered and counterfeit notes, with intent to sell or pass the same, of any notes issued by the United States, or under the authority thereof, or any postage currency, issued by the same, or under any law of congress, or the

notes of any bank or association, created, chartered or incorporated under any law of congress, shall, to all intents and purposes, come within the provisions of the 164th, 165th, 166th and 167th sections of the act to which this is a supplement, passed on the 31st day of March 1860, as fully, to all intents and purposes, as if said notes, currency, banks and associations had been specially named or described in said sections, and shall constitute the same offence, and be punished in like manner, as if therein particularly named and described. Act 7 January 1867, § 1. *Purd.* 1457.

If any person shall falsely and fraudulently make, forge or counterfeit, or cause or procure, or willingly aid or assist, in making, forging, counterfeiting or altering, any coupon or other instrument of writing for the payment of money, purporting to be attached to, or form part of any bond or obligation, issued by the United States, by this or any other state or territory, or any municipal or other corporation, company or individual, or shall pass, utter, publish, or attempt to pass, utter or publish, as true and genuine, any false, forged or counterfeited coupon, or other instrument of the form and similitude thereof, as aforesaid, knowing the same to be false, forged or counterfeit, with intent to defraud any person, company or corporation whatever, or the United States, or this or any other state or territory, or shall sell, utter or deliver, or cause to be sold, uttered or delivered, any such false, forged or counterfeit coupon, or other instrument, as aforesaid, knowing the same to be such, or if any person shall have in his or her possession, or under his or her control, ten or more false, forged, counterfeited or altered coupons, or other instruments of writing purporting to be issued as aforesaid, knowing the same to be false, forged, counterfeited or altered, with intent to utter, pass or sell the same, and thereby to injure and defraud, or cause to be injured and defrauded, as aforesaid, such offender shall be guilty of felony, and on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years. *Ibid.* § 2.

If any person shall make, engrave or prepare, or cause or procure to be made, engraved or prepared, or have in his custody or possession, any plate or substance, made or prepared, after the similitude of any plate or substance, from which any bond, note, coupon or other instrument, issued by the United States, or this or any other state or territory, or any corporation, company or individual, shall have been printed or taken, or wherefrom or by means whereof, bonds, notes, coupons or other instruments for the payment of money, may be made, printed or prepared, after the similitude of such bonds, notes, coupons or other instruments issued as aforesaid, with intent to use such plate or substance, or cause or suffer the same to be used, in forging or counterfeiting any of the instruments aforesaid, or shall have in his or her possession or custody, any paper adapted to the making of any such bonds, notes, coupons or other instruments, similar to the paper on which said obligations or evidences of debt shall have been issued, with intent to use such paper, or suffer the same to be used, in forging or counterfeiting such instruments, such offender shall be guilty of felony, and on conviction, sentenced to pay a fine not exceeding one thousand dollars, and be imprisoned, by separate or solitary confinement at labor, not exceeding five years. *Ibid.* § 3.

To utter and publish a counterfeit note of a private unauthorized banker, knowing it to be counterfeit, is an indictable offence. 12 S. & R. 237.

And of a bank, the charter of which has expired. 4 B. 418.

To utter and publish a bank bill, is to declare or assert, directly or indirectly, by words or actions, that the note is good; but a note is not passed, until it is received by the person to whom it is offered. 2 B. 339.

Passing a paper is putting it off in payment or exchange; *uttering* it, is a declaration that it is good; with an intention to pass, or an offer to pass it. 1 Bald. 366.

The party accused of passing or uttering counterfeit money must be present when the act is done; or aiding, consenting or procuring it to be done. If done by consent, all consenting are equally guilty. *Ibid.*

The possession of other counterfeit money by the defendant or a confederate, at the time of passing counterfeit notes, is evidence of the *scienter* [knowledge]. *Ibid.*

On the trial of an indictment for passing counterfeit notes, evidence may be given of the defendant passing similar counterfeit notes, and counterfeit notes of other banks at the same time; but not of passing counterfeits of another bank at another time. 1 Bald. 514, 519.

If there is a concert between two or more to pass counterfeit notes, or any joint or concurrent action in passing them, the act of one is evidence against the other, and the possession of counterfeit notes by one is the possession of the other. 1 Bald. 292.

III. COUNTERFEITING PUBLIC BRANDS.

If any person shall counterfeit or fraudulently impress the brand, mark or any number or mark of any public inspector, or mark or number in imitation thereof, upon any article subject to inspection, or upon any cask or vessel containing such article, or shall counterfeit the stamp of any such inspector upon any plug, or shall fraudulently stamp any plug put into any cask, or shall fraudulently alter, deface, conceal or erase any inspection mark duly made; or if any person shall counterfeit or fraudulently impress upon any article liable to inspection, or upon any cask or vessel containing such article, the brand, mark or other mark of any miller, manufacturer, packer or other person, or shall fraudulently alter, deface or erase any such mark, or shall fraudulently impress the brand, mark or other mark of any person upon such article or vessel; the person so offending shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two hundred dollars, and undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court. Act 31 March 1860, § 172. Purd. 245.

IV. COUNTERFEITING TRADE MARKS.

If any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, any representation, likeness, similitude, copy or imitation of the private stamps, wrappers or labels, usually affixed by any mechanic or manufacturer to and used by such mechanic or manufacturer on or in the sale of any goods, wares or merchandise, with intent to deceive or defraud the purchaser or manufacturer of any goods, wares or merchandise whatsoever, such person shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding two years. Act 31 March 1860, § 173. Purd. 246.

If any person shall have in his possession any die, plate, engraving or printed label, stamp or wrapper, or any representation, likeness, similitude, copy or imitation of the private stamp, wrapper or label usually affixed by any mechanic or manufacturer to and used by such manufacturer or mechanic on or in the sale of any goods, wares or merchandise, with intent to use or sell the said die, plate, engraving or printed stamp, label or wrapper, for the purpose of aiding or assisting, in any way whatever, in vending any goods, wares or merchandise, in imitation of or intended to resemble and to be sold for the goods, wares or merchandise of such mechanic or manufacturer, such person shall be guilty of a misdemeanor, and, upon being thereof convicted, be sentenced to pay a fine not exceeding one hundred dollars, and to undergo an imprisonment not exceeding one year. Ibid. § 174.

If any person shall vend any goods, wares or merchandise, having thereon any forged or counterfeited stamps or labels of any mechanic or manufacturer, knowing the same to be forged or counterfeited, and resembling or purporting to be imitations of the stamps or labels of such mechanic or manufacturer, without disclosing the fact to the purchaser thereof, such person shall, upon conviction, be deemed guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars. Ibid. § 175.

Counties and Townships.

I. Corporate powers. townships.
 II. Actions by and against counties and III. Judicial decisions.

I. ACT 15 APRIL 1834. Purd. 203.

SECT. 2. Every city shall be deemed and taken to form part of the county in which it is, or may be, situate, saving nevertheless to each city and to the citizens thereof, all and singular the jurisdictions, powers, rights, liberties, privileges and immunities granted by the respective charters, and by the laws of this commonwealth.

SECT. 3. The several counties and townships in this state shall have capacity as they corporate—

First. To sue and be sued as such “by the corporate name of the county of —, or the township of —, as the case may be.”

Secondly. To take and hold real estate within their respective limits, and also personal property: *Provided*, That such real and personal estate shall be taken or held only for the benefit of the inhabitants of the respective county or township, and for such objects and purposes, and none other, as county or township rates and taxes are now, or hereafter may be authorized by law to be laid and collected, and for such other objects and purposes as may hereafter be expressly authorized by law.

Thirdly. To make such contracts as may be necessary and proper for the execution of the same objects and purposes.

SECT. 4. The corporate powers of the several counties and townships shall be exercised by the commissioners or supervisors thereof, respectively.

II. ACTIONS BY AND AGAINST COUNTIES AND TOWNSHIPS.

SECT. 5. All suits by a county or township, shall be brought and conducted by the commissioners or supervisors thereof respectively, and in all suits against a county or township, process shall be served upon and defence made by the commissioners or supervisors thereof, respectively.

SECT. 6. If judgment shall be obtained against a county in any action or proceeding, the party entitled to the benefit of such judgment may have execution thereof, follows, and not otherwise, viz.—It shall be lawful for the court in which such judgment shall be obtained, or to which such judgment may be removed by transcript from a justice of the peace or alderman, to issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with the interest and costs, to be paid to the party entitled to the benefit of such judgment, out of any moneys unappropriated of such county; or if there be no such moneys, out of the moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment.

SECT. 7. If judgment shall be obtained against a township, the like proceedings may be had to enforce payment out of the township funds, according to the circumstances of the case. (a)

III. A county can only be sued in the courts of the county itself; the courts of other counties have no jurisdiction. 5 W. & S. 181.

No action can be maintained against a county without a previous demand on the county commissioners. 11 H. 141.

But although orders drawn on townships and counties ought not to be sued until presented for payment, yet the court will not reverse for failure to make such demand, where the fact was not strictly in issue. 2 J. 33.

Interest is not recoverable on an order drawn by a municipal corporation on its

(b) By act 8 May 1854, § 21, the like proceedings are to be had to enforce a judgment obtained against a school district. Purd.

The like process must issue on a judgment against the city of Philadelphia. 4 C.

Or the city of Pittsburgh, 19 Leg. Int.

4. See act of 18 April 1858, § 3, for proceedings against townships in McKean county. P. L. 325; and act of 8d May 1862, § 5, as to proceedings against townships in Tioga. P. L. 580.

treasurer, until after presentment and refusal of payment. 7 H. 200. 1 Phila. R. 180. 3 Miss. 57.

A justice of the peace has jurisdiction of an action against a county. 11 H. 141.

The action must be against "the county;" if it be brought against "the commissioners of the county," it is erroneous. 7 W. & S. 197. 3 Pittsburgh Leg. J. 237.

But such an objection to the form of action can only be raised by plea in abatement. 5 H. 184. 6 Barr 292. And such mistake could be immediately amended under the act of 1852.

Service on two of the county commissioners is good, although one of them has not taken the oath of office; and, it seems, that service upon one would be sufficient. 6 Wh. 66.

No other mode of enforcing a judgment against a county can be pursued than that which is pointed out by the act of 1834; there can be no seizure, extension or sale of the property of the county. 7 W. & S. 200.

A judgment against a municipal corporation is not a lien upon its real estate; and this, because no execution can issue against the defendant's land upon such a judgment. 12 C. 126.

A municipal corporation has a right to appeal from an award of arbitrators without payment of costs. 8 C. 443. But not without an affidavit that the appeal is not intended for delay. 4 C. 207.

A municipal corporation cannot be made garnishee, either in foreign or execution attachment. 5 C. 173.

After judgment on a *mandamus* against a municipal corporation, and the issuing of a peremptory writ commanding the defendant to make provision for the payment of the relator's claim, the corporate officers have no discretion; their only duty is obedience to the process of the court. 12 C. 263.

A township cannot give bail for stay of execution. 2 M. 397.

An action on the case will lie against a township to recover damages for an injury sustained by reason of the negligence of the supervisors to keep the road in repair. 5 W. & S. 545.

The mere form of the contract with a corporation is not of much importance; they may be sued for torts, or on verbal promises made by their accredited officers or agents, or upon implied contracts. 4 H. 461.

By act 21 April 1858, § 8, municipal corporations are exempted, in all cases, from giving bail or filing affidavits of defence. Purd. 804.

Taxes on real estate cannot be apportioned among the different persons who may become owners of it during the year. The person charged at the beginning of the year is liable for the taxes of the whole year. The duplicates, with the names of the several persons charged with the year's taxes, are delivered by the commissioners to the several collectors, with a warrant to collect the several taxes from those persons, and not from any others. And the persons charged in the duplicate are personally liable for the tax, and their bodies may be taken in execution, if no goods or chattels are to be found. The collector can look to no other person. When the person who, in the beginning of the year, is charged with the taxes, aliens during the year, it is his business to make his bargain with the alienee [the person to whom the property is transferred] as to the taxes. 12 S. & R. 299.

Covenant.

A COVENANT is the agreement or consent of two or more, by deed in writing, sealed and delivered, whereby either or one of the parties doth promise to the other that something is done already, or shall be done afterwards. He that makes the covenant is called the *covenantor*, and he to whom it is made, the *covenantee*. Whart. Law Dict. 194.

All covenants between persons must be to do what is lawful, or they will not be binding; and, if the thing to be done be impossible, the covenant is void. Dyer 112.

Covenant is an action brought for the recovery of *damages* for breach of any agreement entered into, under *seal*, between the parties. Esp. N. P. 265.

No precise or formal terms are necessary to constitute a covenant. The inquiry always is, what was the intention of the parties. 5 Cow. 170.

In construing a covenant it must be considered with the context, and must be performed according to the intention of the parties, as derived from both. 2 Cow. 781.

The covenants which most frequently occur in the practice of a justice of the peace are those contained in leases and in ground-rent deeds.

The lessor may maintain covenant against the assignee of the lease, by virtue of the statute of 32 Hen. 8, c. 34. 1 J. 489. And by act 25 April 1850, § 8, this right has been extended to ground-rents reserved in a conveyance in fee: the statute gives an action of covenant to the lessee, his heirs, executors, administrators or assigns. Purd. 516.

Under the act of 1850 an action of covenant for ground-rent will lie against the assignee of the lessee, for arrears which accrued before the assignment. 9 C. 435.

The assignee of the reversion may sue in his own name upon express covenants in a lease, running with the land, such as for payment of rent, &c. 4 P. L. J. 117. 3 Ibid. 73.

The act of 1850 gives the action of covenant for ground-rent reserved by deed poll; and it lies, in such case, by the assignee of the rent against the assignee of the land. 9 H. 450.

A justice of the peace has jurisdiction of an action of covenant by the assignee of a ground-rent against the assignee of the land who is in possession. Ibid.

The purchaser at a sheriff's sale of a ground-rent may maintain covenant against the owner of the land out of which it issues. 1 R. 155.

The owner of an undivided portion of a ground-rent may maintain a separate action of covenant for his proportion of the arrears. 10 Wr. 439. 5 Phila. 139.

Arrears of ground-rent, in a personal action, bear interest from the time they fall due. 4 Wh. 516. But not, when recourse is had to the land. 2 B. 146. 2 Barr 97.

The assignee of the lessee ought not to be charged with interest on arrears which accrued prior to the conveyance to him; but on subsequent arrears he is liable for interest. 9 C. 435. And see 4 Phila. 186.

The executors of the covenantor in a ground-rent deed are not liable for ground-rent which accrued after his decease; the covenant does not survive against them, except as to arrears due in the lifetime of the covenantor. 10 H. 510. 11 H. 316. But suit may be brought against them, though the judgment can only be *de terris*. 11 Wr. 288.

All the assignees of a lot of ground, subject to a ground-rent, though claiming by assignments of different dates, may be joined in an action for arrears of ground-rent accruing after their several assignments. 6 H. 9.

Covenant will lie against an assignee of part of the thing demised. 2 P. R. 23.

A purchaser at sheriff's sale, subject to an apportioned ground-rent, is liable to an action of covenant for the arrears. 22 Leg. Int. 236.

A distinct engagement on the part of a landlord with the assignee of the lessee, by which the former is accepted as tenant, and rent is received from him, does not relieve the lessee from the covenants of the lease. 8 Barr 111. 2 W. & S. 556. 6 Wr. 77.

Under a covenant by a lessee to pay the rent clear of all *charges* and *assessments* whatsoever, he must pay all taxes upon the land. 1 Br. 221.

Under a lease wherein the tenant covenanted to pay "all taxes and *assessments* which may be made on the property during the term," he is liable to an assessment for grading, paving, &c., under an act of assembly passed subsequently to the date of his lease. 2 Pitts. Leg. J., 8 December 1853. But see 14 Pitts. L. J. 541.

Otherwise, such assessments are chargeable to the owner of the freehold. 11 H. 305. See 2 Bradford 311.

An action of covenant lies on an instrument under seal exclusively; and not on a specialty modified or enlarged by parol. 2 W. 456. 6 W. & S. 443.

Where a contract under seal is altered by parol, it all becomes parol, but a mere additional parol agreement, not changing or modifying the one under seal, will not have this effect, nor will a stipulation releasing or waiving part performance. 2 Gr. 426.

Cruelty.

I. Abandoning infants.

II. Maltreatment of infants and apprentices.

III. Cruelty to animals.

IV. Summary convictions.

ACT 31 MARCH 1860. Purd. 225, 233.

I. SECT. 45. If the father or mother of any child, under the age of seven years, or any person to whom such child shall have been confided, shall expose such child in any highway, street, field, house, outhouse or other place, with intent to wholly abandon it, such person shall be guilty of a misdemeanor, and upon conviction thereof, be sentenced to an imprisonment not exceeding twelve months, and to pay a fine not exceeding one hundred dollars.

II. SECT. 90. If any master or mistress of an apprentice, or any person having the legal care and control of any infant, being legally liable to provide for such apprentice or infant, necessary food, clothing or lodging, and shall wilfully, and without lawful excuse, refuse or neglect to provide the same; or when the master or mistress, or person having the legal care and control of such apprentice or infant, shall unlawfully and maliciously assault such apprentice or infant, whereby his life shall be endangered, or his health shall have been, or shall be likely to be permanently injured; such master, mistress or other person, on being thereof convicted, shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding two years, or both, or either, at the discretion of the court.

III. SECT. 46. If any person shall wantonly and cruelly beat, torture, kill or maim any horse or other domestic animal, whether belonging to himself or another, every such person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding two hundred dollars, or undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.

IV. ACT 29 MARCH 1869. Purd. 1548.

SECT. 1. Any person who shall, within this commonwealth, wantonly or cruelly ill-treat, overload, beat or otherwise abuse any animal, whether belonging to himself or otherwise, or shall keep or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, and every person who shall encourage, aid or assist therein, or who shall permit, or suffer any place to be so kept or used, shall be deemed guilty of a misdemeanor, and on being convicted thereof, before any alderman or magistrate, shall be fined by the said alderman or magistrate for the first offence in a sum not less than ten dollars nor more than twenty dollars, and for the second

and every subsequent offence in a sum not less than twenty, nor exceeding fifty dollars, to be paid one-half to the informer (who shall be a competent witness notwithstanding such interest), and the other half to the county where the offence may be committed; and if said fine or penalty and the costs of the proceedings be not paid, then said alderman or magistrate shall commit said offender to the county prison, there to remain until discharged by due course of law: *Provided*, That when the fine imposed exceeds the sum of ten dollars, the party complained against may appeal from the decision of said alderman or magistrate to the court of quarter sessions, upon his entering bail in the nature of a recognisance, in the usual manner, for his appearance at said court, when the offence shall be prosecuted in the same manner as is now directed by law in other cases of misdemeanor.

SECT. 2. If, in lieu of deciding the cause, such alderman or magistrate shall bind over or commit such person to appear at the court of quarter sessions, or if such person shall appeal as aforesaid, or upon such binding over or commitment appear before the said court and be there convicted of such misdemeanor, he shall be sentenced to pay a fine not exceeding two hundred dollars, payable as aforesaid, or undergo an imprisonment not exceeding one year, or both, at the discretion of the court.

SECT. 3. If any person shall be arrested for carrying, or causing, or allowing to be carried in or upon any cart, or other vehicle whatsoever, any creature in a cruel or inhuman manner, the person taking him into custody may take charge of such vehicle and its contents, and deposit the same in some safe place of custody, and any necessary expenses which may be incurred for taking charge of and keeping the same, and sustaining any animal attached thereto, shall be a lien thereon, to be paid before the same can lawfully be recovered, or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same, of the owner of said creature, in any action therefor.

SECT. 4. If any maimed, sick, infirm or disabled creature shall, by any person, be abandoned to die in any public place, such person shall be guilty of a misdemeanor; and it shall be lawful for any alderman or magistrate to appoint suitable persons to destroy and remove such creature, if unfit for further use, at the cost of the owner thereof, recoverable before the said alderman or magistrate.

SECT. 5. Any policeman or constable of any city or county, or any agent of the Pennsylvania Society for the Prevention of Cruelty to Animals, shall, upon his own view of any such misdemeanor, or upon the complaint of any other person who may declare his or her name and abode to such policeman, constable or agent, make arrests, and bring before any alderman or magistrate thereof, offenders found violating the provisions of this act.

Custom and Usage.

WHEN the custom of a country, or a particular place is established, it may enter into the body of a contract without being inserted. 5 B. 287. See 11 P. F. Sm. 107.

A custom or usage, to make it obligatory, must be ancient (at least sufficiently so to be generally known), certain, uniform and reasonable. 4 R. 212. 3 W. 179.

Customs become law from immemorial and universal acquiescence either in a neighborhood or in the entire community to be affected. 7 P. F. Sm. 291.

An usage of plasterers to charge one-half part of the size of the windows, where the price agreed on includes the cost of materials, is unreasonable and bad. 8 Y. 818.

Although an usage is often resorted to for explanation of commercial instruments, it never is, nor ought to be, received to contradict a settled rule of commercial law. 8 W. 179.

A usage which is to govern a question of right between parties must be so certain, uniform and notorious, as to be understood and known by them. 1 Gilp. 356. 1 H. 37. 1 Wall. Jr. 64. Bright. R. 76, 365. 8 Am. L. J. 485.

The usage of a department of government in settling its accounts can have no effect on those of an individual, unless it be certain, uniform and notorious. 1 Gilp. 356.

Evidence is admissible of a custom or usage fixing the construction of the words "inevitable dangers of the river" in a bill of lading for the transportation of goods on a river. 8 S. & R. 533. 2 B. 72.

Where an usage is so established as to leave no reasonable doubt of its existence, it becomes a part of the law, and the court will decide upon it as such, without requiring it to be again proved. 1 Pet. C. C. 230.

Thus the rate of interest in China is so well established to be 12 per cent. per annum, that the court will not require it to be proved. Ibid.

A custom which allows a payment of advance wages by the owners of a vessel to their own agent, and a payment by him to some boarding-house keeper, with whom the seamen must settle whether he be under legal obligation to him or not, is neither a reasonable nor a proper custom. 23 Law Rep. 551.

On the sale of a raft, it is proper for the court to refer to the custom of the river, which required a measurement, certificate and payment of money, to complete the contract. 2 C. 467.

The rule of law in relation to fixtures, cannot be evaded by proving a custom in opposition to it. 4 C. 271.

By the custom of Pennsylvania, a book account for goods sold, bears interest from the end of six months from the sale and delivery. 6 C. 346.

Where the usage of trade has fixed a period at which book accounts bear interest, this becomes the law of the contract. Ibid.

In an action by a bank against one of its customers, evidence is admissible of the custom of the bank to enter payments on account of an indorsement, on the indorser's bank book; in order to rebut the presumption that would otherwise arise, that such entry was a deposit and not a payment. 9 C. 134.

Evidence will not be received of any custom, however ancient, if contrary to morality. 6 Wr. 159.

A plaintiff, to prevent the bar of the statute of limitations, cannot be allowed to prove a custom existing among merchants engaged in the same business, by which all bills must be settled by note, on January 1st and July 1st after purchase. This would only be evidence, if uniform and universal, or if made part of the contract, or assented to by the defendant. 4 Wr. 241.

Damages.

DAMAGES signify, generally, any hurt or hindrance that a man receives in his estate; but in a particular sense, it is applied to what the jurors are to inquire of, and bring in, when any action passeth for the plaintiff. Co. Litt. 257. *Damages* are a species of property acquired and lost by suit and judgment at law, and are given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for battery, for imprisonment, for slander, for trespass. 2 Bl. Com. 488.

A justice may give judgment for damages, without the intervention of referees, if *neither* of the parties request that referees may be appointed. 1 S. & R. 234.

A justice may give judgment for damages, in an action of trespass for entering plaintiff's house, and making a noise and disturbance therein, although no actual loss be proved. 13 S. & R. 420. 13 Leg. Int. 29.

The paramount rule in assessing damages is that every person unjustly deprived of his rights, should at least be fully compensated for the injury sustained. 2 C. 143.

The ordinary rule of damages in trover is the value of the goods taken, with interest. 9 C. 251.

Exemplary damages may be given in trespass, whenever there has been oppression, outrage or vindictiveness on the part of the trespasser. But in the absence of proof of aggravation, compensation is the proper measure of damages. 10 C. 48.

The measure of damages for seizing property in transit, is the value of the property, at the time, at the place of consignment, less the costs and charges of conveying it there. 5 C. 40.

In an action against the publishers of a newspaper, for neglecting to insert an advertisement of a public sale of real estate, for which they received payment in advance, the measure of damages, in the absence of fraud, is the amount paid to them for the publication of such advertisement: they are not liable to speculative damages. 11 C. 107.

In all actions for the breach of a contract, the loss or injury for which damages are sought to be recovered, must be a proximate consequence of the injury: a remote or possible loss is not sufficient ground for compensation. 12 C. 360.

But the loss of profits or advantages which must have resulted from a fulfilment of the contract, may be compensated in damages, where they are the direct and immediate fruits of the contract, and must, therefore, have been stipulated for, and have been in the contemplation of the parties when it was made. 12 C. 360. 10 C. 9.

To entitle a plaintiff, however, in an action on a contract, to recover more than nominal damages for its breach, there must be evidence that an actual substantial loss or injury has been sustained; unless the contract itself furnish a guide to the measurement of damages. 12 C. 360. But if the plaintiff's rights have been invaded, he is entitled to a nominal verdict, though the damages be not appreciable. P. F. Sm. 419.

Generally, in actions upon contract, where the plaintiff fails in proving the amount due, or the precise quantity, he can recover only the lowest sum indicated by the evidence. Thus, where delivery of a bank note was proved, but its denomination was not known, the jury were rightly instructed to presume it to be of the lowest denomination in circulation. 2 Greenl. Ev. § 255.

In an action upon a warranty, the measure of damages is the difference between the actual value and the value of the thing when sound; and that without regard to the price originally given, or obtained upon a resale. 4 Barr 168. 12 C. 405.

The plaintiff cannot recover in damages the expenses of prosecuting a suit to enforce the contract. 5 C. 254.

Upon breach of an agreement to deliver specific articles, the measure of damages is the difference between the market and the contract price, at the time specified for delivery. 2 P. F. Sm. 363.

Debt.

I. Of debt, and its various kinds.

III. Of the right of appropriation.

II. Of the joint and several liability of debtors.

I. OF DEBT, AND ITS VARIOUS KINDS.

A **DEBT**, in the usual acceptance of the word, is a sum of money due from one person to another. But in the legal sense it is taken to be an action, which lieth when a man oweth a certain sum of money, by obligation or bargain for a thing sold, or by contract, &c., and the debtor will not pay the debt at the day agreed. Selw. N. P. 484.

Debt is a contract whereby a chose in action, or right to a certain sum of money, is mutually acquired and lost. Any contract whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt; and taken in this light, it comprehends a great variety of acquisitions, being usually divided into *debts of record*, *debts by specialty*, and *debts by simple contract*. A *debt of record* is a sum of money which appears to be due by the evidence of a court of record. *Debts by specialty* or special contract, are such whereby a sum of money becomes, or is acknowledged to be due by deed or instrument under seal. *Debts by simple contract* are such where the contract upon which the obligation arises is matter not ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any, or by notes unsealed. 2 Bl. Com. 465.

It seems that wherever *indebitatus assumpsit* lies, debt may be brought. 1 Pet. C. C. 149.

Debt lies to recover the annual interest of money payable on bond, where the principal is not due. 1 B. 152.

An action of debt will not lie upon a mortgage which contains no express covenant to pay, and therefore creates no personal responsibility. 7 W. 360.

In a suit on a penalty *by the party aggrieved*, damages may be recovered for the detention; *secus*, if the suit be by a common informer. 2 R. 196.

A verdict for the plaintiff generally in an action of debt, without finding any sum, is bad; and the judgment will be reversed on error. 2 R. 53.

A verdict in an action of debt for a larger sum than that demanded in the writ, is good, if the excess appear to be interest on the principal sum. 1 W. 428.

Debts may be attached before they are due and payable. 1 Sm. 47. 8 H. 412. A debt in suit may be attached. 2 D. 277. 1 Barr 380.

II. OF THE JOINT AND SEVERAL LIABILITY OF DEBTORS.

If two enter into a bond, and one die before judgment, the survivor shall be charged alone. 7 S. & R. 363. Bright. R. 65.

In all suits now pending or hereafter brought in any court of record in this commonwealth, against joint and several obligors, copartners, promissors or the indorsers of promissory notes, in which the writ of process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process or judgment shall not be a bar to recovery in another suit against the defendant or defendants, not served with process. Act 6 April 1830, § 1. Purd. 776.

In all cases of amicable confession of judgment by one or more of several obligors, copartners or promissors, or the indorsers of promissory notes, such judgment shall not be a bar to recovery in such suit or suits as may have to be brought against those who refuse to confess judgment. Ibid. § 2.

This act applies to proceedings before a justice of the peace. 3 W. 203. It is a remedial statute, and to be liberally construed. 5 Barr 401. 1 J. 394.

Joint owners of a steamboat are within the act. 1 J. 394. It is applicable to cases, not only of joint contract, but also of joint action. 6 Wh. 268.

The original process should be issued against all the defendants. 5 Barr 402. The second writ should be issued only against the defendant not served. 6 W. 528.

And from the same forum: otherwise it will not take the case out of the statute of limitations. 2 H. 313.

The act does not extend to the case of a defendant dying pending the action. 2 W. 204. 1 W. & S. 112.

A plaintiff by accepting the voluntary appearance of two joint obligors to a writ issued against three, and proceeding to judgment and execution, does not debar himself of the right to proceed against the one not served. 5 Barr 399.

The second section of the act of 1830 has reference to subsequent separate actions against the parties. If, in a joint action, the plaintiff accept a confession of judgment from one of the defendants, it is a bar to further proceedings against the others. 2 T. & H. Pr. 632. But see 3 Gr. 52, 302.

Where a judgment shall hereafter be obtained against two or more copartners, or joint or several obligors, promissors or contractors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone. Act 11 April 1848, § 3. Purd. 776.

In any suit or suits which may hereafter be brought against the executors or administrators of a deceased copartner, for the debt of the firm, it shall not be necessary to aver on the record, or prove on the trial, that the surviving partner or partners is or are insolvent, to enable the plaintiff to recover. Ibid. § 4.

Where a judgment shall be hereafter recovered against one or more of several copartners, or joint and several obligors, promissors or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded, are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits against any person or persons, who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably or by adversary process. Ibid. § 5.

This act renders the deceased partner's estate liable, in the first instance, whether the survivor be solvent or insolvent. 8 C. 115.

The judgment recovered against the surviving partner, it seems, is not evidence against the representatives of the deceased partner, for they are no parties to it. 10 C. 411.

A receipt not under seal, to one of several joint debtors, for his part of the debt, if given for a valid consideration, discharges the other altogether. 1 R. 391. But this is altered by the act 22 March 1862. Purd. 1282.

By the law of Pennsylvania, as it is now settled, a discharge, acquittance or release of a debt, is, though secured by a formal sealed instrument, as valid without a seal as with it. Ibid. 398. But it requires proof of a consideration to support it. 9 C. 268.

Where one of several principals pays the amount of a judgment against them all, he is not entitled to an assignment of the judgment so as to obtain contribution, in the same manner that a surety would be entitled to be substituted, when he pays the debt of his principal. 1 P. R. 361.

When there are two joint debtors, and the creditor has the means of satisfaction in his hands by legal process levied on the property of one, and chooses not to retain it, but suffers it to pass from his hands, the other debtor is discharged *pro tanto* [for so much]. 16 S. & R. 252.

III. OF THE RIGHT OF APPROPRIATION.

Where a debtor indebted on several accounts makes a payment, he may apply it to either account; if he does not, the creditor may do so; if neither does, the law will appropriate it according to the justice of the case, provided there are no other parties interested. 1 Gilp. 106.

But a debtor cannot appropriate a payment in such a manner as to affect the relative liability or rights of his different sureties without their assent. Ibid.

Although, as between the immediate parties, the creditor has a right to appropriate where the debtor has failed to do so, yet this right must be exercised within a reason-

able time after the payment, and by the performance of some act which indicates an intention to appropriate. 12 S. & R. 305.

And where there is a third person whose interests will be affected by the result of a particular appropriation by the creditor, it will not be permitted. *Ibid.*

If a payment be made by a county treasurer, on account of his indebtedness to the commonwealth, without any distinct appropriation of the amount, it is competent for the accounting officers to appropriate it to the payment of the indebtedness of the treasurer, for which the county is not liable. 12 C. 524.

It is to be presumed, in the absence of any actual appropriation, that a debtor paying money intends to apply the payment to a debt then payable, and bearing interest. 10 W. 255.

Where a general payment is made, in the absence of any appropriation by the parties, the law will apply it in discharge of the earliest liabilities of a running account. 9 C. 151. 2 Gr. 28.

Where no application of a payment is made either by the debtor or the creditor, the law will apply it in the way most beneficial to the creditor; and therefore, to the debt which is least secured, unless to the prejudice of a surety. *Ibid.*

If the creditor, in the absence of any appropriation by the debtor, credit a payment generally on an open account, the law will not afterwards appropriate it to a judgment, although older than the account; especially if the creditor have security for the judgment and none for the account. 1 C. 411.

The application of payments may be proved by circumstances, as well as by words. 7 Blackf. 286. 2 J. 238. Story's Eq. § 459 b.

Debtor and Creditor.

Of the extinguishment and satisfaction of debts; and of collateral securities.

A CHECK drawn by one person in favor of another, and paid to the latter, is presumed to have been received on account of a debt shown to have existed at the time. 5 C. 128.

But where the check of a third party is received by a creditor from his debtor, upon a pre-existing debt, the presumption is, that it was received as a conditional payment, and as satisfaction of the debt, if and when paid. 5 C. 448.

A paid check, drawn by the defendant's wife, is evidence of payment, in the absence of proof of any other transaction to which it could be applied. 9 C. 235.

Promissory notes given by a purchaser to a vendor are evidence of payment, but not of set-off, and, unless it otherwise appear, should be presumed to have been given for a pre-existing debt, and not for debts contracted afterwards. 4 C. 241.

The receipt of a negotiable promissory note operates as an extinguishment of a prior existing debt, if so intended between the parties. 8 C. 493.

The general rule seems to be, that if one indebted to another, by simple contract, give his creditor a promissory note, drawn by himself, for the same sum, without any new consideration, the new note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor. 15 S. & R. 162.

Whether a note or bond were accepted in satisfaction of the original claim, is matter of fact for the jury, and it is error for the court to decide it as matter of law. 10 S. & R. 807. 4 H. 450.

But, if the amount be lost by the negligence of the person to whom it was transferred, it is to be considered as payment of the debt. 2 W. C. C. 191.

If a creditor take a note from his debtor, indorse it, and get it discounted at bank, and apply the proceeds to the credit of the maker, and afterwards the note be protested and paid by the creditor, this is not such a parting with the note as makes it an extinguishment of the preceding debt. 3 S. & R. 283.

A confession of judgment by a third person to the plaintiff, for a simple con-

tract debt due from the defendant to the plaintiff, is not a merger of the debt. 11 S. & R. 149.

Nor is the judgment a payment or extinguishment of the debt, unless it were so intended and agreed by the parties. Ibid.

A bill or note taken in satisfaction of a precedent debt, imposes no further duty on the creditor, than to use reasonable diligence in obtaining payment or acceptance, by presenting it in season, and giving notice of its dishonor to the debtor from whom it was had, if he be a party to it; but if he be not a party to it, even want of notice is immaterial, unless he have sustained actual loss from it 4 W. 308.

Where a negotiable note has been given for the price of goods sold by the plaintiff to the defendant, and the plaintiff brings suit upon the original contract, the note must be produced at the trial, or it must be proved to have been lost or destroyed. Ibid. 452.

It is well established, that the receipt of one thing in satisfaction of another, is a good payment; as the acceptance of a horse in lieu of a sum of money; or, of a bond by a third person, in discharge of a prior obligation. 1 D. 217.

But an agreement, without any consideration, to receive a less sum from the debtor, does not extinguish, nor is it a satisfaction of the original debt. 2 W. C. C. 180. 3 W. 319.

An agreement to deliver goods, or a less sum of money and goods for the residue, in discharge of a greater sum owing and payable, must be fully executed, and the goods, or money and goods, accepted in satisfaction thereof; otherwise it is no extinguishment of the original debt or demand. Ibid. 128. 2 Greenl. Ev. § 28.

But the payment of part of a debt, in satisfaction, if the creditor agree to receive the smaller sum in full, is a discharge of the whole demand, when such agreement is fully executed. 2 Am. L. J. 186.

One who receives a counterfeit note in payment from an innocent person, and retains it six months, is guilty of unreasonable negligence, and cannot recover of the person from whom he received it. 13 S. & R. 318. 1 Pet. C. C. 307.

A specialty received as *collateral security*, for a simple contract debt, does not extinguish the simple contract. 1 S. & R. 294.

A promissory note of a third person, received as collateral security for a debt, may be sued, and the amount recovered when due, without first resorting for payment to the original debtor. 4 W. 141.

If a claim be transferred by a debtor to his creditor as collateral security for the payment of a debt, it is incumbent on such creditor to use ordinary diligence to realize the claim; and he would be responsible for loss occasioned by an omission to do so. 12 C. 89. But if the transfer be of a special character, authorizing the creditor to receive the claim when collected, then it imposes no responsibility on the creditor as to the diligent prosecution of it. 8 W. 192.

A creditor cannot split up an entire cause of action, so as to maintain two suits upon it. If he do, a recovery in the first suit, although for less than his whole claim, is a bar to the other suit. 11 S. & R. 78.

There is no principle of law which will sanction an action by a creditor against the debtor of his debtor, upon the ground of contract. 1 Pet. C. C. 276. 1 D. 155.

Where a debtor owes two parties, one of them may accept payment in any thing of value he can get, though he know that the debtor owes the other party and cannot pay both. 2 C. 85.

Deeds.

- I. Probate and acknowledgment of deeds. III. Execution of deeds.
II. Forms of acknowledgment, &c.

I. ACT 28 MAY 1715. Purd. 310.

SECT. 1. There shall be an office of record in each county of this province [state,] which shall be called and styled **THE OFFICE FOR RECORDING OF DEEDS**, and shall be kept in some convenient place in the said respective counties, and the recorder shall duly attend the service of the same, and at his own proper cost and charges shall provide parchment, or good large books of royal or other large paper, well bound and covered, wherein he shall record, in a fair and legible hand, all deeds and conveyances which shall be brought to him for that purpose, according to the true intent and meaning of this act.(a)

SECT. 2. All bargains and sales, deeds and conveyances of lands, tenements and hereditaments, in this province, may be recorded in the said office; but before the same shall be so recorded, the parties concerned shall procure the grantor or bargainor named in every such deed, or else two or more of the witnesses (who were present at the execution thereof) to come before one of the justices of the peace of the proper county or city where the lands lie, who is hereby empowered to take such acknowledgment of the grantor, if one, or of one of the grantors, if more.

SECT. 3. But in case the grantor be dead or cannot appear, then the witnesses brought before such justice shall, by him, be examined upon oath or affirmation, to prove the execution of the deed then produced: whereupon the same justice shall, under his hand and seal, certify such acknowledgment or proof, upon the back of the deed, with the day and year when the same was made, and by whom; and after the recorder has recorded any of the said deeds, he shall certify on the back thereof, under his hand and seal of his office, the day he entered it, and the name or number of the book or roll, and page where the same is entered.

SECT. 4. All deeds and conveyances, made and granted out of this province, and brought hither and recorded in the county where the lands lie, (the execution whereof being first proved by the oath or solemn affirmation of one or more of the witnesses thereunto, before one or more of the justices of the peace of this province, or before any mayor, or chief magistrate or officer of the cities, towns or places where such deeds or conveyances are so proved, respectively,) shall be as valid as if the same had been made, acknowledged or proved, in the proper county where the lands lie in this province [state.]

SECT. 5. All deeds and conveyances made, or to be made, and proved or acknowledged, and recorded as aforesaid, which shall appear so to be, by indorsement made thereon, according to the true intent and meaning of this act, shall be of the same force and effect here, for the giving possession and seisin, and making good the title and assurance of the said lands, tenements and hereditaments, as deeds of feoffment, with livery and seisin, or deeds enrolled in any of the king's courts of record at Westminster, are, or shall be in the kingdom of Great Britain; and the copies or exemplifications of all deeds so enrolled, being examined by the recorder, and certified under the seal of the proper office, (which the recorder or keeper thereof is hereby required to affix thereto,) shall be allowed in all courts where produced, and are hereby declared and enacted to be as good evidence, and as valid and effectual in law as the original deeds themselves, or as bargains and sales enrolled in the said courts at Westminster, and copies thereof can be, and the same may be showed, pleaded and made use of accordingly.

SECT. 7. If any person shall forge any entry of the said acknowledgments, certificates or indorsements, whereby the freehold or inheritance of any man may be changed, he shall be liable to the penalties against forgers of false deeds, &c.; and if any person shall perjure himself in any of the cases herein above-mentioned, he

(a) Exemplifications of deeds, &c., recorded in one county, may be recorded in any other, by act 26 January 1870. P. L. 13.

shall incur the like penalties as if the oath or affirmation had been in any court of record. (a)

ACT 24 FEBRUARY 1770. Purd. 311.

SECT. 2. Where any husband and wife shall hereafter incline to dispose of and convey the estate of the wife or her right of, in or to, any lands, tenements or hereditaments whatsoever, it shall and may be lawful to and for the said husband and wife, to make, seal, deliver and execute any grant, bargain and sale, lease, release, feoffment, deed, conveyance or assurance in the law whatsoever, for the lands, tenements and hereditaments intended to be by them passed and conveyed, and after such execution, to appear before one of the judges of the supreme court, or before any justice of the county court of common pleas of and for the county where such lands, tenements or hereditaments shall lie, and to acknowledge the said deed or conveyance, which judge or justice shall, and he is hereby authorized and required to take such acknowledgment, in doing whereof he shall examine the wife separate and apart from her husband, and shall read, or otherwise make known, the contents of such deed or conveyance to the said wife; and if, upon such separate examination, she shall declare that she did voluntarily, and of her own free will and accord, seal, and as her act and deed, deliver the said deed or conveyance, without any coercion or compulsion of her said husband, every such deed or conveyance shall be, and the same is hereby declared to be, good and valid in law, to all intents and purposes, as if the said wife had been sole, and not covert, at the time of such making and delivery, any law, usage and custom to the contrary in any wise notwithstanding.

ACT 18 MARCH 1814. Purd. 314.

SECT. 1. Each alderman of the city of Philadelphia and justice of the peace of this commonwealth, shall have power to take and receive the acknowledgment or proof of all deeds, conveyances, mortgages or other instruments of writing, touching or concerning any lands, tenements or hereditaments, situate, lying and being in any part of this state, and also power to take and receive the separate examination of any *feme covert* touching or concerning her right of dower, or the conveyance of her estate, or right in or to any such lands, tenements or hereditaments, as fully to all intents and purposes whatsoever, as any judge of the supreme court, or president or associate judge of any of the courts of common pleas within this commonwealth. (b)

(a) This section is not expressly repealed by the revised Penal Code, and does not appear to be fully supplied by it.

(b) Deeds conveying lands in Pennsylvania, made and executed within the state, may be acknowledged or proved before any judge of the supreme court, or the president or associate judge of the court of common pleas in any county, or the mayor or recorder of the city of Philadelphia, Lancaster, Pittsburgh, Allegheny, Carbondale, Williamsport or Lock Haven, or any recorder of deeds or notary public, or any alderman of the said cities, or justices of the peace of any county. If made and executed out of the state and within the United States, they may be acknowledged or proved before any notary public, or any mayor, chief magistrate or officer of the city, town or place where such deeds or conveyances are or shall be made or executed and certified under the common or public seal of the city, town or place, or before one of the judges of the supreme court of the United States, or before a judge of the district court of the United States, or before any one of the judges or justices of the supreme or superior court or courts of common pleas of any state or territory within the United States, or be-

fore any one of the judges or justices of a court of probate, or court of record of any state or territory, within the United States, and so certified under the hand of the said judge and seal of the court, or before any commissioner residing out of the state of Pennsylvania and in any other of the United States, or in the District of Columbia or any of the territories, authorized for that purpose by the governor of this commonwealth; or before any officer or magistrate of such state or territory, duly authorized to take acknowledgments of deeds, his authority to be proved by the certificate of the clerk or prothonotary of any court of record. If made and executed in any foreign state, they may be acknowledged or proved before any notary public, mayor or chief magistrate, or officer of the cities, towns or places where such deeds or conveyances are or shall be made or executed, and certified under the common or public seal of such cities, towns or places; or before any consul or vice-consul of the United States, duly appointed for and exercising consular functions in the state, kingdom, county or place where such deeds or conveyances, &c., may or shall be made and executed, and certified under the public official seal of such

ACT 11 APRIL 1848. Purd. 322.

SECT. 6. Every species and description of property, whether consisting of real, personal or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture by will, descent, deed of conveyance or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property; and the said property, whether owned by her before marriage, or which shall accrue to her afterwards, shall not be subject to levy and execution for the debts or liabilities of her husband, nor shall such property be sold, conveyed, mortgaged, transferred or in any manner incumbered by her husband, without her written consent first had and obtained and duly acknowledged before one of the judges of the courts of common pleas of this commonwealth, that such consent was not the result of coercion on the part of her said husband, but that the same was voluntarily given and of her own free will: *Provided*, That her said husband shall not be liable for the debts of the wife contracted before marriage: *Provided*, That nothing in this act shall be construed to protect the property of any such married woman from liability for debts contracted by herself or in her name by any person authorized to do, or from levy and execution on any judgment that may be recovered against a husband for the torts of the wife, and in such cases execution shall be first had against the property of the wife.

ACT 11 APRIL 1856. Purd. 323.

SECT. 1. So much of the act relating to the right of married women, and for other purposes, passed the 11th April 1848, as requires the consent of a married woman to be first had and obtained, or the acknowledgment of her deed or mortgages, when conveying her own real estate, to be made differently from that which she is authorized to make when she joins her husband in conveying his real estate to bar her right of dower therein, is hereby repealed; and all deeds or mortgages of any married woman heretofore acknowledged jointly with her husband, so as to bar her right of dower or interest in her husband's lands, shall be effectual and valid to debar her in respect to her own real estate.

ACT 22 MARCH 1865. Purd. 1888.

SECT. 1. The deed of conveyance executed and acknowledged by a wife in conjunction with her husband of his real estate, shall be valid and effectual, notwithstanding the minority of the wife at the time of such execution and acknowledgment; and any such deed heretofore made shall be as valid as if the wife had at the time been of lawful age.

II. FORMS OF ACKNOWLEDGMENT, &c.

1. FOR ONE PERSON.

COUNTY OF CHESTER, ss.

THE — day of —, A. D. 1860, before the subscriber, one of the justices of the peace in and for the county aforesaid, personally came the within-named A. B., and in due form of law acknowledged the above-written indenture to be his act and deed, and desired the same might be recorded as such. Witness my hand and seal, the day and year aforesaid.

C. D., Justice of the Peace. [SEAL.]

consul or vice-consul of the United States; or before any commissioner appointed for that purpose by the governor of this state.

It has been held that "an acknowledgment before two justices of the county of B— in another state, accompanied by the certificate of the clerk of the county court, under the seal of the court, that the persons who took the acknowledgment were justices of the peace, and that there were no magistrates superior to them in B— county," is a good acknowledgment under the third section of the act of

assembly of February 24, 1770. 5 B. 29 3 Y. 424.

The power of commissioners under the act of 14th day of April 1828, does not extend to authorize them to take the separate examination of *femes covert* [married women]. The power is limited to "acknowledgments and proceedings for execution," and has no express reference whatever to conveyances by *femes covert*. Therefore believed, and with good reason, deeds so acknowledged will not pass estates of *femes covert*.

2. ACKNOWLEDGMENT BY VIRTUE OF A LETTER OF ATTORNEY.

CITY OF PHILADELPHIA, ss.

THE — day of —, A. D. 1860, before J. S., mayor of the said city, personally came the above-named E. F., and in his own name, and in the name of his constituents, the above-named A. B. and C. D., in due form of law acknowledged the above-written indenture, or deed of conveyance, to be his own act and deed, and the act and deed of his constituents, the said A. B. and C. D., by him, the said E. F., done and executed by virtue of a letter of attorney to him for that purpose granted, and desired the same might be recorded as such. Witness my hand and seal, the day and year aforesaid.

J. S., Mayor of the City of Philadelphia. [SEAL.]

3. ACKNOWLEDGMENT BY HUSBAND AND WIFE.

CITY OF PHILADELPHIA, ss.

THE — day of —, A. D. 1860, before the subscriber, one of the aldermen in and for the said city, personally appeared the above (or within) named A. B., and C. his wife, and in due form of law acknowledged the above (or within) written indenture to be their act and deed, and desired the same might be recorded as such; and the said C. being of full age, and separate and apart from her said husband, by me thereon privately examined, and the full contents of the above (or within) deed being by me first made known unto her, did thereupon declare and say that she did voluntarily, and of her own free will and accord, sign, seal, and, as her act and deed, deliver the above (or within) written indenture, deed or conveyance, without any coercion or compulsion of her said husband. Witness my hand and seal, the day and year aforesaid.

S. B., Alderman. [SEAL.]

4. PROBATE OF A DEED.

CITY OF PHILADELPHIA, ss.

BE IT REMEMBERED, that on the — day of —, A. D. 1860, before P. C., one of the aldermen in and for the said city, personally came A. B., of the said city, merchant, one of the subscribing witnesses to the execution of the within-written indenture, and on his solemn affirmation, according to law, doth declare and say that he did see C. D., the grantor within named, seal, and, as his act and deed, deliver the within-written indenture, deed or conveyance for the uses and purposes therein mentioned; that he did also see E. F. subscribe his name thereunto as the other witness of such sealing and delivery, and that the name of this affirmant thereunto set and subscribed as a witness is of this affirmant's own proper and respective handwriting.

(Signed) A. B.

Affirmed and subscribed, the day and year aforesaid,
before me. Witness my hand and seal.

P. C., Alderman. [SEAL.]

5. ANOTHER FORM OF PROOF.

COUNTY OF DAUPHIN, ss.

BE IT REMEMBERED, that on the — day of —, in the year of our Lord 1860, before A. B., one of the justices of the peace in and for the county aforesaid, personally came C. D. of —, and on his solemn affirmation, according to law, doth declare and say that he was present, and did see E. F., of the township of —, in the county aforesaid, carrier, the grantor in the within indenture named, sign, seal, and, as his act and deed, deliver the within-written indenture, deed or conveyance for the uses and purposes therein mentioned; that the same was so signed, sealed and delivered in the presence of G. H. of the city of Philadelphia, bricklayer, and of this affirmant; that the name E. F., set and subscribed to the said indenture as the party executing the same, is of the proper handwriting of the said E. F.; and that the names G. H. and C. D., also set and subscribed to the said indenture as the witnesses attesting the due execution thereof, are of the respective proper handwritings of the said G. H. and of this affirmant. (Signed) C. D.

Affirmed and subscribed, the day and year aforesaid,
before me. Witness my hand and seal.

A. B., Justice of the Peace. [SEAL.]

6. PROBATE OF A DEED BY A CORPORATION.

CITY OF PHILADELPHIA, ss.

BE IT REMEMBERED, that on the — day of —, in the year of our Lord one thousand eight hundred and sixty, before me, A. H., Esq., mayor of the said city, personally appeared T. D., Esq., president of the above-named corporation, and, being duly sworn, both and saith, that he was personally present at the execution of the above-written indenture or deed of conveyance, and saw the common seal of "The Philadelphia Bank" affixed thereto, and that the seal so affixed thereto is the common and corporate seal of "The Philadelphia Bank" aforesaid; and that the above-written indenture or deed of conveyance was duly sealed and delivered by and as and for the act and deed of "The Philadelphia Bank" aforesaid, for the uses and purposes therein mentioned; and the

name of this deponent subscribed to the said deed, as president of the said corporation, in attestation of the due execution and delivery of the said deed, is of this deponent's own proper and respective handwriting. T. D.

Sworn and subscribed, the day and year aforesaid,
before me. Witness my hand and seal.

A. H., Mayor of the City of Philadelphia. [SEAL.]

7. ATTESTATION WHERE THERE ARE INTERLINEATIONS OR ERASURES, &c.

SIGNED, sealed and delivered by the within-named A. B., the words "—," having been previously interlined in the sixth and seventh lines in the presence of us.

(Signed) A. B. and C. D., witnesses.

8. BY A BLIND PERSON.

THE above-written instrument was signed, sealed and delivered by the above-named A. B., and, he being blind, the same was carefully and deliberately read over to him in the presence of us.

(Signed) A. B. and C. D., witnesses.

9. ATTESTATION OF THE EXECUTION OF A DEED BY A PERSON DEAF AND DUMB.

MEMORANDUM. The above written instrument was signed, sealed and delivered by the above-named A. B., who, being deaf and dumb, but capable of reading, the same was first read over by him, and he seemed perfectly to understand the same, in the presence of us, &c.

(Signed) A. B. and C. D., witnesses.

10. RECEIPT ON A DEED.

RECEIVED, the day of the date of the above-written indenture, of the above-named E. F., the sum of — dollars, being the full consideration-money therein mentioned.

III. A deed is an instrument in writing on parchment or paper, *and under seal*, containing some conveyance, contract, bargain or agreement, between the parties thereto; and it consists of three principal points, *writing, sealing and delivering*. 2 Thomas' Co. Litt. 263, (224.) 2 Bl. Com. 295.

The *signing* of a deed is now the material part of the execution. A written or ink seal is good. 1 D. 64. 1 S. & R. 72.

A deed is good *without subscribing witnesses*. It is enough if there be a sealing and delivery. 1 S. & R. 72.

It should be recorded within six months. Act of March 28, 1820. 2 B. 497. 4 B. 140.

The date of a deed is *prima facie* evidence of the time of delivery, but it is not conclusive. 1 P. R. 402.

From the fact of *signing* the jury may presume the sealing and delivery, although there be no reference to sealing in the body of the writing, if there be a seal affixed to the name. 4 C. 413.

The presumption of the delivery of a deed, arising from the fact of its being recorded, is one that may be rebutted and destroyed by counter evidence. 10 C. 252.

Where there is a contract of purchase, or an equity of any sort, pre-existing in the grantee, the law will, in behalf of creditors, carry back the delivery, by relation, to the date of the deed. But it is otherwise, as to a voluntary conveyance; actual delivery, in such case, is essential to vest any interest in the land. 12 C. 383.

Where a party produces a deed from a third person, purporting on its face to have been duly executed and acknowledged, the possession of it, by the grantee, or by the person producing it, is *prima facie* evidence of delivery. 3 C. 30.

If a grantor execute a deed and retain it in his possession, and the grantee request its delivery to a third person, and the grantor give the deed to such third person, to be handed over to the grantee, when he calls for the same, it is in law a delivery of the deed, though not handed over to the grantee and found among the grantee's papers after his death. 2 C. 422.

A deed executed by husband and wife, for lands of the wife, but not delivered in her lifetime, cannot be rendered effectual to pass the estate, as against the heirs of the wife, by a delivery after her decease. 10 C. 24. 1 Wr. 87.

As to what facts are sufficient to rebut the presumption of the delivery of a deed, arising from the fact of its being recorded. See 10 C. 252.

It is not necessary for a witness making probate of a deed, to sign the probate; the certificate of the magistrate is sufficient. 5 W. & S. 223.

The certificate should state the official character of the officer, but if it do not, it may be proved *aliunde*. 11 S. & R. 347. 7 W. 334. 13 S. & R. 386. 3 H. 452. 11 H. 231.

A grantee in a deed which has been duly acknowledged, is at liberty, if the acknowledgment be not satisfactory, to make probate of it by a subscribing witness. 11 H. 247.

A justice of the peace cannot take an acknowledgment of a deed out of his proper county. 7 S. & R. 43. 1 Ash. 131.

He is required to indorse on the deed a certificate of the acknowledgment. 1 B. 480. 9 S. & R. 273.

A justice bound to make title by a conveyance from a third person, is incompetent to receive the acknowledgment of the grantor's wife. 7 W. 227.

It must appear by the justice's certificate, that the wife was examined separate and apart from her husband. 1 B. 470. 5 S. & R. 289, 534. 9 S. & R. 268.

But a privy examination is not requisite; it is sufficient that the husband be absent, although it take place in the presence of others. 5 S. & R. 523-34.

The wife will be presumed to have been of full age, unless the contrary be shown. Pet. C. C. 452.

If it do not appear that the contents of the deed were made known to the wife, the acknowledgment is invalid, and the wife's title does not pass. 6 S. & R. 49. 14 S. & R. 84. 15 S. & R. 72.

The certificate ought to state substantially that the wife was separately examined; that she had a knowledge of the nature and consequences of the act she was about to perform; and that her will, in the performance of it, was free. 4 S. & R. 272 3 C. 22.

It is sufficient if the certificate state that she voluntarily assented to the deed; 6 B. 435: or did voluntarily seal and acknowledge; 3 Wh. 457: or that she freely executed, &c.; Pet. C. C. 453, 188.

It must appear by the certificate, in some way, that she executed the deed, without any coercion or compulsion of her husband. 6 S. & R. 143-5.

Defects in the certificate cannot be aided by parol testimony. 1 B. 470. 9 S. & R. 268. 15 S. & R. 72. Nor can it be contradicted, except in cases of fraud and imposition. 3 Wh. 457. 15 S. & R. 72. Or, of concealed duress of the wife. 9 Barr 14.

If the husband use his influence and power over the wife, in such manner as to control her unduly, and so as to make her act under his will, and not her own, the deed is void. 3 C. 22.

The certificate of the magistrate is conclusive in favor of one who accepted it in good faith, and paid his money, without knowing, or having reason to suspect, that it is untrue. Ibid. 1 P. F. Sm. 289.

In such cases knowledge of the falsity of the certificate ought to be brought home to the grantee, or of such facts as are sufficient to put him on the inquiry. 4 H. 451. This doctrine, however, is not applicable to the case of a mortgagee of a married woman's property. A justice's certificate of the wife's separate acknowledgment, which is false in fact, will confer no rights on a mortgagee. 2 Wr. 334.

But if the certificate be false in fact, and the grantee knew it, or knew of circumstances which should put an honest and prudent man upon inquiry, then it may be contradicted by parol evidence. 3 C. 22.

When the certificate is overthrown by evidence that the examination was in the presence of the husband, or that the wife was not properly informed as to the nature of the transaction, or that she was under the influence of fraud or coercion, it goes for nothing. Ibid.

Until delivery of the deed, the wife may revoke her assent, notwithstanding the acknowledgment. 1 H. 85.

A deed not executed in conformity with the act of 1770, will not pass the wife's right of dower. 2 B. 341. 5 S. & R. 289. 7 S. & R. 43. 15 S. & R. 72.

A deed by a married woman conveying her separate estate, to which her husband

C. C. 452

is not a party, is void. 4 H. 484. And so is a release of dower. 7 Barr 287. And the act of 1848 has not altered the law in this respect. 6 H. 506. 7 H. 361. 1 C. 326. 3 C. 213.

The act of 1848 only applies to cases where the husband, by the wife's authority, undertakes to transfer or incumber her estate; it makes no change in the form of acknowledgment where both join in the deed. 12 H. 253. 1 C. 142.

The record of a deed is constructive notice to all mankind. 1 Y. 173.

When a party executes a deed with a blank in it, which is afterwards filled up, with his assent, and he *subsequently* acknowledges the deed, it is valid, the filling up of the blank will not avoid it. 4 Bingh. 123. 1 Greenl. Ev. § 568, a.

If a deed which has been executed and acknowledged by the grantor, with a blank for the grantee's name, be surreptitiously and fraudulently taken from the grantee's house, and the blank filled up, no title passes thereby; and a *bond fide* purchaser, for a valuable consideration, stands in no better situation than such fraudulent holder, especially if the original grantor remain in possession of the property. 4 Wh. 382.

A deed so acknowledged or proven, as to be properly admitted to record, is admissible in evidence, without further proof of execution. 4 Barr 13. 5 Gilm. 376.

The registry of a deed, defectively proved or acknowledged, is not evidence of notice to a subsequent purchaser. 3 Y. 186. 2 B. 40. 5 Barr 145.

The recording of an instrument not within the purview of the recording acts, will not make a certified copy of it legal evidence. 4 R. 444. 7 W. & S. 16. 11 C. 269.

Where two deeds are made, of different dates, from the same grantor to different persons, neither of which is recorded within six months, that which is first recorded will take priority. 5 W. & S. 49.

An *alteration* in a deed, by a party claiming under it, after its execution, will render it void. 1 Greenl. Ev. § 564-8. 3 H. 462. 8 H. 12. Thus the addition of subscribing witnesses, if *fraudulently* done, without the consent of one of the parties, will avoid it as to him. 8 Barr 378, 518.

An *interlineation* in a deed, in the absence of testimony, is presumed to have been made before execution; for, if altered afterwards, it would be a *fraud*, which is never to be presumed. 1 Greenl. Ev. § 564, n. 4. 2 Eng. L. & Eq. 102. Math. Pr. Ev. 39. 3 H. 281.

Where a deed, bond or other instrument is offered with an interlineation or erasure that is material, it is a question for the jury under all the circumstances, whether the alteration were made before or after signature. 11 H. 249. 3 C. 423.

The conveyance of an estate which lies in livery, and not in grant, is not avoided by an alteration in a material part of it; for the title, being vested by a deed having by statute the force of livery of seisin, can be revested only by a reconveyance. But an alteration of a bond, bill or note, stands on a different principle. When it is made by a voluntary act of the creditor, and increases or injuriously affects the responsibility of the debtor, whatever the motive for it, the security is gone. 7 H. 122. 3 C. 244. 11 C. 80. And see 7 C. 322.

Defalcation.

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|-----------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| I. The statutes regulating set-off.
II. Between what parties set-off may be allowed. | III. Of the subject-matter of set-off.
IV. Of set-off before a justice of the peace. |
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I. STATUTES REGULATING SET-OFF.

If two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts or the like, and one of them commence an action in any court of this province, if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account or bargain in evidence; and if it shall appear that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, and judgment shall be entered that the plaintiff shall take nothing by his writ, and shall pay the costs; and if it shall appear that any part of the sum demanded be paid, then so much as is found to be paid shall be defalked, and the plaintiff shall have judgment for the residue only, with costs of suit. But if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted or in arrear to the defendant more than will answer the debt or sum demanded, and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record. Act of 1705, § 1. Purd. 331.

In all cases where, by the verdict of a jury, any debt or damages shall have been found or certified in favor of the defendant, he shall be entitled to judgment and execution in like manner as if the verdict were in favor of the plaintiff. Act 11 April 1848, § 12. Purd. 331.

A defendant who shall neglect or refuse in any case to set off his demand, whether founded upon bond, note, penal or single bill, writing obligatory, book account or damages on assumption, against a plaintiff, which shall not exceed the sum of one hundred dollars, before a justice of the peace, shall be, and is hereby, for ever barred from recovering against the party plaintiff by any after suit: but in case of judgment by default, the defendant, if he has any account to set off against the plaintiff's demand, shall be entitled to a rehearing before the justice within thirty days, on proof being made, either on oath or affirmation of the defendant, or other satisfactory evidence, that the defendant was absent when the process was served, and did not return home before the return day of such process, or that he was prevented by sickness of himself, or other unavoidable cause; and the justice shall have power to render judgment for the balance in favor of the plaintiff or defendant, as justice may require. Act 20 March 1810, § 7. Purd. 597.

II. BETWEEN WHAT PARTIES.

Debts which can be set off must be such as are due in the same right. 2 Y. 208. 3 P. R. 492. 7 Wr. 79.

It may be stated as a general rule, that the person having the *right of action* may set off a debt due to him as a trustee, against a debt due by him in his own right. 6 S. & R. 244.

It is not essential that the defendant should be able to sue for the demand in his own name. 3 B. 135.

The defalcation act of Pennsylvania has uniformly been construed to admit of a set-off, either by or against an executor or administrator. Ibid.

In an action by an administrator, on a promissory note given by the defendant to him, for the purchase-money of goods of the intestate sold by the plaintiff to the defendant, the defendant cannot set off a debt due by the intestate to him. 10 S. & R. 10.

A surviving partner, sued as such, may set off a debt due by the plaintiff to him in his individual capacity. 11 S. & R. 48.

One of two defendants may set off a debt due to him by the plaintiff, unless there be some superior equity in a third person. 12 S. & R. 252. 9 Ibid. 68. See 4 P. F. Sm. 508.

But a debt due by the plaintiff to a co-obligor not summoned cannot be set off against the joint debt. 9 Ibid. 379.

A debt due from the plaintiff to the defendant, and another, who was not summoned, is a good set-off against the plaintiff's demand on the obligor who is summoned. 2 R. 121.

In an action by two or more administrators, the defendant cannot set off a debt due to himself by one of the administrators unconnected with the estate in right of which the action is brought. 2 R. 111.

In an action by A. the defendant cannot set off an account for goods sold to A. and B. as partners. 14 S. & R. 800.

In an action brought for the use of three persons, the defendant cannot set off a separate claim against each of them. 7 W. 344.

A debtor may set off a debt due him by his creditor at the time of his death though the estate of the creditor be insolvent. 8 Barr 403. 11 H. 167.

Set-off is only allowable in favor of a defendant; consequently there can be no such thing as set-off against set-off. 4 W. & S. 19. 1 H. 181. 12 Wr. 512. 4 P. F. Sm. 154.

Set-off is allowed in order to prevent multiplicity of actions, and ought not to be allowed so as to be the cause of new disputes. 7 C. 72.

An action on a due-bill, not negotiable, assigned to a third party long after its date, is to be regarded as between the original parties, and to subject to every legal set-off the maker may have against the payee. 5 C. 475.

In an action by one of several partners for his individual debt, an unsettled claim against the firm cannot be set off, even though it were out of the same transaction. 1 Wr. 456.

III. SUBJECT-MATTER OF SET-OFF.

It seems, that in all cases where the cause of action, which the defendant wishes to set off, arises from the same transaction on which the plaintiff founds his action, it may be defalked. 1 S. & R. 477.

Equitable as well as legal demands may be set off in Pennsylvania. 3 Binn. 135. 8 S. & R. 88.

One judgment may be set off against another, when both are in the same right, though in different courts. 3 Y. 132. 1 M. 10. But this cannot be done before a justice. 10 Wr. 519.

It is only permitted where it will infringe on no other right of equal grade; consequently, it is not permitted to affect an equitable assignee for value. 2 W. 228.

In an action to recover the price of cattle, the defendant may give in evidence, by way of set-off or equitable defence, that he had sustained damages by reason of the plaintiff not having delivered to him certain sheep purchased by him, at the same time, of the plaintiff, in an entire contract. 12 S. & R. 275.

Unliquidated cross-demands, arising out of a distinct contract, may be set off under our statute. 6 W. & S. 150, 155, 179, 439. 4 W. & S. 290. 5 W. & S. 459. 5 C. 192. 9 P. F. Sm. 450.

A debt not due at the commencement of the suit, cannot be set off. 3 D. 50. 1 W. & S. 418. 1 H. 552.

A plea of set-off cannot be supported by a defendant upon a claim against the plaintiff, acquired after the institution of the suit. 9 W. 126. 10 H. 116. C. 192.

Buying the plaintiff's paper before action brought, entitles the defendant to set off. 1 D. 452. See 7 Wr. 70.

But the mere possession of a note, which is offered as a set-off, is not evidence that it belonged to the defendant at the commencement of the suit. It is incumbent on him to show that it was acquired in proper time. 10 H. 116. 5 C. 192.

In an action on a promissory note given by the defendants in favor of the plaintiff, it was *held*, that the defendants might set off a debt due by the plaintiff to

company or partnership of which the defendants were members, the other members of the company or partnership authorizing the same. 5 Wh. 379.

A set-off is not admissible, where the demand against the plaintiff arises from an act done by him of a *tortious* nature. 5 S. & R. 122. 14 Ibid. 439.

But the defendant may give evidence of acts of nonfeasance or misfeasance by the plaintiff, where these acts are *immediately connected with the plaintiff's cause of action*, such evidence not being admitted by way of defalcation, but for the purpose of defeating, in whole or in part, the plaintiff's cause of action. Ibid.

In an action for services performed by the plaintiff, as housekeeper, and also for goods sold and delivered, evidence of acts of malfeasance by the plaintiff, in embezzling the property of the defendant, is not admissible by way of set-off, but may be given under the plea of *non assumpsit* and payment with leave, &c. 4 S. & R. 249.

The pendency of a suit to recover the claim offered to be set off, is no objection to its being used for that purpose. 1 W. & S. 57. 8 W. 444. The set-off is in the nature of a cross-action, and it may be withdrawn from the consideration of the jury. 5 W. & S. 506.

A defendant cannot avail himself by way of set-off of a debt against the plaintiff, for which a suit is pending on an appeal from arbitrators, by the party offering such set-off. 5 W. 116.

The defendant having a demand against the plaintiff, is not compelled by the defalcation act to set it off. He may do so, or he may bring an action against the plaintiff for it, as he pleases. 7 W. 500.

Mutual demands do not necessarily extinguish each other by operation of law—set-off is permissive, not compulsory; and if there be no agreement between the parties, either may hold and set off his claim; or, if he choose, assign it, and leave the other party to his legal remedy. 8 W. 39, 260, 406.

Parties having mutual demands against each other, may, by their agreement, extinguish them by a set-off; but the statute of defalcation does not, by any operation, *per se*, apply the demand of one party, in such case, against that of the other, so as to produce either a payment, satisfaction or extinguishment of them. 9 W. 179.

On appeal, the defendant cannot set off a claim above \$100. 12 Wr. 456.

IV. SET-OFF BEFORE A JUSTICE.

The 7th section of the act 20 March 1810, which compels a defendant in a suit before a justice to set off his demand against the plaintiff, is applicable to cases of unliquidated damages for breach of contract. 3 H. 361.

In an action before a justice of the peace to recover the price of goods sold and delivered, defendant may give in evidence, as a set-off, a special contract between him and plaintiff, by which plaintiff promised to do certain work for defendant, and did not, whereby defendant is entitled to recover damages for the nonfeasance. 4 W. & S. 290.

When a defendant claims a right to off-set a demand which he had against the plaintiff for a sum exceeding \$100, the justice is right in rejecting the evidence of such off-set, on the ground that it exceeds, in amount, his jurisdiction; but if the demand of the defendant be composed of several items, he may set off such of them as do not exceed the jurisdiction of the justice. 3 P. R. 469.

Where a justice of peace issues his process, which is served, according to law, on a defendant, the latter cannot turn round and sue the plaintiff before another justice, for any debt or demand arising from contract not exceeding \$100; but must submit the claim by way of set-off to the justice before whom the plaintiff has brought his suit. 1 Ash. 171. 2 Ash. 146. 5 W. & S. 460.

If, however, both suits be carried on at the same time, without objection, both proceedings are valid. 3 C. 71.

A justice cannot set off against a judgment on his docket, a larger judgment before another justice. 10 Wr. 519.

Distress for Rent.

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| I. Proceedings on a distress for rent.
II. Form of warrant to distrain.
III. Summons to landlord to defalcate. | IV. Proviso in a lease, waiving the benefit of the exemption law. |
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I. PROCEEDINGS ON A DISTRESS FOR RENT.

THE law of distress is a subject of great use and importance, and deserves particular notice. A *distress* is "the taking a personal chattel out of the hand of the wrongdoer, into the possession of the party injured, to procure a satisfaction for the wrong committed." 3 Bl. Com. 6. And the most usual injury for which a distress may be taken is that of non-payment of rent.

At common law, distresses were incident to every *rent service*; and a ground-rent reserved upon a conveyance in fee being, in Pennsylvania, a *rent service*, the right of distress is incident to it of common right. 9 W. 262. The act of 1772 permits a distress and sale of goods "for any rent reserved and due upon any demise, lease or contract whatsoever." Purd. 310.

A distress is inseparably due to every service, that may be reduced to a certainty. 2 R. 13. But although the owner of real estate may, in an action for use and occupation, recover a *reasonable* compensation, yet he cannot distrain unless the rent be *certain* and *fixed*, by agreement of the parties. 3 P. R. 30. Thus, a landlord cannot distrain where the agreement is, that the tenant shall pay no rent, provided he make certain repairs, and the value of the repairs be uncertain. A. 347. But if it may be reduced to a certainty, the right of distress is incident to the demise. Thus, the right of distress is incident to a lease reserving a share of the produce by way of rent. 2 R. 11. 5 W. & S. 163. And rent payable in iron may be distrained for. 3 W. & S. 531. And see 5 B. 229. 2 S. & R. 480. 1 Barr 126. 2 Ibid. 293.

The general rule is, that all personal chattels are liable to be distrained; yet to this rule there are certain exceptions. Thus, things wherein no one can have an absolute or valuable property, as dogs, cats and animals *feræ naturæ*, cannot be distrained; but when the reason of the rule ceases, it no longer applies, for deer kept in a private enclosure for sale as profit, may be distrained for rent. 3 Bl. Com. 7.

Whatever is in the personal use or occupation of a man, is, for the time, privileged and protected from a distress, as an axe or spade, with which one is laboring, or a horse while a man is riding him. But horses drawing a cart, may (cart and all) be distrained for rent-arrear. Ibid. 8.

Valuable things in the way of trade are not liable to distress; as a horse standing in a smith-shop to be shod, or in a common inn; or cloth at a tailor's; or corn sent to a mill or market; Ibid.; or goods placed with a commission merchant on storage; 17 S. & R. 138; 7 W. & S. 452; or goods stored with a warehouseman in the way of trade; 6 C. 287; or cattle received by a tenant to be pastured for hire; 8 H. 422; or goods on the premises of an auctioneer, for the purpose of sale by auction; 20 Eng. L. & Eq. 370; or the goods of a boarder at a boarding-house. 5 Wh. 9. For all these things are protected and privileged for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house, but to his customer. 3 Bl. Com. 8.

But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent: for otherwise, a door would be open to infinite frauds upon the landlord; and the stranger has his remedy over by action against the tenant, if, by the tenant's default, the chattels are distrained, so that he cannot render them when called upon. 13 S. & R. 57. Ibid. 180. 1 R. 440. A wife's goods, found on the demised premises, are not exempted by the act of 1848, from a distress for rent by the husband's landlord. 2 Wr. 344.

Nothing can be distrained for rent that may not be rendered again, in as good a plight as when it was distrained; for which reason, milk, fruit and the like cannot be distrained. 3 Bl. Com. 9.

Things annexed to the freehold cannot be distrained, as doors, windows, mill-stones, and the like; for they savor of the realty. And so far is this principle carried, that if a fixture be severed from the freehold for a temporary purpose, it is not distrainable in that its solitary state; as in the instance of a millstone severed from the mill, for the purpose of being picked. 17 S. & R. 418. 2 W. & S. 116. For this reason also, growing corn could not be distrained at common law; but the act of 21st March 1772 authorizes a lessor to take and seize as a distress for rent, any cattle or stock of his tenant, feeding or depasturing upon any part of the demised premises; and also all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing upon any part of the demised premises; and that the purchaser thereof shall have free egress and regress to and from the same, when ripe, to cut, gather and carry away the same. Purd. 611. If, however, the growing grain be sold by the tenant, it is not liable to distress. 4 W. & S. 346.

It is also a rule that goods in the custody of the law cannot be distrained. Thus, goods which have been previously levied upon on an execution, or foreign attachment, cannot be distrained for rent. 4 W. & S. 344. Nor can goods seized by a sheriff, under a writ of replevin, but left by him, for a reasonable time, upon the demised premises. 1 Phila. R. 173. But goods replevied may be distrained for subsequent arrears of rent. 2 D. 68, 131. 4 W. 42.

The act of 9th April 1849 likewise exempts from distress for rent, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all bibles and school books in use in the family, which had been exempted by previous statutes. Purd. 612.

Rent payable in advance may be distrained for. 2 Wh. 95. 3 Barr 219. 9 W. 438. 13 S. & R. 60. But a distress cannot be made on the same day the rent becomes due. 6 W. 41. A distress for rent must be made in the day time. 3 Bl. Com. 11. 2 Eng. L. & Eq. 278. And upon the demised premises; for the statute of 52 Hen. III., ch. 15, prohibits any man, for any cause, from taking a distress out of his fee, or upon the king's highway, or in the common street. Rob. Dig. 171.

But if the tenant shall fraudulently or clandestinely carry off from the demised premises his goods and chattels, with intent to prevent his landlord from distraining the same for arrears of rent, the act of 21st March 1772 makes it lawful for the landlord, within thirty days thereafter, to take and seize such goods and chattels, as a distress for rent, wherever the same may be found; and to sell and dispose of the same in the same manner as if distrained upon the demised premises. Purd. 611.

Upon this act, it is to be observed, that a mere removal in the day time, without the knowledge of the landlord, is not fraudulent. 12 S. & R. 217. 1 Ash. 121. 8 Wr. 477. That it is only the goods of the tenant that can be so followed and distrained; not those of a stranger. 1 D. 440. But that those of the tenant's assignee may be followed and seized, if clandestinely removed. 3 W. & S. 531. The act also protects the tenant's goods, although fraudulently removed, after a *bond fide* sale to an innocent purchaser. Purd. 611. It is a trespass to enter the house of a stranger, to search for and distrain goods fraudulently removed, if no goods of the tenant be there found. 13 S. & R. 417.

If the goods of the tenant be once fairly and openly removed, or if clandestinely removed and thirty days elapse, or if fairly sold to an innocent purchaser, although such purchaser be the succeeding tenant, and the goods yet remain upon the land, they cannot be distrained by the landlord for rent. 3 W. 246. If the tenant's goods be fraudulently removed, they are *prima facie* liable to be distrained; and it is for the claimant to show affirmatively that he is a *bond fide* purchaser without notice of the fraud. 14 Eng. L. & Eq. 488.

In the city of Philadelphia, the like remedy is given to a landlord of following and distraining upon goods fraudulently removed by his tenant, before the rent becomes due, by the act of 25th March 1825. But in such case the rent is to be apportioned up to the time of such removal; and the landlord is required first to make oath, before a judge, alderman or justice, that he verily believes the said goods were carried away for the purpose of defrauding him of his remedy by dis-

treas. Purd. 611. Under this act, an affidavit by the landlord "that he has just cause to suspect and doth believe," that such was the tenant's intent is not sufficient. 1 Ash. 121.

The distress may be made by the landlord himself, or he may empower any individual to make it as his bailiff. A parol authority is sufficient. 4 W. 119. 3 W. & S. 531. But if the warrant be in writing, the law requires no set form of words. 3 W. & S. 531. It is sufficient if the landlord and tenant be named, and power given to distrain for the rent. 4 W. 98. Tenants in common who make a joint lease to a tenant for years, may join in making a distress for rent. 3 W. & S. 531. A distress cannot legally be made on Sunday. 1 Br. 171. Or by breaking open an outer door; 1 Br. 241; even of a stable; 2 Eng. L. & Eq. 275. But in order to distrain he may open the outer door in the ordinary way. 8 Eng. L. & Eq. 503. Taking a note, or obtaining a judgment for the rent, does not impair the right to distrain. 3 P. R. 487.

By the act of 1772, the landlord is empowered to distrain, after the termination of the lease, provided it be made during the continuance of his title. Purd. 612. This right is without limitation as to time; the statute gives it to him, whenever the rent is in arrear, and he retains the title. 11 C. 162. But the tenant's possession must also continue. 1 W. & S. 416. For the goods of an outgoing tenant, which have been *bond fide* sold to the succeeding tenant, are not liable to distress at the suit of the landlord, for the arrears of rent of the former, though the goods remain on the demised premises. 3 W. 246. An executor, however, cannot distrain for rent falling due after the death of the landlord. 8 Wr. 220.

The whole rent due ought to be distrained for at once, and not a part at one time and a part at another; but if the distress made for the whole turn out to be insufficient, either from the circumstance of not finding a sufficient distress on the premises, or mistaking the value of the property seized, a second distress may be made to supply the deficiency. 3 Bl. Com. 11. A distress must be made for the precise sum due; and the landlord cannot add interest to the arrears of rent. 2 B. 153. Trespass will not lie for distraining for more rent than is due. 6 W. 41. But a landlord is liable, in an action on the case, for distraining for more rent than is due, without proof of malice, or want of probable cause. 5 H. 163.

The act of 1772 gives a tenant a right to recover double the value of the goods distrained, if a distress be made when there is no rent in arrear. Purd. 611. And it has been held, that in an action against a constable for making a distress, as bailiff, he can only justify by showing that there was rent in arrear; the landlord's warrant is no protection. 3 P. R. 30. 5 H. 153. The act does not preclude the tenant from bringing his action of trespass, at common law, in which he may recover damages to a greater amount than double the value of the goods distrained. 6 S. & R. 286.

The distress, as already stated, must be made in the day time. 2 Eng. L. & Eq. 278. And if the landlord come into a house and seize upon some goods as a distress in the name of all the goods in the house, that will be a good seizure of all. 6 Mod. 215. The distress having been made, the act of 1772 requires that notice of the taking, with the cause of the distress be left, at the time of making it, at the mansion-house, or other most notorious part of the premises charged with the rent. Purd. 610. This notice must be in writing, and should embrace a schedule of the several articles levied on, as well as the amount of rent in arrear. 3 Eng. L. & Eq. 574, 578. The omission to give this notice does not render the distress itself unlawful; it is only necessary to warrant a sale of the goods distrained. 6 W. 40. It may be given to the tenant in possession, or to the owner of the goods distrained. 8 W. & S. 303. But the tenant, if not the owner of the goods, has no authority to waive an appraisal and notice of sale. 6 C. 287. This doctrine, however, only applies to a case in which the goods are not distrainable for the rent in arrear. 18 Leg. Int. 172.

It is the duty of the tenant, immediately after a distress has been made upon his goods, to give notice of his intention to claim the benefit of the exemption law. For the exemption of certain goods from distress for rent is a privilege that may be waived by the tenant, either by the terms of his contract, or by an omission to claim the exemption at a proper time. 6 W. 36. 11 H. 93. 12 C. 380. 2 Gr. 197. It is too late after the property is put up for sale. 7 H. 255. 1 C. 182. The object of the legislature was, to prevent a sale of the property; and every act or omission

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no rent due

the debtor that amounts to an acquiescence in, or an affirmation of the sale, is in fact contravention of that object. 9 H. 247.

A sub-tenant, or assignee of the tenant, who has not been recognised as such by the landlord, cannot claim the benefit of the exemption law as against a distress for rent; the goods being levied on as those of the original lessee, by whom no claim to the exemption is made. 10 C. 369. And joint owners of chattels distrained for rent due upon a joint demise, are not entitled to the benefit of the exemption law. 8 Wr. 442.

If the tenant claim the benefit of the exemption law, it becomes the duty of the constable or officer charged with the execution of the warrant, to summon three disinterested and competent persons, who are to be sworn or affirmed to appraise the articles which the debtor may elect to retain under the exemption law; and the property thus chosen and appraised is thereby exempted from levy and sale. 10 C. 433. The sheriff or constable may administer the oath or affirmation to the appraisers. Ibid. 434.

The act of 1772 allows to the tenant five days, after distress made, in which to replevy the goods. Purd. 610. And during this period, the landlord may remove the goods upon the premises. 2 D. 68.(a) In computing this time, the day of making the distress is to be excluded; and if the last day fall on Sunday, the landlord has until the next day to remove the goods. 6 W. 37. If the appraisal be made before the expiration of the five days, the landlord becomes a trespasser *ab initio*. 10 P. F. Sm. 452.

At the expiration of this period, the person distraining is required to call on the sheriff or constable, (if not already done,) who are required by the act of 1772 to aid and assist therein, and to cause the goods to be appraised by two disinterested freeholders; who are to be first duly sworn or affirmed by the sheriff or constable. Purd. 610. A constable may be compelled to assist in the collection of the distress; and whenever he so acts he acts officially, and he and his sureties are liable for moneys collected or neglected to be collected by him under a landlord's warrant. 4 P. L. J. 180. He is not bound, however, to make the distress, but thereby assume the responsibilities of the distrainer; the law only requires his presence, after the distress made, should an appraisal and sale become necessary. 5 H. 169.

If the distress having been duly appraised, the act of 1772 requires the sheriff or constable, after six days' public notice, to sell the goods and chattels so distrained for the best price that can be gotten for the same, for and towards the satisfaction of the rent, and the costs of the distress; leaving the overplus, if any, in the hands of the sheriff or constable, for the owner's use. Purd. 610. An omission to appraise and advertise renders the landlord a trespasser *ab initio*. 14 S. & R. 399. 6 Wh. 9. This is absolutely essential to a valid sale, and can only be dispensed with by the owner of the goods, or by some one having equivalent authority. 6 C. 291.

The act of 1772, moreover, gives to the landlord a special action on the case, for treble damages, for any pound breach or rescous of goods distrained for rent; either against the actual offender or against the owner of the goods, in case the offender be afterwards found in his possession. Purd. 610. And in case of pound breach, the distrainer may also follow the goods and retake them. 2 D. 70.

As the tenant may have a set-off against the landlord's claim for rent, the act of 20th March 1810, § 20, gives to justices of the peace jurisdiction in all cases of rent, not exceeding one hundred dollars, so far as to compel the landlord to calculate, or set off, the just account of the tenant out of the same; but the landlord may waive further proceedings before the justice, and pursue the method of distress in the usual manner, for the balance so settled. And if any landlord shall be convicted, after such waiver, of distraining for and selling more than to the amount of such balance, and of detaining the surplus in his hands, he shall be liable to the tenant four times the amount of the sum detained. The act also provides that no appeal shall lie in the case of rent, but the remedy by replevin shall remain as heretofore. Purd. 612.

(a) Goods distrained for rent may remain on the premises for a reasonable time after the expiration of the five days; seven days is such reasonable time. 27 Leg. Int. 140.

Sub-tenant
Exemption

Under this act, it seems, that the justice cannot proceed to judgment and execution. 4 Y. 237. But his decision is *prima facie* evidence, on the issue of no rent in arrear, in favor of a stranger whose goods were levied on. 1 R. 435. No appeal lies by the tenant from the justice's decision. 1 Br. 69. But the court of common pleas of Philadelphia county have held, that the landlord is not deprived of the right of appeal by the proviso in the act.

II. FORM OF WARRANT TO DISTRAIN.

To G. H.

WHEREAS, C. D. is now indebted to me in the sum of ten dollars twenty-five cents for rent due on the first day of June, A. D. 1860, these are to authorize and empower you to distrain the goods and chattels of the said C. D., which you shall find on the premises now or lately occupied by him, said premises being a house situate No. 8, Strawberry street, in the city of Philadelphia, and the same retain in your possession until they can be lawfully appraised, and after due notice, "sell the said goods and chattels so distrained for the best price that can be gotten for the same, for and towards satisfaction for the rent for which the said goods and chattels are distrained, and of the charges of such distress, appraisement and sale," returning the overplus, if any, to the said tenant. And for your so doing, this shall be your sufficient warrant.

WITNESS my hand and seal, this tenth day of June, A. D. 1860.

A. B. [SEAL]

III. SUMMONS TO LANDLORD TO DEFALCATE.

COUNTY OF BERKS, ss.

The Commonwealth of Pennsylvania,

To the Constable of C—— township, in the County of Berks, or to the next constable of the said county most convenient to A. B., greeting:

WE COMMAND you that you summon A. B., of the township of C——, in the said county, to appear before J. R., Esquire, one of our justices of the peace in and for the said county, on the [fifteenth] day of [August,] in the year of our Lord one thousand eight hundred and [sixty], at [eleven] o'clock in the [forenoon] of that day, to show cause, if any he has, why the just account of E. F., his tenant, whose goods have been distrained by him, the said A. B., for a sum not exceeding one hundred dollars, should not be defalcated or set off out of the said rent. Witness the said J. R., Esquire, at C—— township aforesaid, the [tenth] day of [August], one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL]

IV. PROVISIO IN A LEASE WAIVING THE BENEFIT OF THE EXEMPTION LAW.

And the said C. D., for himself, his executors and administrators, doth hereby covenant and agree, that all personal property on the said premises shall be liable to distress, and also all personal property, if removed therefrom, shall, for thirty days after such removal, be liable to distress, and may be distrained and sold for rent in arrear; the said C. D. for himself, his executors and administrators, hereby waiving all right to the benefit of any laws made or hereafter to be made, exempting personal property from levy and sale for arrears of rent.

District Attorneys.

ACT 31 MARCH 1860. Purd. 334.

SECT. 17. If any district attorney shall wilfully and corruptly demand, take or receive any other fee or reward than such as is prescribed by law, for any official duties required by law to be executed by him in any criminal proceeding; or if such district attorney shall be guilty of wilful and gross negligence in the execution of the duties of his office, he shall be guilty of a misdemeanor in office, and on conviction thereof, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding one year, and his said office shall be declared vacant. Upon complaint in writing, verified by the oath or affirmation of the party aggrieved, made to the court in which any district attorney shall prosecute the pleas of the commonwealth, charging such district attorney with wilful and gross negligence in the execution of the duties of his office, the said court shall cause notice of such complaint to be given to the said district attorney, and of the time fixed by the said court for the hearing of the same. If, upon such hearing, the court shall be of opinion that there is probable cause for the said complaint, they shall bind over or commit the said district attorney to answer the same in due course of law. If the court shall be of opinion that there is no probable cause for such complaint, they shall dismiss the same with reasonable costs, to be assessed by the court.

SECT. 18. If any district attorney shall be charged according to law, with any crime or misdemeanor, before, or bound over or committed by any court, to answer for wilful and gross negligence in the execution of the duties of his office, it shall be the duty of the court to appoint some competent attorney thereof, to prepare an indictment against such district attorney, and to prosecute the same on behalf of the commonwealth, until final judgment, to whom a reasonable compensation, to be fixed by the court, shall be paid for his services, out of the county treasury. If such district attorney shall be convicted of any crime, for which he may be sentenced to imprisonment, by separate or solitary confinement at labor, in addition hereto, his said office shall be declared vacant by the court passing such sentence.

ACT 31 MARCH 1860. Purd. 334.

SECT. 29. No district attorney shall, in any criminal case whatsoever, enter a *nolle prosequi*, either before or after bill found, without the assent of the proper court in writing first had and obtained.

ACT 12 MARCH 1866. Purd. 1423.

SECT. 1. If any district attorney within this commonwealth shall neglect or refuse to prosecute, in due form of law, any criminal charge, regularly returned to him, or to the court of the proper county; or if, at any stage of the proceedings, the district attorney of the proper county and the private counsel employed by the prosecutor should differ as to the manner of conducting the trial, it shall be lawful for the prosecutor to present his or her petition to the court of the proper county, setting forth the character of the complaint, and verify the same by affidavit; whereupon, if the court shall be of the opinion that it is a proper case for a criminal proceeding or prosecution, it shall be lawful for it to direct any private counsel employed by such prosecutor to conduct the entire proceeding, and where an indictment is necessary, to verify the same by his own signature, as fully as the same could be done by the district attorney.

The act of 29th March 1819, § 4, provided that, after indictment found by the grand jury, it should not be lawful for the attorney-general to enter a *nolle prosequi* therein, except in the cases of assault and battery, fornication and bastardy, on agreement between the parties, or in prosecutions for keeping tippling-houses, with the consent of the court. 7 Sm. 227. The act of 31 March 1860, still further restricts the powers of the district attorney, but it does not appear to confer on him the right to enter a *nolle prosequi*, even with the consent of the court, in cases in which it was previously forbidden. 6 H. 497. 10 H. 21

The Docket.

- I. The manner in which the justice should make his entries and keep his civil docket. II. Judicial authorities in relation to docket entries.

I. NOTHING is of more importance, nothing more entirely essential, to the prompt and correct discharge of the duties of a magistrate, than a regular, well-kept *docket*. The justice should recollect, that when he begins a docket entry cannot tell how important may be the principles involved, or the consequences which may result from the cause, whether civil or criminal, which he is about to make a matter of record. There is no cause which he enters upon his docket, however trivial, which may not be carried before a court, and his conduct under a public, judicial, revision, either by *certiorari* or appeal. These considerations will, undoubtedly, induce a desire, that all his entries and his return, shall be of such a character, that they will bear the severest scrutiny, the closest examination.

Make your docket entries, on the instant that you transact the business which you record, and be especially attentive, on all occasions, to enter the *date* of the transaction. Do no act; issue no process; let nothing be done, in relation to a suit, without instantly making it, and the time it is done, a matter of record. You will you, at all times, with entire confidence, be able to refer to your docket a faithful record of all that has been done in the suit of which it purports to be an authentic register.

Be accurate in every entry; so accurate as to be at all times ready to be legally qualified as to the truth of every part of it. When you note that A. was affirmed or B. was sworn, do not fail to note whether they were witnesses called by the plaintiff, or the defendant: thus John Scott, sw. p., Job Ox, aff. d. This does to a magistrate, who has not had experience, may seem of little, or no, value; but nothing can be unimportant which goes to stamp the character of fidelity and minute accuracy upon the magistrate's docket. Let it exhibit a full and faithful record of all that has been done, from the issuing of the first process to the termination of the suit.

When called upon to issue a subpoena, note its issue and the date, and whether for plaintiff or defendant, and the number of witnesses whose attendance is required. The value of such minute details will be more and more estimated the longer the magistrate continues in the commission, because his opportunities of appreciating their value will increase in proportion to the amount of business which may be called upon to transact.

The entries on the civil docket should exhibit the following particulars:—

1. The names of the parties, and the *right* or capacity, in which they sue, or are sued; whether as individuals, executors, administrators, assignees, partners, or living partners, &c., &c.
2. The *time* at which the process issues, and is made returnable.
3. The *cause* for which the process issues; whether for debt, damages, trover, penalty, &c., &c.
4. The name of the *constable* by whom the process was served, and his return always in his own words.
5. Any and every adjournment, and each and every meeting, and whether or both the parties attend.
6. Any and every subpoena issued; the party by whom taken out; the number of witnesses required; and the person to whom it was delivered for service and the return.
7. The name of every witness examined, whether sworn or affirmed, and by whom of the parties called.
8. The judgment when rendered should always be written in *words*.
9. The bail *when* taken; taking care to note whether it be for stay of execution or appeal, and to vary the form accordingly.
10. *When* the execution issues; to *whom* it is delivered and the *return*, which should always be entered in the *very words* of the returning officer.

In a word, *every* fact should appear on the record.

It may be well so to apportion even your docket entries, as to have the same information always on record in the same place, so that, by casting your eye on a particular part of your docket-entry, you will always find the same kind of information. To illustrate what is here rather obscurely hinted, we furnish a simple docket entry.

A. B. } June 30th 1860, summons issued. J. W., c. Returnable July 5th, 10 A. M.
 vs. } Served, on oath, by producing to the debt. the original sums. and informing him
 C. D. } of the contents thereof. Parties appear. Debt; goods sold and delivered; demand \$10.44. A. B. sworn to his original entries. Judgment for the plaintiff for ten dollars and $\frac{4}{5}$. July 5th, I become absolute bail for stay of execution in \$25.
 (Signed) E. F., No. 2, Dock street.

Those who will take the trouble to analyze this entry, will find it in the following order. The name of the plaintiff and defendant, being entered on the margin, the justice enters the day on which he issues the summons; then follows the name of the constable to whom it was delivered for service; then the day and hour at which the parties are to meet; then a notice that the constable has sworn to the service of the summons; next the appearance of the parties; then the nature and amount of the claim, and the proof, the plaintiff being sworn to his original entries; then the judgment, and the bail for stay of execution.

Thus it will be seen that every event is noted in the regular order in which it presented itself. It is recorded in the natural order of things, and any inquiry made can be answered promptly by the eye of the justice, being, from habit, directed to that part of the entry which contains the record of the matter inquired after. One of the most frequent inquiries made is, *what constable served the process?* The eye of the magistrate, at once, directs itself to the middle of the first line of the docket entry, and there he finds the initial letters of the constable's name, and is ready, in a moment, to give the information required. The *index* to the docket should be carefully kept and frequently posted up.

Experienced magistrates may consider this notice as of no value whatever, inasmuch as they have long, and with advantage to the public and themselves, practised what is here suggested. These gentlemen, however, should consider that if all of law and practice, with which they are familiar, were to be excluded from this publication, it would reduce its bulk, in all probability, to a very few pages indeed. It is for the inexperienced, for those but recently commissioned, that much of this work is written and is expected to be useful.

One of the early English writers characterizes the importance attached to a transcript from the justice's docket, in such full and clear, honest and impressive language, that it is here inserted as deserving not only to be read but to be studied.

"A record or memorial, made by a justice of the peace, of things done before him, judicially and in the execution of his office, shall be of such credit that it shall not be gainsaid. One man may affirm a thing, and another man may deny it, but if a *record* once say the word, no man shall be received to aver or speak against it; for if men should be permitted to deny the same, there would never be any end of controversies; and, therefore, to avoid all contention, while one saith one thing and another saith another thing, the law repositeth itself, wholly and solely, in the report of the judge. And hereof it cometh that he [the judge or justice] cannot make a substitute or deputy in his office, seeing that he may not put over (to another) the confidence that is put in him. Great cause, therefore, have the justices to take heed that they abuse not this credit, either to the oppression of the subject, by making an untrue record, or the degrading of the king [or commonwealth] by suppressing the record that is true and lawful." Lamb. 63, 66.

The above extract is admirably calculated to impress aldermen and justices of the peace not only with the solemn obligations they are under to keep their dockets correctly, but to impress them anew with the very great importance of the office they hold. "Justices of the peace," says Lord Coke, 4 Inst. 170, "is such a form of subordinate government, for the tranquillity and quiet of the realm, as no part

of the Christian world hath the like, if the same *be duly executed*." Let then every man who is honored by the commission, make it his study, as it is his duty, duly to execute the duties of this high and honorable office. Occasion is taken to remark that Lord Coke, high authority it will be granted, everywhere speaks of justices of the peace as *judges of record*. In 4 Inst. 177, Lord Coke, giving a reason for certain authority having been vested in them, says: "Because justices of the peace are judges of record, and ought to proceed upon record, and not upon surmises."

II. The docket of a justice of the peace is the best evidence to show the cause of action before him; and parol proof is inadmissible to contradict or vary it. 2 W. & S. 377.

The docket of a justice of the peace is not a record. 6 W. & S. 50. And, therefore, it cannot be proved by a certified transcript. 7 W. 189, 192.

But the law considers them as almost equal to records. They fall within the rule of public books, which may be proved by sworn copies. 14 S. & R. 440. 4 W. & S. 192. 10 Barr 161. 2 H. 413. 8 C. 539. 1 Phila. R. 25.

A sworn copy of the entries of a justice of the peace is admissible in evidence, with the same effect as the docket itself. *Ibid*. In certain cases, however, where an inspection of the original docket is necessary to the due administration of justice, the justice may be compelled to produce it in court, by a subpoena with a clause of *duces tecum*; for instance, where there is any question as to the genuineness of the alleged docket entry; where a subsequent fraudulent alteration of the original entry is alleged, &c.

As justices of peace have not jurisdiction in *all* cases of contract, it ought to appear, from their docket entry, what is the nature of the contract upon which the action is founded. If it do not *appear* from the record that the justice had jurisdiction, the judgment, on *certiorari*, will be reversed. 1 Br. 339.

A justice of peace is not bound to set out the evidence at large on his docket, but he must state the demand of the plaintiff, and the kind of evidence produced to support it, and, in case of an appeal, he must return the whole proceedings. 2 B. 31. 1 Br. 207.

If by the transcript of a magistrate's judgment filed in the court of common pleas, it appears that execution was issued and returned, "No goods and defendant not found," it is sufficient to warrant a *fiert facias* [a writ to levy] without filing a certificate. 6 W. & S. 343.

Docket Entries and Fees.

THE following docket entries, civil and criminal, and the marginal fee-bills, noting the fee allowed by the act 2 April 1868, for every service performed by the justice and the constable, have been diligently and repeatedly revised by the writer of this note, and every entry and item of costs has been carefully verified. They are, therefore, with confidence, recommended to the magistracy of the state, as being, in all particulars, in accordance with the laws. The anxiety for accuracy in the entries and the items of cost has been the greater from the difficulties heretofore experienced, and from not having been able to find entries and bills of costs upon which any reasonable reliance could be placed as to their accuracy.

Care has been taken not only to select docket entries, embracing a great variety of subjects, but also to introduce into the proceedings those incidents which most frequently present themselves in the discharge of this department of the duties of a justice of the peace.

ABBREVIATIONS USED IN THE DOCKET ENTRIES, &c.

Plf. Plaintiff; *Def.* Defendant; *W.* witness; *sw.* sworn; *aff.* affirmed; *subp.* subpoena; *c.* constable; *atty.* attorney; *agt.* agent; *int.* interest; *Ex. issd.* execution issued; *Ex. ret.* execution returnable; *m.* miles; *adjd.* adjourned.

REFERENCES TO THE DOCKET-ENTRIES.

- | | |
|---------------------------------------------------|-----------------------------------------------|
| I. to III. Goods sold and delivered. | XVI. For work and labor, and services. |
| IV. A case in trover and conversion. | XVII. A case before referees. |
| V. Of trespass for damages, &c. | XVIII. Horse and gig hire. |
| VI. Penalty for taking illegal fees. | XIX. On an assignment. |
| VIII. IX. For work and labor done. | XX. A case of nonsuit. |
| X. Landlord and tenant's case. | XXI. Against bail. |
| XI. Goods sold and delivered. | XXII. On a promissory note. |
| XII. On a promissory note. | XXIII. Money paid and laid out. |
| XIII. Goods sold and delivered. | XXIV. For rent. |
| XIV. Claim of a penalty for issuing a small note. | XXV. Proceedings on a rule to show cause, &c. |
| XV. Tenant against landlord. | |

JEREMIAH FINNY
vs.
HORATIO BIRNEY.

COSTS.

Justice.	
Returning action . . .	25
Summons . . .	20
Return and oath of constable . . .	15
Return confessed . . .	25
Return . . .	25
Return of execution . . .	15
Deflection . . .	10
Constable.	
Returning summons . . .	25
Return, 2 m. circular . . .	12
Returning execution . . .	50
Return, 2 m. circular . . .	12

\$2.34

I. CIVIL SUIT. Summons issued 7th October 1869. J. Walker, constable. Returnable 12th, at 9 to 10 o'clock, A. M.; "served, on oath, by producing the original summons to defendant, and informing him of the contents thereof, October the 8th." And now, October 12th, parties appear; plaintiff claims \$20 for goods sold and delivered to defendant. Demand \$20. Defendant admits plaintiff's claim; and judgment, by confession, for twenty dollars, and costs. Same day, defendant pleads freehold for stay of execution. (a) 13th January 1870, execution issued; returnable February 3d. Returned January 24th, with plaintiff's receipt for the debt. Costs paid into office.

When the return of the constable is debt and costs paid into office, the justice should enter on his docket "money paid into office. Received satisfaction." The money being paid over to the plaintiff, his agent or attorney, and the person so receiving having signed the receipt on the docket, the proceedings in that suit are concluded.

(a) It has elsewhere been stated, what it is deemed advisable here to repeat, that where judgment is for a sum not exceeding \$5.33, there is no stay of execution. Where judgment is for a sum greater than \$5.33, not exceeding \$20, the defendant shall have a stay of execution for three months; where the judgment shall be above \$20, and not exceeding \$60, there shall be a stay of six

months; and where the judgment shall be above \$60, and not exceeding \$100, there shall be a stay of execution for nine months: Provided, That the defendant shall put in absolute bail, or a plea of freehold, which shall be accepted, and entered on the docket of the justice. The stay of execution is counted from the day on which the judgment is entered.

JOSEPH BARBARA
vs.
BENJAMIN BYNANY.

COSTS.

Justice.	
Entering action . . .	35
Summons . . .	30
Ret. and oath . . .	15
Trial and judgment . .	50
Bail . . .	25
Execution . . .	25
Return . . .	15

Constable.	
Serving summons . . .	25
Mileage, 2 m. circular . .	12
Serving execution . . .	12
Mileage, 2 m. circular . .	12

\$2.74

-II. CIVIL SUIT. Summons issued 2d October 1869. J. Walker, constable. Returnable the 7th at 4 to 5 o'clock, p. m. "Served, on oath, by producing the original summons to defendant, and informing him of the contents thereof, October 3." October 7th, parties appear; plaintiff claims \$20 for goods sold and delivered. Defendant admits that he owes plaintiff \$10; but denies the balance. Plaintiff produces his book of original entries, and being sworn to make true answers to such questions as shall be asked him touching said book and entries, he proves that the several entries, charging the goods to the defendant, are in his own handwriting, and that they were made in the book on the day the goods were sold and delivered, and that no alterations have been made in them since: whereupon judgment, publicly, for the plaintiff, for twenty dollars, and costs. Defendant enters bail for stay of execution. I am held in \$45 as absolute bail for stay of execution. Signed, J. RAY, No. 500, So. 6th St.

Execution issued 8th January 1870; returnable January 28th. Returned by the constable, indorsed "No goods."

WELIG OVENSHEINE
vs.
WILLIAM ANCHORSMITH

COSTS.

Justice.	
Entering action . . .	35
Summons . . .	30
Return, and o. oath . . .	15
One oath . . .	10
Trial and judgment . .	50
Recognition . . .	25
Receiving and paying over .	50
Satisfaction . . .	10

Constable.	
Serving summons . . .	25
Mileage, 2 m. circular . .	12

\$2.42

III. CIVIL SUIT. August 8th 1870, summons issued. G. Wallace, c. Returnable August 13th, at 10 to 11, A. M. Served, by copy, at the dwelling of defendant, &c., on oath. Parties appear. Debt, balance of an account for goods sold and delivered. Demand, \$19.44. T. H. (sw.) plff. Defendant claims to set off a pair of shoes sold to plaintiff, charged in his book at \$1.75. Plff. produces deft.'s receipt for the above shoes for \$1.75. Judgment for the plaintiff for nineteen dollars and forty-four cents.

August 30th, I become absolute bail in this case, in the sum of forty dollars, for stay of execution.

Signed, A. BELL, No. 967, Arch St.
Money paid into office, December 12th.

Received satisfaction.

Signed, W. OVENSHEINE.

WILLIAM DRINKHOUSE
vs.
MARY COLDWATER.

COSTS.

Justice.	
Entering action . . .	35
Summons . . .	30
Return and constable's oath .	15
Continuance . . .	10
Subpoena, two witnesses . .	25
Subpoena, three w. . .	30
Four oaths . . .	40
Trial and judgment . .	50
Appeal, &c. . .	50
Oath, &c., of bail . . .	10

Constable.	
Serving summons, by copy .	25
Mileage, 2 m. circular . .	12
Serving two subps. personally	30
Mileage, 6 m. circular . .	30

Two witnesses for plaintiff .	50
Mileage, 4 m. circular . .	12

\$4.34

IV. TROVER AND CONVERSION. Summons issued 7th October 1869. G. Wallace, constable. Returnable 12th October, 9 to 10 o'clock, A. M. Returned, on oath, "Served, October 8th, by leaving a copy at defendant's dwelling-house, in the presence of one of her family." Parties appear. Plaintiff claims \$20 damages in trover and conversion, for a gun belonging to the plaintiff, which he loaned to defendant, and which defendant has not returned, although requested. Demand, \$20. Defendant asks a continuance, to which plaintiff does not object. Adjourned to the 14th inst., 9 A. M. Subpoena for two witnesses given for plaintiff. Subpoena for three witnesses for defendant:—and now, October 14th, parties appear. E. F. (sw.) plaintiff, G. H. (sw.) plaintiff, J. R. (aff.) and G. M. (sw.) for defendant. Having heard the parties, their proofs and allegations; judgment, publicly, for the plaintiff for \$15 and costs. Defendant appeals. I am held as absolute bail in this case in \$35, conditioned for the payment of all costs accrued, or that may be legally recovered against the appellant.

Signed, B. COOKE, No. 34, So. 13th St.

Bail justified on oath. Same day, gave a transcript to defendant.

HENRY DUNDAS
vs.
WILLIAM PITT.

COSTS.

Justice.	
Entering action	25
Capias	30
One oath	10
Trial and judgment	50
Bail	25
Execution	25
Return of execution	15
Al. ex. and return and satisfaction	50

Constable.	
Arresting on capias	25
Mileage, 4 m. circular	24
Serving execution	50
Mileage, 4 m. circular	24
Serving al. ex. and mileage	74
	\$4.17

V. TRESPASS IN DAMAGES. Warrant issued 7th October 1869. J. Walker, constable. Same day defendant brought up. Plaintiff appears and claims \$35 damages in trespass for injury done or committed by defendant, on the 2d inst., on his (plff's) real estate. Defendant says he is not guilty. E. H. (sw.) for plaintiff. On hearing the proofs and allegations of the parties, judgment, publicly, for the plaintiff for thirty-five dollars, and costs. Defendant claims stay of execution.

I am held in \$75 in this case as absolute bail for stay of execution, 7th October 1869.

Signed, C. J. Fox, No. 340, So. 4th St.

1870, 8th April, execution issued; returnable 28th April. Execution returned indorsed by the constable "No goods, and the defendant removed from the city. J. Walker, constable. April 28th." The bail appears, May 10th, and pays the debt, interest and costs; and the plaintiff assigns to him the debt, interest and costs. "For a valuable consideration, I assign this judgment, &c., to C. J. Fox, the bail in this case."

Signed, HENRY DUNDAS.

October 20th, C. J. Fox desires that an execution may issue against the defendant. Execution issued and made returnable November 9th. Int. \$1.09.

FORM OF THE EXECUTION IN THIS CASE.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Second Ward, or to the next constable of the said city most convenient to the defendant, greeting:

WHEREAS Henry Dundas to the use of C. J. Fox, the bail of the defendant, on the 7th day of October 1869, obtained judgment before J. F., one of our aldermen for the said city, against William Pitt, for the sum of thirty-five dollars, damages in trespass, together with two dollars and ninety-three cents, the costs of suit, which judgment remains unsatisfied; therefore we command you that you levy the said damages and costs on the goods and chattels of the said debtor, and indorse hereon the time at which you make your levy, and hereon, or on a schedule to be hereto annexed, (a) a list of the same, and within twenty days from the date hereof expose the same to sale by public vendue, you having given due notice thereof, by three or more advertisements, put up at the most public places in your ward, and returning the overplus, if any, of the said sale, to the said defendant. [And, for want of sufficient distress, that you take the body of the said defendant into custody, and him convey to the debtor's apartment of the said city, there to be kept by the sheriff or keeper thereof until the damages, interest and costs aforesaid, shall be fully paid.] (b) And of your proceedings herein, together with this execution, make return to our said alderman on or before the ninth day of November, in the year of our Lord one thousand eight hundred and seventy. Witness our said Alderman, at Philadelphia, who hath hereunto set his hand and seal the 20th day of October, A. D. 1870.

Nov. 5. Money paid into office.

J. F., Alderman. [SEAL.]

Received satisfaction.

Signed,

C. J. Fox.

Indorsement on the back
of the Execution.

H. DUNDAS, to the use,
&c.,

C. J. F.

vs.

WILLIAM PITT.

Debt	\$35.00
Interest (c)	1.09
Costs	2.95
Al. ex.	1.24

J. W., c.

\$40.28

Returnable Nov. 9th, page 178.

(a) The constable is authorized by law to indorse his levy either on the back of the execution or on a piece of paper attached to it; but the time at which he makes his levy must be indorsed on the execution itself.

(b) When the law does not permit the imprisonment of the defendant, the words enclosed in brackets in the execution should

be carefully expunged by the justice before he puts it into the hands of a constable.

(c) The justice should calculate interest on the amount of the judgment from the day on which the judgment was given, until the day on which the money is paid, or on which he issues his execution.

F. A. AECHTERNACHT
vs.
GABRIEL JOHNSON,
Sheriff of the county of
Chester.

COSTS.

Justice.	
Entering action . . .	25
Summons . . .	20
Return and oath of const. . .	15
Continuance . . .	10
One oath . . .	10
Appeal, &c. . .	50
Constable.	
Serving summons personally . . .	25
Mileage, 6 m. circular . . .	36
	<hr/>
	\$1.91

VI. FOR TAKING ILLEGAL FEES. April 24th 1870, summons issued. D. Rittenhouse, constable. Returnable, April 30th 10 to 11, A. M. Served on the defendant, on oath, by producing to him the original summons, and informing him of the contents thereof. Parties appeared April 30th. Plaintiff claims \$3 penalty from the defendant, for that, within six months next before the commencing of this suit, he, the said defendant, sheriff of the county of Chester, did, within the said county to wit, at West Chester, charge, demand and take from the plff. other and greater fees than are expressed and limited by the act of assembly in such cases made and provided, for service done and rendered by defendant as sheriff aforesaid in relation to a suit in the court of common pleas for said county, in which the said F. A. Aechnacht was plaintiff and Paul Murray was defendant, by which taking of unlawful fees the plaintiff was injured.

The plff. further claims another penalty of \$50; for that the deft. within six months aforesaid, as sheriff aforesaid, within the county aforesaid, to wit, at West Chester, did charge, demand and take, from the plff., other and greater fees than are expressed and limited by the act of assembly of this commonwealth in such cases made and provided, for services done and rendered by defendant, as sheriff aforesaid, in and about a suit, in the said court of common pleas, in which the said F. A. Aechnacht was plaintiff and Joanna Mickly, defendant, by which taking of unlawful fees aforesaid, the plaintiff was injured. Demand, \$100. Adjourned to May 6th, 10 A. Parties appear. W. W. (sw.) plff. Adj. to the 11th, 10 A. Plaintiff appears. Judgment, publicly, for plaintiff, for one hundred dollars.

May 13th, defendant appeals. I am held in \$50 as be absolute in this case, conditioned for the payment of all costs accrued, or that may be legally recovered against the appellant.

Signed, C. WICKERLY, New Lond. Towns'p.

JUSTICE JUMPUP
vs.
CHRISTIAN KINGKILLER.

COSTS.

Justice.	
Entering action . . .	25
Summons . . .	20
Return, and c. oath . . .	15
Two subpoenas . . .	40
Rule to refer . . .	10
Rule of reference . . .	15
Notice to referees . . .	20
Two subpoenas . . .	40
Notice to parties . . .	30
Entering judgment on report . . .	15
Receiving and paying over . . .	50
Satisfaction . . .	10
Constable.	
Serving summons . . .	25
Mileage, 1 m. circular . . .	6
Serving subp. 2 w. copy . . .	30
Mileage, 2 m. circular . . .	12
Serving notices on the referees, personally . . .	50
Mileage, 3 m. circular . . .	18
Serving subp. 2 w. personally . . .	30
Mileage, 2 m. circular . . .	12
Serving notices to parties . . .	50
Mileage, 3 m. circular . . .	12
	<hr/>
	\$5.35

VII. CIVIL SUIT. September 19th 1870, summons issued. J. Walker, c. Returnable September 24th, 3 to 4 P. M. Served on oath, on the defendant, by producing to him the original summons, and informing him of the contents thereof. Plaintiff claims for work and labor, and services rendered in selling tract of land for defendant. Demand, \$35. Two subpoenas for plaintiff. Parties appear, and agree to leave all matters in variance between them to H. C., B. S. and J. W., to meet at 6 o'clock, in the evening of October 4th, at the office of J. E. Esq., No. 188, N. Fourth Street. September 26th, delivered the rule to the plaintiff; and served notices on the arbitrators. Two subpoenas for plaintiff. October 17th, received the report of the arbitrators. Notified the parties to appear. October 19th, 12 M., plaintiff appears. Judgment according to the award, for twenty-two dollars and eighty-seven cents.

Money paid into office.

Received satisfaction.

Signed, JOHN TOD, Agent for Plaintiff.

STOKES DICKSON
vs.
SIXTY MATLACK.

COSTS.

<i>Justice.</i>	
Returning action	25
Summons	20
Return and c. oath	15
Subpoena	10
Sub. plff.	20
Sub. def. 5 names	40
Sub. oath	60
Subpoena	10
Subpoena	10
Trial and judgment	50
Exec'n, ret. and satisfac'n	50
<i>Constable.</i>	
Serving summons	25
Mileage, 3 m. circular	18
Serving subpoena	15
Mileage, 2 m. circular	12
Serving execution	50
Mileage, 2 m. circular	12
\$4.42	

VIII. CIVIL SUIT. August 17th 1870, summons issued. D. Rittenhouse, c. Returnable August 23d, 8 to 9 A. M. Served, on oath, personally, on the deft., by producing to him the original summons, and informing him of the contents thereof. Parties appear. Debt, work and labor done, and materials furnished, \$45.05. Deft. claims a set-off for money paid and laid out to the use of plff., \$44. Adjourned to the 27th, 8 A. M. Subpoena for plff. Subpoena for five witnesses for deft. Parties appear. J. W. (sw.) deft. D. K. (sw.) deft. D. R. K. (sw.) deft. J. M. (aff.) deft. L. K. (sw.) plff. R. H. (aff.) plff. Adj'd. to the 30th, 8 A. M. Parties appear. Adjourned to 12 M. Parties appear. Judgment, publicly, for the plaintiff for forty dollars. Execution issued Sept. 22d. Returnable Oct. 12th.

Money paid into office.

Received satisfaction.

G. DAVIS, Agent for Plaintiff.

HENRY KIKER
vs.
JABEZ RAMSHART.

COSTS.

<i>Justice.</i>	
Returning action	25
Summons	20
Return, and c. oath	15
Rule to refer	10
Rule of reference	15
Notice to referees	30
Notice to plaintiff	15
Notice to defendant	15
Returning report and judgment	25
Execution	15
Return	15
Satisfaction	10
<i>Constable.</i>	
Serving summons	25
Mileage, 1 m. circular	6
Serving notice on plff.	25
Mileage, 3 m. circular	18
Serving notice on deft.	25
Mileage, 1 m. circular	6
Serving notice on 3 referees	75
Mileage, 8 m. circular	48
Serving execution	50
Mileage, 1 m. circular	6
\$4.79	

IX. CIVIL SUIT. September 10th 1870, summons issued. J. Walker, c. Returnable September 16th, 10 to 11 A. M. Served, by leaving a copy at the dwelling-house of defendant, in the presence of one of his family, on oath. Parties appear. Debt, work and labor done, 33 days' wages, \$30 a month, \$38.25, credit, cash \$11. Demand, \$27.25, referred to J. F., T. H. and M. R., to meet September 19th, 7 A. M., at Hollahan's tavern, Chestnut St., No. 201. Notified the arbitrators. December 13th, received the report of the arbitrators. Notified the parties December 13th, to appear December 16th, 10 A. M., to show cause why judgment should not be entered according to the award, &c. Parties appear. Judgment, according to the award of the arbitrators, for the plaintiff, for seventeen dollars. Execution issued, December 28th. Returnable January 18th.

Money paid into office.

Received satisfaction.

Signed,

HENRY KIKER.

ADAM BUDDY
vs.
DUKE ELDERBERRY.

COSTS. (a)

<i>Justice.</i>	
Serving complaint	25
Serving precept	25
Returning and determining	50
Returning proceedings	50
Writ of restitution	50
<i>Constable.</i>	
Serving precept	1.00
Mileage, 2 m. circular	20
Executing writ of poss'n	2.00
Mileage, 2 m. circular	20
\$5.40	

X. LANDLORD AND TENANT'S CASE, under the Act of 3d April 1830. July 14th 1870, complainant appears and makes oath that in August 1869 he demised to defendant a certain tenement, No. 3 Lafayette Court, in the city of Philadelphia, reserving rent; the rent whereof is in arrear and unpaid; that there are not sufficient goods and chattels on the premises to pay or satisfy the said rent, except such as are by law exempted from levy and sale, and that the said lessee has, after being duly notified, according to law, neglected or refused to redeliver up possession of the said premises. Same day, summons issued, returnable July 18th, 5 to 6 P. M. G. W. constable. Served on oath. July 18th, parties appear, and, it appearing that said complaint is in all particulars just and true, judgment is hereby entered against the said Duke Elderberry, the lessee, that the premises aforesaid shall be delivered up to the lessor, the said Adam Buddy, and the rent in arrear is ascertained to be \$56.44. Writ of possession issued July 24th. Returnable August 3d. July 28th, the constable returns "possession of the premises given to the plaintiff this day; costs paid into office."

July 28th.

G. WALLACE, Constable.

(a) This bill of costs is taxed by the fee-bills of 1865 and 1866, for the city of Philadelphia. Pard. 1391, 1428.

PARRY PARTRIDGE
vs.
THADY TELLTALE.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and o. oath	15
One oath	10
Continuance	10
Subp. 3 witnesses	30
Trial and judgment	50
Execution	25
Return	15
Satisfaction	10
Notice of rule	15
Continuance	10
Subpoena, 2 witnesses	25
Continuance	10
Two oaths	20
Continuance	10
Execution	25
Return	15
<i>Constable.</i>	
Serving summons	25
Mileage, 5 m. circular	30
Serving subp., 3 witnesses	45
Mileage, 7 m. circular	42
Serving execution	50
Mileage, 5 m. circular	30
Serving al. execution	50
Mileage, 5 m. circular	30

\$6.52

XI. CIVIL SUIT. September 6th 1870, summons issued. J. Walker, c. Returnable September 12th, 9 to 10 A. M. Served on the defendant on oath, by producing to him the original summons, and informing him of the contents thereof. Parties appear. Debt, *goods sold and delivered*. Demand, \$4.79. I. D. (sw.) plff. Adjourned to the 16th, 9 A. M. Subpoena for deft., for three witnesses. Plaintiff appears. Judgment, publicly, for the plaintiff for four dollars and seventy-nine cents. Same day, execution issued. Returnable October 5th. Execution stayed by a rule on the plaintiff, to show cause why the judgment shall not be opened, in consequence of an error in the subpoena as to the hour of meeting. Adjourned to the 26th, 9 A. M. Notified the plaintiff. Parties appear. September 26th, adjourned to October 6th, 9 A. M. Subp. for two w. for defendant. Parties appear. Adj. to the 10th, 9 A. M. October 8th, issued two attachments for F. D. and I. H., defaulting witnesses. Parties appear. J. D. (aff.) and I. H. (sw.) for plff. Adj. to 3 P. M. Plaintiff appears. Rule discharged, and alias execution issued, October 10th. Returnable October 30th.

October 31st, money paid into office.

Received satisfaction.

Signed, No. NOBLE, Atty. for Plaintiff.

JONATHAN WINEBIBBER
vs.
TONEY SOBERSIDES.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and o. oath	15
Continuance	10
One oath	10
Trial and judgment	50
Bail	25
Oath of bail	10
Execution	25
Return	15
<i>Constable.</i>	
Serving summons	25
Mileage, 2 m. circular	12
Serving execution	50
Mileage, 2 m. circular	12

\$3.04

XII. ON A PROMISSORY NOTE. June 25th 1869, summons issued. G. Wallace, c. Returnable July 1st, 10 to 11 A. M. Served on deft. on oath, by producing to him the original summons, and informing him of the contents thereof. Parties appear. Debt, as indorser of a promissory note drawn by S. Brady, dated March 16th 1869, at 90 days, for \$40. Demand, \$40. Adjourned. Parties appear. Adj. to 16th, 4 P. M. Parties appear. F. T. (sw.) plff. Judgment, publicly, for plff. for forty dollars.

August 6th, I become absolute bail in \$85 for stay of execution. Bail justified on oath.

Signed, Geo. Laws, No. 118, Lawrence St. August 21st 1869. For a valuable consideration, I transfer to F. Toms, all the right, &c., of the plaintiff to this judgment, &c.

Signed, JOB JONES, Atty. for the Plaintiff. Execution, issued January 25th 1870. Returnable February 15. Interest, \$1.20. Ret'd "no goods."

JAMES GRASPALL,
to the use of Joe Jones,
vs.
THEODORE JEMINGSON.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and oath of const.	15
Continuance	10
Discontinuance	10
<i>Constable.</i>	
Serving summons	25
Mileage, 2 m. circular	12

\$1.17

XIII. CIVIL SUIT. May 7th 1870, sums. issued. D. R. const. Ret. May 13th, 10 to 11 A. M. Served, on oath, on deft., by producing to him the original summons, and informing him of the contents thereof. Parties appear May 13th. Debt, goods sold and delivered, \$39.31. Interest, \$7. Demand, \$46.31. Adj. to the 15th, 9 A. M. Parties appear. Deft. produces an order under seal of the court of common pleas of Phila. county, dated March 13th 1870, stating that the deft. having exhibited to the court the consent in writing of a majority in number and value of his creditors, the said court order that he be released from all suits, &c., for any debt contracted, or cause of action created previously, and that he be discharged for seven years thereafter. Whereupon the plff. withdrew his suit, and paid the costs.

FORM OF A SUMMONS FOR A PENALTY FOR HAVING ISSUED A SMALL NOTE IN THE NATURE, &c., OF A BANK NOTE.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Eighth Ward, or to the next Constable of the said city most convenient to the defendant, greeting:

You are hereby commanded to summon Job Ox, president of the X. Y. and Z. Savings Institution, to be and appear on the first day of May 1870, between the hours of eight and nine o'clock in the forenoon, before J. B., one of our aldermen in and for the said city, to answer John Leo, who sues as well for himself as for the guardians of the poor of the city of Philadelphia, for a penalty of five dollars for a violation of an act of assembly, passed April 12th 1828, concerning small notes.

Witness our said alderman, at Philadelphia, who hath hereunto subscribed his name and affixed his seal the 26th day of April, in the year of our Lord 1870.

[Alderman's Office, No. 36 S. Sixth St.]

J. B., Alderman. [SEAL.]

Indorsed, "Served on the defendant, April 27th 1870, by producing to him the original summons, and informing him of the contents thereof.

"GEORGE WALLACE, Constable, May 1st."

JOHN LEO, who sues as well for himself, as the guardians of the poor of the city of Philadelphia,

vs.

Job Ox, president of the X. Y. and Z. savings institution.

COSTS.

Justice	
Returning action	25
Summons	20
Return of summons and oath	15
Subp. two witnesses	25
Subp. 2 oaths	20
Continuance of suit	10
Verdict and judgment	50
Execution	25
Certiorari	15
Return on certiorari	50
Constable	
Serving summons	25
Subp. 5 m. circular	30
Serving 2 subp. by copy	30
Subp. 3 m. circular	15
Serving execution	50
Subp. 5 m. circular	30
	\$4.38

XIV. FOR A PENALTY FOR ISSUING A SMALL NOTE. April 26th 1870, summons issued. G. Wallace, c. Returnable May 1st, 8 to 9 A. M. Served, on oath, on the deft., by producing to him the original summons, and informing him of the contents thereof. Parties appear. Subpoena for two witnesses for plff. Plff. complains that the deft. has violated the provisions of the 1st and 2d sections of an Act of Assembly passed April 12th 1828, entitled "An act concerning small notes and the payment of money," by having issued, or caused to be issued, a note or ticket, purporting to be a note or ticket in the nature, character and appearance of a bank note, for a less sum than \$5, to wit, for 50 cents, whereby he has incurred a penalty of five dollars, which plff. claims. Plff., by his counsel, H. H., Esq., asks that this suit and two other suits, between the same parties, now pending before the same alderman, for a similar offence, may be consolidated, which request the alderman declines to comply with, as being against the letter and spirit of the act of assembly. T. D. (sw.) plff. S. P. (aff.) Adj'd to the 4th, 8½ A. M. Parties appear. The alderman publicly declares that the deft. is convicted, and gives judgment for the plff. for five dollars. Same day, execution issued. Returnable May 24th. May 26th, received a certiorari from the court of common pleas. Same day, superseded the execution and made a return to the certiorari.

\$4.38

AMOS PAINTER

vs.

AARON PENNYFINDER.

COSTS.

Justice	
Returning action	25
Subp. 5 m. circular	30
Return of summons and oath	15
Subp. 3 m. circular	50
Serving and paying over	50
Execution	10
Constable	
Serving sub. fn. by copy	30
Subp. 5 m. circular	36
	\$2.36

XV. CIVIL SUIT. *Sci. fa.* issued 7th October 1869. D. Rittenhouse, c. Returnable the 14th, at 9 to 10 o'clock, A. M., requiring Aaron Pennyfinder, the landlord, to appear and show cause why the just account of his tenant, Amos Painter, should not be set off against his claim for rent. D. R., c. (sw.) served by leaving a copy at the dwelling-house of the deft., in the presence of one of his family. And now, 14th, parties appear, and plaintiff claims to off-set his just account of \$50 for goods sold and delivered to defendant, against his demand for rent of \$87.50. On hearing, off-set allowed and rent adjudged; balance due, \$37.50. Defendant agrees to accept the amount adjudged to be due, which is paid into office. Received the sum of \$37.50, in full of rent due to the first inst.

Signed, AARON PENNYFINDER.

JACOB FAITHFUL
vs.
PETER SIMPLE.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and o. oath	15
Continuance	10
Two oaths	20
Two continuances	30
One oath	10
Continuance	10
Trial and judgment	50
Bail	25
Transcript	40
Notice of rule	10
Continuance	10
Appeal, &c.	50
Transcript for plaintiff	40
Execution	25
Return	15
Satisfaction	10
<i>Constable.</i>	
Summons served	25
Mileage, 2 m. circular	12
Serving execution	50
Mileage, 2 m. circular	12
	<u>\$5.04</u>

XVI. CIVIL SUIT. June 19th 1870, summons issued. G. Wallace, c. Returnable June 25th, 9 to 10 A. M. Served a copy at defendant's dwelling in the presence of one of his family, on oath. Parties appear. Adj. to the 26th, 11 A. M. Parties appear. Debt, *work* and *labor* done, and services rendered in the sale of certain real estate. Demand, \$14.50. J. R. (sw.) plff. W. E. (sw.) plff. Adj. to the 27th, 10 A. M. Parties appear. Adj. to the 28th, 10 A. M. Parties appear. A. L. (sw.) def. Adj. to the 1st July, 9 A. M. Parties appear. Judgment, publicly, for the plaintiff for fourteen dollars and fifty cents.

July 19th, I become absolute bail in \$30 for stay of execution. Signed, MICHL. BARRY, No. 479 N. 2d st.

July 20th, transcript for defendant. July 23d, rule on plaintiff to show cause why bail for an appeal shall not be entered as of the 19th inst., bail for stay of execution having been put in by mistake, as appears from the affidavits of defendant and his bail, filed in this office. Rule returnable July 25th, 12 M. Plaintiff notified. Plaintiff appears; defendant does not appear. Rule dismissed. Same day another rule granted on the plaintiff, returnable July 27th, 12 M. Notified plaintiff. Parties appear. Adj. to the 29th, 12 M. Parties appear, and on hearing, the defendant allowed to enter bail for an appeal as of the 19th of July. Same day, transcript for defendant. September 28th, transcript for plaintiff. Same day, received a certificate from the prothonotary of the court of common pleas that no appeal in this case had been filed. Execution issued, September 28th. Returnable, October 18th. Money paid into office.

Received satisfaction.

Signed, JACOB FAITHFUL

RUSH RUNNY
vs.
KILLE KILLINGSWORTH.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and oath	15
Rule to refer	10
Rule of reference	15
Notice to referees	30
Notice to parties	30
Continuance	10
Notice to parties	30
24 rule of reference	10
Notice to referees	30
Notice to parties	30
Entering rept. and judgment	15
Continuance	10
Receiving and paying over	50
Satisfaction	10
<i>Constable.</i>	
Serving sums.	25
Mileage, 3 m. circular	18
Serving 3 notices on the referees twice, 25 cents each	1.50
Mileage, 18 m. circular	1.08
	<u>\$6.41</u>

XVII. CIVIL SUIT. June 6th 1870, summons issued. J. Walker, c. Returnable the 12th, at 3 to 4 P. M. Served, on oath, by producing to the def. the original summons, and informing him of the contents thereof. June 12th, parties appear. Debt, goods sold and delivered and money lent. Demand, \$55.40. Parties agree to submit all matters in variance to J. M., J. V. and J. K., to meet June 19th, 4 P. M., at plaintiff's house. June 23d, received the report of the arbitrators. Notified the parties to appear June 29th, 10 A. M. Parties appear. Arbitrators report that they find for the plaintiff \$50. Parties agree that the award shall be sent back to the same arbitrators. Adjourned to July 8th, 10 A. M. July 3d, received report of the arbitrators awarding plaintiff \$50. July 5th, notified parties to appear, &c. July 7th, 12 M., parties appear and agree to set aside the award, and to refer all matters in dispute to J. W., J. O. and J. K., and that their award shall be final and conclusive. Arbitrators to meet on the 10th inst., at 5 P. M., at J. K.'s house. July 14th, referees file report. July 16th, notified parties to appear July 18th, 9 A. M. Parties appear the 16th, 9 A. M. Referees find for the plaintiff forty dollars. Judgment for the plaintiff, on report of the referees, for forty dollars.

Same day, money paid into office.

Received satisfaction.

Signed, KILLE KILLINGSWORTH.

STEPHEN ASHTUB
vs.
BARNABY BRAZIER.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and o. oath	15
Continuance	25
Two oaths	30
Continuance	20
Subj. 2 witnesses	25
Continuance	20
Five oaths	50
Two continuances	20
Subj. 3 witnesses	25
Two oaths	20
Continuance	10
Trial and judgment	50
Receiving and paying over	20
Satisfaction	10
<i>Constable.</i>	
Serving summons	25
Mileage, 3 m. circular	13
Three witnesses for plff., one	
day each	75
Mileage, 6 m. circular	36
	<hr/> \$4.88

XVIII. CIVIL SUIT. July 9th 1870, summons issued. J. Walker, c. Returnable July 25th, 9 to 10 A. M. Served on the deft. on oath, by producing to him the original summons, and informing him of the contents thereof. Parties appear. Debt, *horse and gig hire*, Sept. 1869, \$9; horse hire, March 31st, \$1; demand, \$10, and 90 cents interest. Adj'd. to the 24th, 9 A. M. Parties appear. J. J. (sw.) plff. J. D. (sw.) deft. Adj'd. to the 1st August, 9 A. M. Subpenas for plff. for two witnesses. Parties appear. Adj'd., by consent of parties, to the 2d, 8 A. M. Parties appear. W. B. (sw.) plff. J. D. (sw.) plff. J. W. (aff.) deft. D. J. (sw.) deft. J. W. (sw.) to the service of a subp. at the dwelling-house of A. Z., to attend as a witness for plff. Plff. prays that an attachment may issue against the said A. Z., which the magistrate refuses, there being no proof that the subpoena had been *personally* served on the said A. Z. Adj'd. to the 8th, 11 A. M. Adj'd., by consent of parties, to the 9th, 11 A. M. Subp. for two witnesses for deft. Parties appear. Plff. puts in a further claim for \$3.50, for money paid, laid out and expended to deft.'s use. F. H. (sw.) plff. J. W. (sw.) deft. Adj'd. to the 11th, 10 A. M. Plff. appears. Judgment, publicly, for the plff., for five dollars and eighty-two cents. Money paid into office.

Received satisfaction.

Signed, JOSEPH GRAY, Atty. for Plff.

JOHN THOMPSON, for the
use of ABRAHAM
SPRINGUP,
vs.
INGRAM INSTEP.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and o. oath	15
Trial and judgment	50
Trans. for deft.	40
Execution	25
Return	15
Satisfaction	10
<i>Constable.</i>	
Serving summons	25
Mileage, 4 m. circular	24
Serving execution	50
Mileage, 4 m. circular	24
	<hr/> \$3.18

XIX. CIVIL SUIT. May 24th 1870, summons issued. G. Wallace, c. Returnable May 30th, 10 to 11 A. M. Served, on oath, on the deft., by producing to him the original summons, and informing him of the contents thereof. Parties appear. Debt as per J. T.'s assignment, dated June 11th 1868, of a claim on the deft. for work and labor done. Demand, \$61. The assignment is produced before the alderman by deft., agreeably to notice given by plaintiff. The agreement between J. T. and J. S. W., dated September 15th 1867, given in evidence. Defendant admits that there is money of J. T.'s in his hands, sufficient to pay the demand, but pleads that attachments have issued out of the district court of the city and county of Philadelphia, which attachments have been issued since the assignment and notice to the defendant. On hearing, judgment, publicly, for the plaintiff for sixty-one dollars. June 28th, transcript for defendant. Execution issued June 29th. Returnable July 19th.

Money paid into office.

Received satisfaction.

Signed, ABRAHAM SPRINGUP.

MANY THOUSANDS
vs.
SOME HUNDREDS.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and o. oath	15
Judgment of nonsuit	25
Execution	25
Return	15
<i>Constable.</i>	
Serving summons	25
Mileage, 4 m. circular	24
Serving execution	50
Mileage, 1 m. circular	6
	<hr/> \$2.30

XX. CIVIL SUIT. Summons issued 5th December 1870. D. Rittenhouse, c. Returnable 10th, 9 to 10 A. M. Constable returns, on oath, "Served, on defendant, by producing to him the original summons, and informing him of the contents thereof, 6th December 1870," and now, 10th of December, the defendant appears, and the plaintiff not attending to substantiate his claim, the defendant asks, and the justice grants, a judgment of nonsuit, with fifty cents for defendant's reasonable costs and trouble in attending the suit. Same day, execution issued for costs, and returned with the defendant's receipt.

Costs paid into office.

JOEL MATHIAS
vs.
BUCK MEYERS,
Bail of High Town for
stay of execution.

COSTS.

Justice.	
Entering action . . .	25
Sci. fa.	30
Return and oath of c. . .	15
Trial and judgment . . .	50
Execution	25
Return	15
Satisfaction	10

Constable.

Serving sci. fa. personally . .	30
One mile circular	6
Serving execution	50
Mileage	6

\$2.52

XXI. CIVIL SUIT. *Sci. fa.* issued, 15th April 1870. J. Clapp, Jr., c. Returnable 27th, at 9 to 10 A. M. Returned, served, on oath, on deft., by producing to him the original writ, and informing him of the contents thereof, 15th of April; and now, 27th of April, parties appear. Plff. claims \$75. Debt, interest and costs due on a recognisance of bail, dated May 7th, A. D. 1869, on the docket of Justice Mills. Record produced, and judgment, publicly, for plff. for seventy-five dollars. Same day, execution issued. Returnable May 17th. Constable returns, "levied on one horse and wagon; sold, and proceeds of sale paid into office."

Received satisfaction of judgment and costs.

Signed, JOEL MATHIAS.

May 17th, original judgment marked to the use of Buck Meyers. May 18th, paid to defendant \$10.76, being the overplus of the proceeds of the sale, paid into office by the constable.

Received \$10.76.

Signed, BUCK MEYERS

MOSES NEIDAY
vs.
ANTHONY JOLY.

COSTS.

Justice.	
Entering action . . .	25
Summons	20
Return and oath . . .	15
Judgment confessed . . .	25
Entering bail	25
Notice of rule	15
One oath	10
Continuance	20
Two oaths	20
Execution	25
Return	15
Two witnesses	50
Mileage, ea. 3 m. circular . .	15

Constable.

Serving summons	25
Mileage, 2 m. circular . . .	15
Serving notice on plff. . . .	20
Mileage, 2 m. circular . . .	12
Serving execution	50
Mileage, 2 m. circular . . .	12

\$4.04

XXII. CIVIL SUIT. June 8th 1869, summons issued. J. Clapp, Jr., const. Returnable the 14th, at 10 to 11 A. M. Returned, on oath, served on the deft. by producing to him the original summons, and informing him of the contents thereof, the 10th inst. June 14th, parties appear. Debt, promissory note, dated April 4th, 1860, on demand, for \$35.50. Judgment by consent for the plaintiff for thirty-five dollars and fifty cents. Same day, I became absolute bail in this case in \$75, for stay of execution. Signed, J. Laws, No. 20 Bear St.

September 3d, rule on plaintiff to show cause why the bail shall not be stricken off, the defendant being dead. Served a notice on plaintiff, returnable September 6th, 12 M. Parties appear. J. W. (sw.) plff. Adj'd. to the 7th, 3 P. M. Parties appear. W. W. (sw.) plff. J. N. (sw.) plff. Rule discharged. Dec. 15th, execution issued. Returnable Jan. 4th 1870. Settled on the execution, as appears by plff.'s receipt. Costs paid into office.

WICKEREE WIGGINS
vs.
CASPAR PHYSICK.

COSTS.

Justice.	
Entering action . . .	25
Summons	20
Return and c. oath . . .	15
One oath	10
Subpna, 3 witnesses . . .	30
Three oaths	30
Continuance	10
One oath	10
Continuance	10
Trial and judgment . . .	50
Execution	25
Return	15

Constable.

Serving summons	25
Mileage, 2 m. circular . . .	13
Serving execution	50
Mileage, 4 m. circular . . .	24

\$3.61

XXIII. CIVIL SUIT. Sept. 22d 1870. Summons issued. G. Wallace, c. Returnable Sept. 28th, 10 to 11 A. M. Served, on oath, by a copy left at the dwelling-house of deft., in the presence of one of his neighbors. Sept. 28th, parties appear. Debt, money paid into the T. W. B. society, and divided by defendant, as one of a committee of said society. Demand, \$5.75. W. S. (sw.) deft. Subp. for plaintiff for three witnesses. M. E. (sw.) plff. E. F. (sw.) plff. G. F. (sw.) deft. Adj'd. to the 3d October, 9 A. M. Defendant admits \$1.62½, pleads a tender, and pays into office \$1.62½, and the costs to this time. Parties appear. Adj'd. to the 6th, 4 P. M. Parties appear. G. F. (ex.) M. G. (sw.) deft. Adj'd. to the 8th, 4 P. M. Parties appear. Judgment, publicly, for the defendant. Execution issued October 26th, by order of defendant. (a) Returnable November 15th. Costs paid by plaintiff. Received for G. F. fifty cents, and M. G. twenty-five cents, witness money, and paid it to defendant, who had paid the witnesses.

(a) Where the judgment is in favor of the defendant, and he requests an execution, as in this case, to issue against the original

plaintiff, he must be made defendant, and the original defendant made plaintiff.

FRISBY FRIEDLINE
vs.
AUGUSTUS DIRKHART.

COSTS.

<i>Justice.</i>	
Entering action	25
Summons	20
Return and o. oath	15
Two oaths	20
Continuance	10
Subpoena, 2 w.	25
Two oaths	20
Continuance	10
One oath	10
Trial and judgment	50
Appeal, transcript, &c.	50
<i>Constable.</i>	
Serving summons	25
Mileage, 2 m. circular	12
Serving two subpoenas personally	30
Mileage, 6 m. circular	36
	<u>\$3.58</u>

XXIV. CIVIL SUIT. September 30th 1869, summons issued. G. W., c. Returnable October 5th, 10 to 11 A. M. Served on the defendant, by producing to him the original summons, and informing him of the contents thereof, on oath. Parties appear. Debt, one quarter's rent, ending 21st September 1869. Demand, \$43.75. A. L. (aff.) plff. M. L. (sw.) deft. Adjd. to the 7th, 10 A. M. Subp. for two w. for plff. Parties appear. Adjd. to the 8th, 8½ A. M. Parties appear. Plff. desires to amend his claim by demanding \$4.81, money laid out and expended for deft. E. B. (sw.) deft. M. A. (sw.) deft. Adjd. to the 10th, 8½ A. M. Parties appear. M. K. (sw.) plff. W. S. (sw.) plff. Deft. claims a set-off, for goods sold and delivered, of \$3. W. L., re-examined. Adjd. to 5 P. M. Parties appear. J. H. (sw.) plff. The deft. tenders to the plff. a judgment for \$12.09, which plaintiff refuses to accept. Judgment, publicly, for the plff. against the deft. for forty-seven dollars and fifty cents. October 24th, plff. desires deft. to be credited for \$25, paid this day to plff. by deft. Defendant appeals.

October 26th, I become bail in this case, in \$100, conditioned for the payment of all costs accrued, or that may be legally recovered against the appellant.

Signed, M. WRIGHT, Girard Place, No. 200.

November 9th, Transcript for defendant.

JOACHIM LEE
vs.
AMINIDAB JONES.

XXV. FORM OF, AND THE PROCEEDINGS ON, A RULE TO
SHOW CAUSE, &C.

Before G. H., a justice of the peace, Vincent township, Chester county, May 10th 1869.

Sir,

The defendant in this case has this day, 10th of May 1869, taken a rule on you to show cause, if any you have, why his plea of freehold in this case shall not be admitted, and the execution stayed. I have appointed the 13th of May inst., at 10 o'clock, A. M., at my office, in Vincent township, for the return of this rule, at which time and place you are requested to attend.

Yours, respectfully,

G. H., Justice of the Peace.

To Joachim Lee, Plaintiff, West Chester.

The rule being handed to the constable, who has the execution, he is required to serve it, and make return of the service, in the same manner as he would a summons, save only as to time. He will, as in the case of a summons, indorse on the rule the time and manner of the service, &c., and return it, on oath or affirmation. If the parties appear, the defendant is called upon to exhibit his deed, or other satisfactory evidence of his being a freeholder; which having done to the satisfaction of the justice, and paid the costs of the execution and the rule, his plea of freehold is recorded on the docket of the justice, the execution is stayed, and the defendant is allowed the stay of execution which the law allows for the amount of the judgment against him. If the plaintiff do not appear, the justice, being satisfied as to the service of the rule, should enter upon the inquiry, and act, in every respect, as if the plaintiff were present.

After what has already been said in relation to keeping the docket, it may be superfluous to remark, that everything done, in relation to the rule, should appear on the record. The following would be a sufficient entry on the docket:—"May 10th, defendant takes a rule on plaintiff to show cause, if any he has, why the defendant shall not be admitted to plead his freehold, and stay the execution. Rule returnable May 13th, 10 A. M. Served, on oath, on plaintiff, personally, May 13th. Parties appear. Defendant's plea of freehold is admitted; the rule made absolute, and the execution stayed."

Docket Entries, in Criminal Cases.

- I. Conspiracy and forgery.
 II. Assault and battery.
 III. Assisting a thief to escape.
 IV. For perjury.

- V. Malicious mischief, &c.
 VI. Rioting at an election.
 VII. Larceny.
 VIII. Assaulting and threatening, &c.

COMMONWEALTH
 vs.
 GEORGE MAYSON.

COSTS.

<i>Justice.</i>	
Information and oath (a) . . .	46
Docket entry . . .	20
Warrant . . .	40
Examination, &c. . .	28
One oath . . .	10
Continuance . . .	10
One oath . . .	10
Continuance . . .	10
Two subpoenas . . .	40
Two oaths . . .	20
Continuance . . .	10
Four subpoenas . . .	80
Two subpoenas . . .	40
Three oaths . . .	30
Continuance . . .	10
Recognition of deft. . .	50
Recog. of pros. and witnesses . .	50
<i>Constable.</i>	
Executing warrant . . .	50
Mileage, 2 m. circular . . .	12
Serving 2 subp. by copy . . .	30
Mileage, 4 m. circular . . .	24
	\$4.14

I. April 25th 1867, warrant issued, D. Moody, c., on the affirmation of T. L. G., charging the defendant with having conspired illegally and fraudulently to make sale of, and to issue notes, purporting to be under the seal, and issued by the authority of the Tinicum Loan Company, of the State of Pennsylvania, with intent to cheat and defraud the said company. April 26th, defendant brought up. C. D. (aff.) Bail required, \$10,000. Defendant and G. H. each held in \$10,000 for defendant's appearance. Adjourned to 4 p. m. Parties appear. G. L. (sw.) Recognizance renewed, for defendant's appearance from day to day. Adjourned 27th, 4 p. m. Two subpoenas for commonwealth. F. E. (sw.) c. G. H. (aff.) c. D. Moody sw. to the personal service of the subpoenas on the defaulting witnesses. Attachments prayed for against L. M. and P. R., defaulting witnesses. Adjourned May 1st, 4 p. m. Two attachments and four subpoenas issued for the commonwealth. Two subpoenas issued for commonwealth. Parties appear. J. F., F. R. and J. M. (sw.) May 3d, 5 p. m., parties appear. Adjourned 30th, 5 p. m. Parties appear. Bail required from the defendant in \$5000, for his appearance at the next court of quarter sessions, to answer the charge of a conspiracy to cheat and defraud certain corporations and individuals; and also in the further sum of \$5000, to answer the charge of forgery, and transferring certain certificates of loan and certificates of stock, in the name of divers persons and corporations, which he was not authorized to transfer.

George Mayson, 659 Walnut St. } each held in the sum of
 John Jones, 796 Chestnut St. } \$10,000, that the defendant shall appear, &c., at the next court of quarter sessions, to answer, &c., and not depart the court without leave, &c.

The prosecutors, and the several witnesses for the commonwealth, to wit, A. B., G. H., J. F., &c., each held in \$1000 to appear and testify, &c.

Returned November 4th, to the court of quarter sessions.

COMMONWEALTH
 vs.
 TIMOTHY WAGON.

COSTS.

<i>Justice.</i>	
Information, &c. . .	40
Docket entry . . .	20
Warrant . . .	40
Examination, &c. . .	24
One oath . . .	10
Continuance . . .	10
Subpoena, 2 witnesses . . .	25
Recognition of deft. . .	50
Recognition of witnesses . . .	50
<i>Constable.</i>	
Executing warrant . . .	50
Mileage, 3 m. circular . . .	12
Serving a subp. by copy . . .	15
Mileage, 6 m. circular . . .	36
	\$3.83

II. May 31st 1867, warrant issued, G. Wallace, c., on the oath of Debh. Fox, charging defendant with having, with others unknown, forcibly entered the house, broken the furniture, and carried away wearing apparel and two \$10 bank notes, the property of deponent; and with having committed on her an assault and battery, on the 27th May inst. June 5th, defendant appears. D. F. (sw.) Bail required, \$500. Defendant and Ld. Haws each held in \$500, that the defendant shall appear at this office June 15th, 12 n. Parties appear June 15th. Adjourned to the 18th, 12 n. Subpoenas two witnesses for defendant. Parties appear. \$500 bail required.

Timothy Wagon, No. 834 Spruce St. } each held in \$500 that
 James Cornocob, 10 Magnolia St. } the defendant shall appear next court of quarter sessions, &c. [of the proper county].
 Debh. Fox, No. 36 1/2 Gray's Court, held in \$250 to testify, &c.
 Returned Dec. 20th, to the court of quarter sessions.

(a) For the information the justice is entitled to two cents for every ten words, and ten cents for the oath. The charge for this

service must depend upon the length of the information.

COMMONWEALTH
vs.
ENOCH KNOXER.

COSTS.

<i>Justice.</i>	
Returning action	20
Examination	20
Fee each	10
Commitment	50
Fee of witness	80
<i>Constable.</i>	
Returning deft.	50
Fee	6
Returning commitment	50
Fee, 3 m. circular	18
	<u>\$2.64</u>

III. June 17th 1867, defendant brought up. J. Clapp, Jr., c., on the oath of whom defendant is charged with having furnished money, and otherwise aided and abetted Jno. Moore, alias O. Power, charged with larceny, in making his escape from deponent, a constable of the city of Philadelphia, who was taking him under a commitment to Moyamensing prison. Bail required, \$300. Defendant committed to the county prison.

J. Clapp, Jr., 178 Vine Street, held in \$100, to testify, &c.
Returned to the July sessions.

COMMONWEALTH
vs.
DAVID CARVER.

COSTS.

<i>Justice.</i>	
Returning action	20
Examination	20
Fee each	10
Commitment	50
Fee of witness	80
<i>Constable.</i>	
Returning warrant	50
Fee, 7 m. circular	43
Returning commitment	50
Fee, 3 m. circular	18
	<u>\$3.00</u>

IV. August 1st 1870, warrant issued. J. Crawford, c., on the oath of Geo. Laws, charged the defendant with having, on his examination before Judge Jones, sitting as a judge of the Insolvent Court in October 1869, falsely and maliciously sworn, for the purpose of cheating and defrauding his creditors, in relation to silk and fur hats and bonnets; which hats and bonnets he falsely swore had been damaged and sold in Florida, for an inconsiderable sum; whereas, in truth, the said hats, &c., are now in Philadelphia, and never were in Florida, and are not damaged. Same day defendant brought up. T. L. (sw.) Bail \$500. Defendant committed to the county jail.

G. Leony, of Penn Township, held in \$250 to testify next court of quarter sessions.

Returned to the September sessions, &c.

COMMONWEALTH
vs.
EDWARD WILD.

COSTS.

<i>Justice.</i>	
Returning action	20
Examination	20
Fee each	10
Commitment	50
Fee of prosecutor	80
Fee of defendant	80
<i>Constable.</i>	
Returning warrant	50
Fee, 4 m. circular	24
	<u>\$2.54</u>

V. September 16th 1869. Warrant issued. J. Walker, c., on the oath of J. F. Bandanna, charging defendant with having maliciously torn down the fruit trees, and carried away the fruit from the premises of deponent, and with having placed in the passages of deponent's house ordure and other offensive matter. Defendant brought up September 23d. J. F. B. (sw.) Bail required, \$100.

Geo. Perry, No. 700 Chestnut St. } each held in \$100 that
Ed. Wild, 78½ Fifth St. } the defendant shall appear at the next court of quarter sessions, &c.

J. F. Bandanna, 900 Chestnut St., held in \$50 to testify, &c.
Returned to the October sessions.

COMMONWEALTH
vs.
J. G. LYONELL,
Constable of Second
Ward.

COSTS.

<i>Justice.</i>	
Returning action	20
Examination	10
Fee each	10
Commitment	50
Fee each	50
Fee of defendant	50
Fee of witness	80
<i>Constable.</i>	
Returning warrant	50
Fee, 16 m. circular	96
	<u>\$3.66</u>

VI. October 5th 1869. Warrant issued. G. Wallace, c., on the affirmation of L. P., charging the defendant with having at the ward election held for the choice of judges, inspectors and assessor of Second Ward in the city of Pittsburgh, on the 4th inst., obstructed the passage to the polls, and otherwise doing all in his power to create a riot at the said election, in violation of his duty and oath of office as constable of said ward. Defendant appears, October 7th. E. M. (aff.) J. F. (sw.) G. W. S. (sw.) Bail required in \$200 to appear at the next court of quarter sessions to answer, &c.

J. C. Peters, Allegheny St., No. 77, and J. F., J. P. and J. R., Union Hotel, Beaver St., each held in \$100 to testify.

J. G. Lyonell, 73 Bank St., } each held in \$300 that the deft.
S. Pitty, 24 Centre St., } shall appear, &c., at the next sessions, &c.

Returned to the December sessions.

COMMONWEALTH
vs.
MICKEL FLAKE.

COSTS.

<i>Justice.</i>	
Information	40
One oath	10
Entering action	30
Warrant	40
Subp. 2 witnesses	25
One oath	10
Continuance	10
Recog. of defendant	50
— of witnesses	50
<i>Constable.</i>	
Executing warrant	50
Mileage, 2 m. circular	12
	<u>\$3.17</u>

VII. October 31st 1869. Warrant issued. J. Walker, c. on the oath of N. Goram, charging the defendant with having feloniously taken off his boat at Middle Wharf, three tons of coal, valued at \$15, the property of deponent, with intent to cheat and defraud him. Subpoena for two witnesses. Defendant brought up the same day. N. Y. (sw.) Defendant says he threw off about two tons of coal at Middle Wharf on the river Schuylkill a few days ago. Adjourned to November 1st, 12 n. Defendant held in \$100 to appear, &c. Parties appear. Bail required, \$100 for defendant's appearance, &c. Mickel Flake, 40 Walnut St., } each held in \$100 that deft Geo. Jenny, 2d and Vine Sts., } appear at the next court of quarter sessions, &c.
N. Goram, Lombard St., held in \$50 to prosecute at the next quarter sessions, &c.
Returned to the December sessions.

COMMONWEALTH
vs.
TIMOTHY BANMAN.

COSTS.

<i>Justice.</i>	
Information, &c.	40
Entering action	20
Warrant	40
One oath	10
Recog. of deft.	50
— of complainant	50
<i>Constable.</i>	
Executing warrant	50
Mileage, 8 m. circular	45
	<u>\$3.06</u>

VIII. Jan. 12th 1867. Warrant issued. G. Wallace, c. on the oath of William Timid, charging the deft. with having assaulted and threatened deponent, so that he is afraid defendant will do him harm in body or estate. Jan. 13th, Deft brought up. W. T. (sw.) Bail required, \$100.
Timothy Banman, Upper Paxton Township, } each held in
Joel Standfast, Lower Paxton Township, } \$100 that the
deft. shall appear, &c., at the next court of quarter session for Dauphin county, &c., and in the mean time keep the peace, &c.
Wm. Timid, Harrisburg, held in \$50 to testify, &c.
Returned to March sessions.(a)

(a) A committing magistrate in this state has no authority to bind a person to keep the peace, or for his good behavior, longer than until the next term of the court; and the case must then be heard before the judges of the quarter sessions, who have the right either to dismiss the complaint, or order the accused

to find bail to keep the peace, and for his good behavior for such period as they in the discretion shall require. It is the justice's duty to make a return of such a case to the court, unless previously settled by the parties. 2 P. 458. Bac. Use 11. *Contra*, Noy 108.

Dogs.

- | | |
|------------------------------------------|----------------------------|
| I. Proceedings in reference to mad dogs. | IV. Judicial decisions. |
| II. Liabilities of owners of dogs. | V. Order to destroy a dog. |
| III. When dogs the subject of larceny. | |

I. ACT 1 APRIL 1834. Purd. 350.

SECT. 1. If any inhabitant of this commonwealth shall make complaint, under oath, to any justice of the peace within the county in which he resides, that any dog owned by a citizen of said county is mad or has been bitten by or been fighting with a dog that is mad, it shall be the duty of the said justice to give notice to the owner to appear forthwith, for the hearing of the said complaint, upon which hearing, if the justice shall be satisfied that the said dog is mad, or that he has been bitten by or been fighting with a mad dog, he shall be authorized to make an order that the said dog be killed; and if the owner of said dog shall refuse or neglect to put him to death immediately, or employ some one to kill him, he shall be liable for all legal costs accruing in consequence of his refusal or neglect; and in such case it shall be the duty of the justice to issue an order to any constable of the county who may be most convenient, directing him forthwith to put the said dog to death, and who shall execute the same under the penalty of five dollars; and if no constable can be had conveniently to execute the said order, then he may direct the order to any other inhabitant of the county whom he may designate, and it shall be, under the like penalty of five dollars, to execute the said order.

II. ACT 14 APRIL 1851. Purd. 350.

SECT. 7. It shall be lawful for any person or persons to shoot or kill any dog or dogs found or known to be chasing or worrying sheep, or accustomed so to do within the commonwealth, without liability on the part of such person or persons to pay damages therefor.

SECT. 8. The owner or owners of any dog or dogs shall be liable for all damages done or caused to be done by any and every such dog or dogs in an action of trespass *vi et armis*, in the name of the person or persons injured, to be sued for and recovered before any court or justice of the peace having jurisdiction of the amount claimed.

III. WHEN DOGS THE SUBJECT OF LARCENY.

It is provided by the act of 29th April 1844, that in all cases where taxes are assessed and paid on dogs, in the counties of Philadelphia and Allegheny, the said dogs shall be considered as personal property; and the owners shall be entitled to the rights and privileges in relation to the same, as in other cases of personal property. Purd. 351.

The acts of 6th April 1854, 3d March 1859, 21st March 1860, and 27th February 1869, provide for the registry of dogs in the counties of Allegheny, Chester, Northampton, Schuylkill, Lancaster, York, Carbon, Clinton, Philadelphia, Franklin, Adams, and Erie; and by the 3d section of the act of 6th April 1854, it is enacted that "All dogs registered according to the provisions of this act, are hereby declared to be personal property; and such dogs so registered as aforesaid, shall be as much the subject of larceny, as any other kind of personal property; and every person stealing and taking away such dog, shall be liable to prosecution and indictment before the court of quarter sessions, and on conviction thereof, shall be sentenced by the court to a fine or imprisonment, or both, as the court in their discretion may think proper." Purd. 351.

IV. An action of trespass will lie before a justice of the peace, against the owner of a dog, for injury done to the plaintiff, in worrying and killing his sheep. 7 Barr 7 H. 359.

And the defendant is liable, not only for the sheep killed by the dog, but for the injuries as may befall the flock from fright. 7 H. 359.

Under the act of 1851, several owners of dogs are liable, in a joint action, for damage done in worrying sheep; and no *scienter* need be shown as to the habits or disposition of the dogs. 27 Leg. Int. 285.

To justify the killing of the dog, it is not necessary that he should have been seen tearing the sheep with his teeth; it is sufficient that he has been observed to follow them with a hostile intent. 1 Gr. 82.

The act of 1851 does not give a magistrate jurisdiction of a case of injury to a *child*, resulting from the bite of a dog: it has exclusive reference to dogs accustomed to worry *sheep*. 2 Phila. R. 44.

V. ORDER TO DESTROY A DOG.

COUNTY OF BRADFORD, ss.

The Commonwealth of Pennsylvania,

To the Constable of Y—— township, in the said county, greeting:

WHEREAS, complaint has been made, under oath, before me, one of the justices of the peace of the said county, that the dog [distinguishing him] owned by A. B. hath been seen fighting with [or hath been bitten by] a mad dog; [as the case may be;] of which fact due notice hath already been given to the said A. B., requiring him to put the said dog to death. And whereas the said A. B. hath refused or neglected to comply with the said order, as by law directed: Therefore, you are hereby commanded to put the said dog to death, without delay: hereof fail not, under the penalty of five dollars. Witness my hand and seal the 5th day of May 1869.

J. R., Justice of the Peace. [SEAL.]

Drunkenness.

I. Penalty for intoxication; and form of conviction.

III. Penalty for public drunkenness.

II. Execution to levy forfeiture.

IV. Judicial decisions.

I. ACT 22 APRIL 1794. Purd. 810.

SECT. 3. If any one shall intoxicate him or herself, by the excessive drinking of spirituous, vinous or other strong liquors, and shall be convicted thereof, he or she shall forfeit and pay the sum of sixty-seven cents for every such offence; or if such person shall refuse or neglect to satisfy the said forfeiture, or goods and chattels cannot be found, whereof to levy the same by distress, he or she shall be committed to the house of correction [or the county prison] of the proper county, not exceeding twenty-four hours.

SECT. 4. Gives jurisdiction to justices of the peace to convict offenders against the preceding section, either upon their own view, or by process issued to bring the body of the accused before them, whereupon they shall proceed in a summary way to inquire into the truth of the accusation; and upon the testimony of witnesses, or the confession of the party, shall convict the offender, and pronounce the forfeiture aforesaid: every such conviction may be in the following terms, viz.:

BE IT REMEMBERED, that on the [first] day of [May.] in the year of our Lord [1860.] A. B., of York county, laborer, (or otherwise, as his rank, occupation or calling may be,) is convicted before me, being one of the justices of the peace in and for the county of York, of being intoxicated by the excessive drinking of spirituous, vinous and other strong liquors, and I do adjudge him to forfeit for the same the sum of sixty-seven cents. Given under my hand and seal, the day and year aforesaid.

J. R., Justice of the Peace. [SEAL.]

Provided always, That every such prosecution shall be commenced within seventy-two hours after the offence shall be committed.

SECT. 12. One moiety of the forfeiture to be paid to the overseers of the poor, &c., and the other moiety to the informer: and the inhabitants of any place may, notwithstanding, be admitted as witnesses.

II. EXECUTION TO LEVY FORFEITURE.

COUNTY OF YORK, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said county, and to the Keeper of the Prison of the county aforesaid, greeting:

WHEREAS, A. B. hath been this day duly convicted before J. R., Esquire, one of the justices of the peace in and for the said county, of being intoxicated by the excessive drinking of spirituous, vinous and other strong liquors; that is to say, on the — day of —, at —, in the county aforesaid, contrary to the act of general assembly in that case made and provided, for which offence he hath forfeited the sum of sixty-seven cents, which fine he hath refused to pay. These are, therefore, to command you, the said constable, to levy the same by distress and sale of the goods and chattels of the said A. B.; but if sufficient goods and chattels cannot be found whereon to levy the same, together with costs, that then you take the said A. B., and deliver him to the keeper of the prison of the county of York, who is hereby commanded to receive and keep the said A. B. in safe custody for the space of twenty-four hours, or until he shall be legally discharged, there to be fed agreeably to law. And herein you are neither of you to fail.

Witness our said justice, who hath hereunto set his hand and seal, the — day of —, A. D. 1860. J. R., Justice of the Peace. [SEAL.]

III. ACT 31 MARCH 1856. Purd. 667.

SECT. 29. Any person who shall be found intoxicated in any street, highway, public-house or public place, shall be fined, upon the view of or upon proof made before any mayor, alderman or justice of the peace, not exceeding five dollars, (a) to be levied with the proper costs upon the goods and chattels of the defendant.

IV. Informers under the summary proceedings authorized by the act of 22d April 1794, and other similar acts, are not liable for costs, if they fail in establishing their accusations. But being entitled to a moiety of the penalty recovered, they are not competent witnesses. 1 Ash. 413.

Where a form of summary conviction is peremptorily prescribed, it must be exactly followed; but if such a provision be merely *directory*, and the conviction contain everything required by the form given, it will not be vitiated by unnecessarily stating more than is required. The 4th section of the act of 1794, which gives the form, declares that "every such conviction *may* be in the following terms," and is, therefore, clearly *directory*. 1 Ash. 411.

The judgment must ascertain not only the amount of fine inflicted, but also the alternative duration of imprisonment. 3 P. L. J. 59.

So odious is drunkenness in the eye of the law, that it has ever been held, that that artificial madness, which is produced and voluntarily contracted by drunkenness and intoxication, and which, depriving men of their reason, puts them in a temporary phrensy, is an aggravation of the offence, rather than an excuse for any criminal misbehavior. 4 Bl. Com. 25.

And Sir Edward Coke says, a drunkard, who is *voluntarius demon*, or a voluntary madman, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it. 1 Inst. 247. And he shall be punished for it, as much as if he had been sober. 1 Hawk. P. C. 3.

The voluntary intoxication of one who, without provocation, commits a homicide, although amounting to phrensy, does not exempt him from the same construction of his conduct, and the same legal inferences, as affecting the grade of crime, which are applicable to a person perfectly sober. 18 N. Y. 9.

In general, a felonious homicide, committed by one in a state of intoxication, is deemed murder in the *second* degree. Where the mind, from intoxication, or any other cause, is deprived of its power to form a design with deliberation and premeditation, the offence is stripped of the malignant feature required by the statute to place it in the list of capital crimes. Lewis' Cr. L. 405. 1 Am. L. J. 149. 4 Cr. C. C. 605.

Evidence of intoxication is always admissible. Where the crime was committed

(a) The act 21 April 1858, § 22, provides of the school district, where the conviction is that the penalty shall not exceed two dollars; had. Purd. 668. and that it shall be paid over to the treasurer

after provocation, it may be considered, in determining whether it was done in the heat of passion; and in other cases, whether threatening words were used by the culprit with deliberate purpose, or otherwise; and generally to explain his conduct. 18 N. Y. 9.

The true criterion as to the capability of the prisoner to commit murder in the first degree, is, not whether he was drunk or sober, but whether he had the power, at the time, deliberately to form and plan in his mind the design and intention of killing his victim. If from intoxication, or other cause, the mind is deprived of the power to plan, deliberate upon, and purpose the death of another, if such act be the result of impulse, not of deliberation, then the perpetrator is not guilty of murder in the first degree. 3 Phila. 235. 2 Brewst. 546.

In a case of murder, the prisoner's intoxication is not such an excuse as will allow a less than ordinarily adequate provocation to palliate the offence, unless it were so great as to render him unable to form a wilful, deliberate and premeditated design to kill, or incapable of judging of his acts and their legitimate consequences. 8 Wr. 55. 2 Brewst. 546.

Insanity, of which the remote cause is habitual drunkenness, is an excuse for an act done by the party while so insane, *but not at the time under the influence of liquor*. The crime (to be punishable) must take place during a fit of intoxication, and be the immediate result of it, and not a remote consequence, superinduced by the antecedent drunkenness of the party. In cases, therefore, of *delirium tremens* or *mania à potu*, the insanity excuses the act, if the party be not intoxicated when it is committed. 5 Mason 28. Lewis' Cr. L. 602. 1 Am. L. J. 147. Wh. Cr. L. § 33. 1 Am. L. R. 38. 2 Cr. C. C. 158. 18 N. Y. 9.

An agreement executed by a person while in a state of intoxication, and when he was incapable of transacting business, by reason thereof, will not be enforced against him or his heir. 2 Har. & Johns. 421. 1 Bouv. Inst. 227.

A person addicted to intoxication, and being in a state of inebriety, though not by the procurement of the defendant, was prevailed on by him to execute a bond for the conveyance of certain lands. Such contract may be avoided, for this cause, by the legal representatives of the obligor. 1 Hen. & Munf. 70. 1 Wash. 164. 3 Cow. 445. 1 P. 31. 13 Ala. 752. 2 Greenl. Ev. § 374.

The contracts of an habitual drunkard, made after inquisition found, and before its confirmation, are void. 6 W. 139.

The trustee of an habitual drunkard is not liable to an action upon a contract made by the drunkard before inquisition found, although he may have effects in his hands sufficient for the payment of the claim. 4 W. 459.

To avoid a contract on the ground of drunkenness, it must be shown affirmatively to have been so excessive as to render the party incapable of consent, or, for the time, incapacitate him from the exercise of his judgment. 24 Texas 174.

Neither habitual intoxication nor the actual stimulus of intoxicating liquors, at the time of executing a will, incapacitates a testator, unless the excitement be such as to disorder his faculties and prevent his judgment. 27 N. Y. 9.

Duelling.

I. Constitutional provisions.

II. Provisions of the Penal Code.

III. Judicial decisions.

I. ANY person who shall fight a duel, or send a challenge for that purpose, or be aider or abettor in fighting a duel, shall be deprived of the right of holding any office of honor or profit in this state, and shall be punished otherwise in such manner as is or may be prescribed by law; but the executive may remit the offence and all its disqualifications. Const. of Penn., art. VI. § 10.

II. ACT 31 MARCH 1860. Purd. 221.

SECT. 25. If any person within this commonwealth shall challenge another by word or writing to fight at sword, rapier, pistol or other deadly weapon, or if any person so challenged shall accept the said challenge; in either case such person so giving or sending or accepting any such challenge, shall be guilty of a misdemeanor, and being convicted thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 26. If any person shall willingly and knowingly carry and deliver any written challenge, or shall verbally deliver any message purporting to be a challenge, or shall consent to be a second in any such intended duel, every such person so offending shall be guilty of a misdemeanor, and being convicted thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment by separate or solitary confinement at labor, not exceeding two years.

SECT. 27. If any person shall have knowledge of any challenge to fight with any deadly weapon, given or received, or in any manner be witness to the fact of such challenge, duel or fighting, not being a second thereat or a party thereto, and shall conceal the same and do not inform thereof, he or she shall be guilty of a misdemeanor, and being convicted thereof, shall be sentenced to pay a fine not exceeding fifty dollars, and to undergo an imprisonment not exceeding twelve calendar months.

SECT. 28. If any person shall, in any newspaper or handbill, written or printed, or otherwise, post, publish or proclaim any other person or persons as a coward or cowards, or use any other opprobrious and abusive language towards such person for not accepting a challenge, or fighting a duel, such person or persons so offending, shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding one year.

III. The offence of duelling consists in the invitation to fight, and the misdemeanor is complete by the delivery of the challenge. 1 Const. Rep. 107.

If a jury believe a letter inviting to a meeting, though on its face it purports to be a challenge, be merely an empty boast, and in ridicule to the party to whom it is addressed, they may acquit; though it is otherwise, if they deem it in earnest. 6 J. J. Marsh. 122. 12 Ala. 276.

It is a misdemeanor at common law to challenge another to fight with fists (2 Law Rep. 148), or to challenge another to fight under any circumstances, whether constituting the statutory offence or otherwise. 1 Hawks 487. 2 Brevard 243. Whart. Cr. L. § 2674.

Upon the trial of an indictment for carrying a challenge to fight a duel, the *scienter* must be proved. 3 Cr. C. C. 178.

Eaves-dropping.

EAVES-DROPPERS, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse and thereupon to frame slanderous and malicious tales, are a common nuisance, and indictable at the sessions, and punishable by fine and finding sureties for their good behavior. 4 Bl. Com. 168. Lewis' Cr.

Eaves-dropping is an indictable offence in Pennsylvania; though it may appear that the alleged offence was committed by the husband of the person who was the object of it, or by his authority, it would *seem* that the person does not lie. There is no law that can prevent a husband constituting a witness for his wife. 6 P. L. J. 226.

Eaves-dropping consists in privily *listening* or hearkening of the discourse, *looking* or *peeping*, which is not indictable; but if the defendant listens to the discourse, or looks, he may be convicted. *Ibid.*

In Tennessee, a prosecution for eaves-dropping can be maintained at common law. 2 Overt. 108.

Election Laws.

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|----------------------------------------------------|-------------------------------------|
| I. Election of inspectors of the general election. | VIII. Meeting and duties of judges. |
| II. Registry of electors. | IX. Township elections. |
| III. Of the general election. | X. Contested elections. |
| IV. Mode of conducting elections. | XI. Wagers on elections. |
| V. Of the qualified electors. | XII. Penalties for misconduct. |
| VI. Duties of peace officers. | XIII. Miscellaneous provisions. |
| VII. Of the closing of the polls. | |

THE purity of our elections is vitally important, not only to the welfare of the country, but to the freedom of the people and the perpetuity of the United States. It is, therefore, of the utmost moment that every citizen should understand the laws which regulate our elections, so that, being well informed, he may lawfully assert his own rights, and carefully avoid infringing on the rights of others. There are many duties, by these laws, imposed upon justices of the peace and peace officers; they are, therefore, especially called upon to understand the laws correctly and thoroughly, to the end that they may perform their duties intelligently and uprightly.

The following pages embrace the general election laws in force throughout the commonwealth. There are various laws applicable only to particular townships which have, for the most part, been referred to in the notes, but the introduction of them at large would have inconveniently extended this chapter; they are therefore referred to the pages of Purdon's Digest, and of the Pamphlet containing a more particular notice of such local statutes.

I. ELECTION OF INSPECTORS OF THE GENERAL ELECTION.

It shall be the duty of the constable or constables of each township, ward or district, at least ten days before the day hereinafter appointed for the election, to give public notice, by six or more printed or written advertisements, affixed at as many of the most public places therein, of the time and place of such election. Act 2 July 1839, § 1. Purd. 370.

In case of the neglect, refusal, death or absence from the county, of the constable or constables of any township, ward or district, the supervisors of the township or district, or the assessors of the ward, as the case may be, shall be liable for the duties hereinbefore required to be done by such constable or constables, in the like penalty. *Provided*, That the said supervisors or assessors shall not

quired to give more than five days' notice of the time and place for holding such election. Ibid. § 2.

The qualified citizens of the several wards, districts and townships, shall meet in every year, at the time and place of holding the election for constable of such ward, district or township, and then and there elect, as hereinafter provided, two inspectors and one judge of elections. Ibid. § 3.(a)

Each of such qualified citizens shall vote for one person as judge, and also for one person as inspector of elections, and the persons having the greatest number of votes for judge shall be publicly declared to be elected judge, and the two persons having the greatest number of votes for inspectors, shall, in like manner, be declared to be elected inspectors of elections. Ibid. § 4.

The elections, as aforesaid, shall be opened between the hours of [eight and ten] o'clock, in the forenoon, by a public proclamation thereof, made by the officers appointed to hold the same, and to be kept open until seven o'clock, except in the city and county of Philadelphia, where it shall be kept open until eight o'clock in the afternoon, (b) when the polls shall be closed, (c) the number of votes be forthwith ascertained, and the persons highest in vote, publicly declared to be elected. Ibid. § 5.

Where any township has been, or shall be, divided in forming an election district, the qualified citizens of each part of such divided township, shall severally elect in the manner and at the time and place aforesaid, two inspectors for each of said several election districts, and shall also elect one person to serve as judge of the elections in each district, to perform the duties enjoined by the 6th section of this act. Ibid. § 7.

As soon as the election for inspectors and judges of election shall be finished, the inspectors and judges of such election shall make out duplicate returns under their hands and seals, setting forth in words at length, the number of votes given for the several persons voted for as inspectors and judge, and also for each township officer voted for at such election; one of which they shall, together with the tickets, list of taxables, list of voters, tally papers and the certificates of the oath or affirmation, taken and subscribed by the inspectors, judges and clerks, carefully collect and deposit in one or more of the ballot boxes, which boxes together with the remaining ones shall be secured, delivered and kept as for similar boxes is directed in the 74th section of the act to which this is a supplement; until the next general election to be held thereafter; and the other duplicate shall be delivered by the judge of each election, within five days thereafter, to the clerk of the court of quarter sessions of the proper county, to be filed in his office; and the said inspectors and judge shall also make out a certificate of election, for each person chosen as an inspector, judge or township officer, which certificate shall be delivered to the person so chosen, or left at his usual place of abode, by the constable of the proper ward, township, district or borough, within five days after such election. Act 13 June 1840, § 1. Purd. 370.

The general, special, city, incorporated district and township elections, and all elections for electors of president and vice-president of the United States, shall be held and conducted by the inspectors and judges elected as aforesaid,

(a) In Philadelphia, the choice of election officers has been taken from the people, by the act 17 April 1869, § 24, and vested in the board of aldermen. Purd. 1559. By the 15th section of this act, the election of township and election officers is to be held on the second Tuesday of October. Purd. 1557.

(b) By act 16 March 1866, at all general and special elections held in the city of Philadelphia, the polls shall be opened at seven o'clock A. M., and be closed at six o'clock P. M. Purd. 1424. And by act 17 April 1869, § 16, at all elections held in other parts of the state the polls are to be opened between the hours of six and seven o'clock A. M., and closed at seven o'clock P. M. Purd. 1558.

(c) It is a sufficient ground to set aside an

election, that the polls were closed at an earlier hour than prescribed by law. 2 P. 526. But it is no objection, if the polls are closed at the proper hour, that a number of voters were in attendance whose votes were thereby excluded. 2 P. 525. Where a poll is kept open after the proper hour, and the number of votes polled afterwards can be clearly ascertained, if the whole of those votes could not change the result, the election will not for that cause be set aside; but where the majority is small, and the result rendered doubtful, by uncertainty as to the number of votes polled after the legal hour, the election must be set aside. 4 P. L. J. 341 And see 1 Luz. Leg. Obs. 12. 1 Brewst. 162. 26 Leg. Int. 356.

and by clerks appointed as is hereinafter provided. Act 2 July 1839, § 14. Purd. 371.

Every judge, inspector and clerk as aforesaid, shall receive the sum of one dollar and fifty cents, except the city and county of Philadelphia, where they shall receive two dollars each, for every day employed in the duties required of him by law, in conducting the general, special or township elections, to be paid by the treasurer of the proper county, on orders to be drawn upon him by the commissioners; which allowance shall be in full for his services and expenses other than the mileage hereinafter allowed, and in lieu of all kinds of refreshment which may have been customary to provide, and no such expense for refreshment shall be paid or allowed by the commissioners of any county. Ibid. § 92.

In all township elections of this commonwealth, for judges of the general and township elections, where a tie shall exist in the said election for judges, the inspector who shall have the highest number of votes, in said election, shall appoint a judge for that purpose. Act 4 March 1842, § 84. Purd. 371.

II. REGISTRY OF ELECTORS.(a)

It shall be the duty of each of the assessors within this commonwealth, on the first Monday in June of each year, to take up the transcript he has received from the county commissioners under the 8th section of the act of April 15th 1834, and proceed to an immediate revision of the same, by striking therefrom the name of every person who is known by him to have died or removed since the last previous assessment from the district of which he is the assessor, or whose death or removal from the same shall be made known to him, and to add to the same the name of any qualified voter who shall be known by him to have moved into the district since the last previous assessment, or whose removal into the same shall be or shall have been made known to him, and also the names of all who shall make claim to him to be qualified voters therein. As soon as this revision is completed he shall visit every dwelling-house in his district and make careful inquiry if any person whose name is on his list has died or removed from the district, and if so to take the same therefrom, or whether any qualified voter resides therein whose name is not on his list, and if so to add the same thereto; and in all cases where a name is added to the list a tax shall forthwith be assessed against the person; and the assessor shall in all cases ascertain, by inquiry, upon what ground the person so assessed claims to be a voter. Upon the completion of this work, it shall be the duty of each assessor as aforesaid to proceed to make out a list, in alphabetical order, of the white freemen, above twenty-one years of age, claiming to be qualified voters in the ward, borough, township or district of which he is the assessor, and opposite each of said names state whether said freeman is or is not a housekeeper; and if he is, the number of his residence, in towns where the same are numbered, with the street, alley or court in which situated; and if in a town where there are no numbers, the name of the street, alley or court on which said house fronts; also, the occupation of the person; and where he is not a housekeeper, the occupation, place of boarding, and with whom, and if working for another, the name of the employer, and write opposite each of said names the word "voter;" where any person claims to vote by reason of naturalization, he shall exhibit his certificate thereof to the assessor, unless he has been for five consecutive years next preceding a voter in said district; and in all cases where the person has been naturalized, the name shall be marked with the letter "N.;" where the person has merely declared his intentions to become a citizen and designs to be naturalized before the next election, the name shall be marked "D. I.;" where the claim is to vote by reason of being between the ages of twenty-one and twenty-two, as provided by law, the word "age" shall be entered; and if the person has moved into the election district to reside since the last general election, the letter "R." shall be placed opposite the name. It shall be the further duty of each assessor as aforesaid, upon the completion of the duties herein imposed, to make out a separate list of all new assessments made by him and the amounts assessed upon each, and furnish the same immediately to the county commissioners, who shall immediately add the names to the tax duplicate of the

(a) For the registry law of Philadelphia, see Purd. 1559.

ward, borough, township or district in which they have been assessed. Act 17 April 1869, § 1. Purd. 1555.

On the list being completed and the assessments made as aforesaid, the same shall forthwith be returned to the county commissioners, who shall cause duplicate copies of said lists, with the observations and explanations required to be noted as aforesaid, to be made out as soon as practicable and placed in the hands of the assessor, who shall, prior to the first of August in each year, put one copy thereof on the door of or on the house where the election of the respective district is required to be held, and retain the other in his possession, for the inspection, free of charge, of any person resident in the said election district who shall desire to see the same; and it shall be the duty of the said assessor to add, from time to time, on the personal application of any one claiming the right to vote, the name of such claimant, and mark opposite the name "C. V.," and immediately assess him with a tax, noting, as in all other cases, his occupation, residence, whether a boarder or housekeeper; if a boarder, with whom he boards; and whether naturalized or designing to be, marking in all such cases the letters, opposite the name, "N." or "D. I.," as the case may be; if the person claiming to be assessed be naturalized, he shall exhibit to the assessor his certificate of naturalization; and if he claims that he designs to be naturalized before the next ensuing election, he shall exhibit the certificate of his declaration of intention; in all cases where any ward, borough, township or election district is divided into two or more precincts, the assessor shall note in all his assessments the election precinct in which each elector resides, and shall make a separate return for each to the county commissioners, in all cases in which a return is required from him by the provisions of this act; and the county commissioners, in making duplicate copies of all such returns, shall make duplicate copies of the names of the voters in each precinct, separately, and shall furnish the same to the assessor; and the copies required by this act to be placed on the doors of or on election places on or before the first of August in each year, shall be placed on the door of or on the election place in each of said precincts. Ibid. § 2.

After the assessments have been completed on the tenth day preceding the second Tuesday in October of each year, the assessor shall, on the Monday immediately following, make a return to the county commissioners of the names of all persons assessed by him since the return required to be made by him by the second section of this act, noting opposite each name the observations and explanations required to be noted as aforesaid; and the county commissioners shall thereupon cause the same to be added to the return required by the second section of this act, and a full and correct copy thereof to be made, containing the names of all persons so returned as resident taxables in said ward, borough, township or precinct, and furnish the same, together with the necessary election blanks, to the officers of the election in said ward, borough, township or precinct, on or before six o'clock in the morning of the second Tuesday of October; and no man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote, as hereinafter required. Ibid. § 3.

Ten days preceding every election for electors of president and vice president of the United States, it shall be the duty of the assessor to attend at the place fixed by law for holding the election in each election district, and then and there hear all applications of persons whose names have been omitted from the list of assessed voters, and who claim the right to vote, or whose rights have originated since the same was made out, and shall add the names of such persons thereto as shall show that they are entitled to the right of suffrage in such district, on the personal application of the claimant only, and forthwith assess them with the proper tax. After completing the list, a copy thereof shall be placed on the door of or on the house where the election is to be held, at least eight days before the election; and at the election the same course shall be pursued, in all respects, as is required by this act and the acts to which it is a supplement, at the general elections in October. The assessor shall also make the same returns to the county commissioners of all assessments made by virtue of this section; and the county commissioners shall furnish copies thereof to the election officers in each district, in like manner in all respects as is required at the general elections in October. Ibid. § 7.

It shall be the duty of said assessors respectively to attend at the holding every general, special or township election, during the whole time the election is kept open, for the purpose of giving information to the inspector or judge, when called on, in relation to the right of any person assessed by law to vote at such election, or such other matters in relation to the assessment of the property as the said inspectors or judge, or either of them, shall from time to time require. For which attendance said assessor shall be entitled to the sum of one dollar per day, to be paid as officers of election are paid by law; and when the township is divided for which said assessor is elected, he shall attend at the election district in which he resides, and is entitled to vote. (a) Act 2 July 1839, § 59. Purd.

III. OF THE GENERAL ELECTION.

It shall be the duty of the sheriff of every county to give notice of the elections, by advertisements posted up in the most public places in every township, district, or by publication in one or more newspapers of the county, at least ten days before the election, and in every such advertisement he shall:

I. Enumerate the officers to be elected.

II. Designate the place at which the election is to be held.

III. He shall give notice that every person, excepting justices of the peace, shall hold any office or appointment of profit or trust under the government of the United States, or of this state, or of any city or incorporated district, who is, or was, a commissioned officer or otherwise, a subordinate officer or agent, who is, or was, employed under the legislative, executive or judiciary department of this state, or of the United States, or of any city or incorporated district, and also that no member of congress, and of the state legislature, and of the select or common council of any city, or commissioners of any incorporated district, is by law incapable of holding or exercising, at the same time, the office or appointment of judge, inspector, or clerk of any election of this commonwealth; and that no inspector, judge, or clerk of any such election, shall be eligible to any office to be then voted for. Act 2 July 1839, § 13. Purd. 372.

The 13th section of the act, passed 2d July 1839, entitled "an act to regulate the elections of this commonwealth," shall not be so construed as to prevent a militia officer or borough officer from serving as judge, inspector or clerk of a general or special election, in this commonwealth. (c) Act 16 April 1840, § 4. Purd. 373.

The inspectors and judges, chosen as aforesaid, shall meet at the respective places appointed for holding the election in the district to which they respectively belong, before nine o'clock in the morning of the second Tuesday of October, in every year; and each of said inspectors shall appoint one clerk, (d) who shall be a qualified voter of such district. Act 2 July 1839, § 15. Purd. 373.

In case the person who shall have received the second highest number of votes for inspector, shall not attend on the day of any election, then the person who shall have received the second highest number of votes for judge at the next preceding election, shall act as an inspector in his place; and in case the person who shall have received the highest number of votes for inspector shall not attend, then the elected judge shall appoint an inspector in his place; (e) and in case the person

(a) Repealed as to Bradford, Wyoming, Tioga, Susquehanna, Wayne, Montgomery and Clinton counties, by act 9 April 1844. P. L. 220.

(b) While no candidate can be an officer at an election, and the election as to him may be set aside on that account, yet it will not affect the election of other candidates for different offices, where there is no charge of fraud or other improper conduct. 2 P. 503.

(c) A candidate for a township office, or for judge, or inspector of elections, is competent to act as judge or inspector of his own election. Case of Passunk township, Com. Pleas, Phila., December 1847. MS. And by act 13 June 1840, § 2, a judge, inspector or clerk

may be voted for to fill any township office. Purd. 385.

(d) The clerk, when appointed, shall be a natural officer, and the inspector cannot be a natural officer, except for some disqualifying cause. Anon., Com. Pleas, Phila., March 1848. MS.

(e) A person appointed to fill a vacancy in the office of inspector, in place of a person elected by the people, and who has not appeared and acted at a general election, is competent to act only *pro hac vice*, and is not competent to act at a succeeding election at which a regularly elected inspector appears at his seat. Case of Penn District Election, Com. Pleas, Phila., 11 May 1850. MS.

a judge shall not attend, then the inspector who received the highest number of votes shall appoint a judge in his place; (a) and if any vacancy (b) shall continue in the board for the space of one hour after the time fixed by law for the opening of the election, the qualified voters of the township, ward or district, for which such officer shall have been elected, present at the place of election, shall elect one of their number to fill such vacancy. Ibid. § 16.

In case any clerk, appointed under the provisions of this act, shall neglect to attend at any election during said year, it shall be the duty of the inspector who appointed said clerk (or of the person filling the place of such inspector) to forthwith appoint a suitable person as clerk, qualified as aforesaid, who shall perform said duties for the year. Ibid. § 17.

The inspectors, judges and clerks aforesaid, shall, before entering on the duties of their offices, severally take and subscribe the oath or affirmation hereinafter directed, (c) which shall be administered to them by any judge, alderman or justice of the peace; but if no such magistrate be present, one of the inspectors of the election shall administer the oath or affirmation to the other judge and inspector, and then the inspector so qualified shall administer the oath or affirmation to him. Ibid. § 18.

The inspectors, judge and clerks, required by law to hold township and general elections, shall take and subscribe the several oaths and affirmations, required by the 19th, 20th and 21st sections of the act of the 2d day of July 1839, entitled "An act relating to the elections of this commonwealth," which oaths or affirmations shall be prepared and administered in the manner prescribed in the 18th and 22d sections of said act; and in addition to the power conferred by the 18th section of said act, the judge, or either of the inspectors, shall have power to administer the oaths prescribed by said act, to any clerk of a general, special or township election. Act 13 June 1840, § 3. Purd. 373.

The following shall be the form of the oath or affirmation to be taken by each inspector, viz.: "I (A. B.) do ——— that I will duly attend to the ensuing election during the continuance thereof, as an inspector, and that I will not receive any ticket or vote from any person, other than such as I shall firmly believe to be, according to the provisions of the constitution and the laws of this commonwealth, entitled to vote at such election, without requiring such evidence of the right to vote as is directed by law, nor will I vexatiously delay or refuse to receive any vote from any person who I shall believe to be entitled to vote as aforesaid, but that I will in all things truly, impartially and faithfully perform my duty therein, to the best of my judgment and abilities; and that I am not directly, nor indirectly, interested in any bet or wager on the result of this election." Act 2 July 1839, § 19. Purd. 373.

The following shall be the oath or affirmation of each judge, viz.: "I (A. B.) do ——— that I will as judge duly attend the ensuing election during the continuance

68, 88. The contrary doctrine, however, is held by the present court, who have ruled that a person so appointed is entitled to act for the whole year. Anon., Com. Pleas, March 1852. MS. The act 17 April 1869, § 15, provides that election officers shall take their places at the expiration of the terms of the persons holding the same at the time of their election. Purd. 1558.

(a) Where an election judge appointed a person inspector in the place of the one who received the highest number of votes, he being absent, and the judge subsequently removed from the ward; held, that the inspector so appointed had power to make an appointment to fill the vacancy in the office of judge. Penn District Election Case, 1 Wh. Dig. 705, pl. 22. But a poll will not be rejected simply because the officers were irregularly chosen. 1 Brewst. 69. 5 Phila. 102.

(b) Upon the division of an election district, the functions of the election officers are destroyed, and cannot be exercised in either

of the new election districts into which the old one is divided. The official functions of local officers fall with the political annihilation of the locality for which they were chosen or appointed. Penn District Election Case, 1 Wh. Dig. 704, pl. 11. 3 S. & R. 121.

(c) Where one of the clerks, by intoxication, was unable to continue his labors, and another person was called to act in his place, but was not sworn, and continued to officiate until the regular clerk was able to resume his duties, the court refused to set an election aside on that ground, there being no allegation of fraud or mistake in conducting the election. 2 P. 503. 1 Brewst. 69. It is a general rule of elections that mere irregularities which do not tend to affect results, are not to defeat the will of the majority. 1 Brewst. 140. But where the law has prescribed a time and place of election, and designated the officers who are to conduct it, a majority may not set up other officers and hold a separate election. 8 H. 493. 8 N. Y. 69. See 1 Brewst. 69.

thereof, and faithfully assist the inspectors in carrying on the same; that I will not give my consent that any vote or ticket shall be received from any person other than such as I firmly believe to be, according to the provisions of the constitution and laws of this commonwealth, entitled to vote at such election, without requiring such evidence of the right to vote as is directed by law, and that I will use my best endeavors to prevent any fraud, deceit or abuse, in carrying on the same by citizens qualified to vote, or others; and that I will make a true and perfect return of the said election, and will in all things truly, impartially and faithfully perform my duty respecting the same, to the best of my judgment and abilities; and that I am not directly or indirectly interested in any bet or wager on the result of this election." Ibid. § 20.

The following shall be the form of the oath or affirmation to be taken by each clerk, viz.: "I (A. B.) do ——— that I will impartially and truly write down the name of each elector who shall vote at the ensuing election, which shall be given me in charge, and also the name of the township, ward or district, wherein such elector resides, and carefully and truly write down the number of votes that shall be given for each candidate at the election, as often as his name shall be read to me by the inspectors thereof, and in all things truly and faithfully perform my duty respecting the same, to the best of my judgment and ability; and that I am not directly or indirectly interested in any bet or wager on the result of this election." Ibid. § 21.

It shall be the duty of the said clerks, forthwith to make out two copies of the forms of each of the said oaths or affirmations, which shall be severally subscribed by each of the inspectors, judges and clerks, and the said oaths or affirmations shall be certified under the hands of the persons by whom they shall be administered. Ibid. § 22.

IV. MODE OF CONDUCTING ELECTIONS.

The commissioners of every county within this commonwealth, shall, on or before eight of the clock in the morning of the day of every general, special, electoral and township election, and at the times, hereinafter specified, perform the following duties. Act 13 June 1840, § 7. Purd. 374.

At elections, as aforesaid, they shall cause to be delivered to one of the inspectors of every election district, within their respective counties, a sufficient number of boxes to contain the tickets (unless the same has already been provided for said township), blank forms of election oaths, tally papers, and returns made out in a proper manner, and headed as the nature of the election may require. Ibid.

At special, electoral and township elections they shall, in addition to the foregoing, deliver to the aforesaid inspectors certified copies, under seal of office, of the duplicate copies delivered them to file in their respective offices, by the respective assessors of wards, townships, incorporated districts and boroughs within their respective counties, pursuant to the directions and provisions contained in the 5th section (a) of this act; also a sufficient number of blank forms of certificates of election, for each person elected to any office voted for at township elections. (b) Ibid.

On the day of meeting of the return judges of elections, within their respective counties, they shall immediately, on said judges having met and selected one of their number as president of the board, deliver to said president a sufficient number of blank forms, of duplicate, triplicate and single returns, made out in a proper manner, and headed as the nature of the return may require; also blank forms of certificates of election for each person elected at such election, made out and headed as the case may require. Ibid.

Every general and special election shall be opened between the hours of eight

(a) *Supra* II. p. 340.

(b) By act 11 March 1852, § 17, so much of this section "as requires county commissioners to furnish every election district with a list of the voters residing therein," is repealed, "so far as relates to township elections, in the county of Lancaster, and it shall be the duty of the inspectors to whom such lists are furnished at the general elections, to preserve the same for use at the township elections."

P. L. 129. This provision is extended to the counties of Dauphin and Northumberland, by act 7 May 1855; to the counties of Chester, Delaware, Montgomery, Cumberland, Fayette, Adams and Franklin, by act 17 March 1855; to the county of York, by act 16 March 1861; to the county of Washington, by act 1 May 1861. Purd. 374. And to the county of Armstrong, by act 18 February 1869. P. L. 205.

and ten in the forenoon, and shall continue without interruption or adjournment until seven o'clock in the evening, when the polls shall be closed, except in the city and county of Philadelphia, the polls shall not be closed before ten o'clock in the evening. (a) Act 2 July 1839, § 61. Purd. 374.

The inspectors shall be placed so as most conveniently to receive the tickets of the electors; and over or near to the door, window or other place at which the tickets are received, the name of the township, ward or district whose inspectors shall be there placed, shall be written or printed in legible characters, so that the electors may readily find the inspectors to whom their tickets are to be delivered. Ibid. § 62.

Every voter and judge of an election shall have full power and authority to administer oaths or affirmations to any and all persons requiring or offering to be sworn or affirmed, in relation to the right of any person to vote at any election, authorized to be held under any law of this commonwealth, and generally shall, in the exercise of the duties of their office as inspector or judge, have the same power to administer oaths or affirmations required or authorized to be administered by the provisions of this act, or the act to which this is a supplement, as justices of the peace have by the laws of this commonwealth; and a violation of such oath or affirmation shall be subject to the same fines and penalties which are or may be inflicted by law, for a violation of such oath or affirmation, when administered by a justice of the peace. Act 13 June 1840, § 14. Purd. 374.

The judges of the elections, within the limits of their respective wards, districts or townships, shall have power, and are hereby required to decide on the qualifications of any person claiming to vote at any election, whenever the inspectors thereof shall disagree upon the right of such person to vote, but not otherwise, and the inspectors thereof shall, upon such decision, forthwith receive or reject the vote of such person as the case may be. Act 2 July 1839, § 6. Purd. 375.

No inspector shall receive any ticket from any person other than an elector residing within the township, ward or district, for which such inspector shall have been elected or appointed. Ibid. § 68.

Every voter may deliver written or printed tickets as he shall see cause, but each ticket shall be on a separate piece of paper folded so as to conceal the name of the person or persons voted for, and containing on the outside fold the designation of the office, (b) and that only; thus—there shall be contained in one ticket the name of a person for governor; in one other ticket the name or names of a senator or senators; in one other ticket the name or names of a member or members of the house of representatives, and thus with respect to other officers as the case may be. (c) Ibid. § 69.

It shall be the duty of each inspector who shall receive the ticket of an elector, to call out aloud the name of such elector, which shall be entered by the clerks in separate lists, and the name shall be repeated by each of them, and the inspector shall insert the letter V in the margin of the alphabetical list, opposite to the name of such elector; and if such elector shall have been sworn or affirmed, or produced a certificate or other evidence as before provided, of having been naturalized, the inspector shall also note the same in the margin of such list; and where proof of residence is made, shall also note the name of the person making such proof. Ibid. § 70.

All tickets folded and indorsed as aforesaid, and personally delivered by the voter and none other, shall, by the respective inspectors, (d) be deposited in separate boxes,

(a) See *ante* 339, note c. Election officers are privileged from arrest, on election day, save for treason, felony or breach of the peace. 1 Brewst. 182.

(b) A ticket containing on the outside the words "prothonotary, register, recorder, &c.," sufficiently designates all the various offices which are filled, in the county, by the same person. 3 P. L. J. 160. So a ticket having on the outside the words "prothonotary and clerk of the several courts of Luzerne county," is sufficient for that purpose. 3 P. L. J. 155.

(c) Where there are more names on the ticket than there ought to be, it is ground for rejecting the votes that contain such names, even if the other names were properly voted for. 2 P. 534. See act of 1866, *infra*.

(d) A thoughtless, inconsiderate interference with the tickets, by a third person, who came into the election room, there being no pretended allegation of fraud, was held, not sufficient ground to set aside the election. 2 P. 503.

according to the office designated on the back of the ticket, and shall there remain until the poll be closed. *Ibid.* § 71.

The qualified voters of the several counties of this commonwealth, at all general, township, borough and special elections, are hereby, hereafter, authorized and required to vote, by tickets, printed or written, or partly printed and partly written, severally classified as follows: one ticket shall embrace the names of all judges of courts voted for, and to be labelled, outside, "judiciary;" one ticket shall embrace the names of all state officers voted for, and be labelled "state;" one ticket shall embrace the names of all county officers voted for, including office of senator, member and members of assembly, if voted for, and members of congress, if voted for, and be labelled "county;" one ticket shall embrace the names of all township officers voted for, and be labelled "township;" one ticket shall embrace the names of all borough officers voted for, and be labelled "borough;" and each class shall be deposited in separate ballot-boxes. (a) Act 30 March 1866, § 1. *Purd.* 1424.

At all general elections, the names of all candidates to be voted for, in the city of Philadelphia, shall be written or printed on one ticket or slip of paper, (b) and the number of the ward and election division in which the ticket is to be voted shall be printed or written on the outside fold thereof. Act 17 April 1869, § 40. *Purd.* 1564.

V. OF THE QUALIFIED ELECTORS.

No person shall be permitted to vote at any election, as aforesaid, other than a * * freeman of the age of twenty-one years or more, who shall have resided in this state (c) at least one year, and in the election district (d) where he offers to vote at least ten days immediately preceding such election, and within two years paid a state or county tax which shall have been assessed (e) at least ten days before the election. But a citizen of the United States, who had previously been a qualified voter of this state, and removed therefrom and returned, and who shall have resided in the election district and paid taxes, as aforesaid, shall be entitled to vote after residing in this state six months: *Provided*, That the * * freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in this state one year, and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes. Act 2 July 1839, § 63. *Purd.* 375.

Every person claiming a right to vote at any election, as aforesaid, shall, if required by either of the inspectors, make proof:

1. That he is a natural born citizen of this commonwealth, or
2. That he was settled therein on the 28th of September 1776, and has since continued to reside therein, or
3. That having been a foreigner, who since that time came to settle therein, he took an oath or affirmation of allegiance to the same on or before the 26th of March Anno Domini 1790, agreeably to the then existing constitution and laws; and as evidence of any of the said facts, the oath or affirmation of such person shall be sufficient, or
4. That he is a natural born citizen of some other of the United States, or had

(a) This section is repealed as to Luzerne and Wyoming counties, by act 6 April 1868, and the mode of voting therein is to be as before its passage. *P. L.* 729.

(b) The act 12 April 1869 provides that in the county of York, it shall be lawful to vote for all candidates for the various offices, at any election, on one slip or ticket. *P. L.* 878.

(c) The party must not only have actually resided in the state one year before tendering his vote, but such residence must have been with the intent to become a citizen of this state, and to abandon the citizenship the party may have previously had in another state. *Anon., Com. Pleas, Phila.,* 3 November 1848.

MS. See 2 *P. A. D.* 450. 1 *Ash.* 126. 1 *Wall. Jr.* 217. 2 *J.* 365. 3 *P. L. J.* 310. An alien lawfully assessed, and in other respects qualified, is entitled to vote, though naturalized within ten days of the election. 1 *Brewst.* 158.

(d) The term "election district," signifies any part of a city or county having fixed boundaries within which the citizens residing therein must vote. 3 *P. L. J.* 310.

(e) The tax must have been personally assessed upon the voter. 2 *S. & R.* 267. An have been paid in money. 1 *Cong. El. Com.* 512-13.

been lawfully admitted or recognised as a citizen thereof, on or before the 26th day of March 1790; and as evidence thereof, he shall, if required by any judge or inspector of the election, produce a certificate in due form from some judge, prothonotary, clerk of a court, mayor, alderman or justice of the peace, or shall be examined on his oath or affirmation, or

5. That having been an alien, he has been naturalized conformably to the laws of the United States; and as the only evidence thereof, he shall produce a certificate thereof, under the seal of the court where such naturalization took place; (a) except where such person shall have resided in said ward, district or township, for ten years or upwards next preceding such application to vote, in which case the oath of such applicant shall be *prima facie* evidence of naturalization. Ibid. § 64.

On the day of election, any person whose name is not on the said list, and claiming the right to vote at said election, shall produce at least one qualified voter of the district as a witness to the residence of the claimant in the district in which he claims to be a voter, for the period of at least ten days next preceding said election, which witness shall take and subscribe a written, or partly written and partly printed, affidavit to the facts stated by him, which affidavit shall define clearly where the residence is of the person so claiming to be a voter; and the person so claiming the right to vote shall also take and subscribe a written, or partly written and partly printed, affidavit, stating to the best of his knowledge and belief, where and when he was born; that he is a citizen of the commonwealth of Pennsylvania and of the United States; that he has resided in the commonwealth one year, or if formerly a citizen therein and has moved therefrom, that he has resided therein six months next preceding said election; that he has not moved into the district for the purpose of voting therein; that he has paid a state or county tax within two years, which was assessed at least ten days before said election; and, if a naturalized citizen, shall also state when, where and by what court he was naturalized, and shall also produce his certificate of naturalization for examination; the said affidavit shall also state when and where the tax claimed to be paid by the affiant was assessed, and when, where and to whom paid; and the tax receipt therefor shall be produced for examination, unless the affiant shall state in his affidavit that it has been lost or destroyed, or that he never received any; but if the person so claiming the right to vote shall take and subscribe an affidavit, that he is a native born citizen of the United States (or if born elsewhere, shall state that fact in his affidavit, and shall produce evidence that he has been naturalized, or that he is entitled to citizenship by reason of his father's naturalization), and shall further state in his affidavit that he is, at the time of taking the affidavit, between the ages of twenty-one and twenty-two years, that he has resided in the state one year and in the election district ten days next preceding such election, he shall be entitled to vote, although he shall not have paid taxes. The said affidavits of all persons making such claims, and the affidavits of the witnesses to their residence, shall be preserved by the election board, and at the close of the election they shall be enclosed with the list of voters, tally-list and other papers required by law to be filed by the return judge with the prothonotary, and shall remain on file therewith in the prothonotary's office, subject to examination, as other election papers are. If the election officers shall find that the applicant or applicants possess all the legal qualifications of voters, he or they shall be permitted to vote, (b) and the name or names shall be added to the list of taxables by the election officers, the word "tax" being added where the claimant claims to vote on tax, and the word "age" where he claims to vote on age; the same words being added by the clerks in each case respectively, on the lists of persons voting at such election. Act 17 April 1869, § 5. Purd. 1556.

(a) A certificate of naturalization cannot be impeached collaterally. 1 Brewst. 182, 218, 263, 270. 27 Leg. Int. 30. Where the naturalization results from that of the parent, the certificate of the latter must be produced. 13 Leg. Int. 140.

(b) An action cannot be maintained against an inspector for refusing a vote, unless on proof of malice. 11 S. & R. 35. 27 Leg. Int. 30. 2 Cr. C. C. 44. 40 Eng. L. & Eq. 89. Nor will an indictment lie, if the officer acted in good faith. 1 Brewst. 183, 273.

It shall be lawful for any qualified citizen of the district, notwithstanding the name of the proposed voter is contained on the list of resident taxables, to challenge the vote of such persons; whereupon the same proof of the right of suffrage as is now required by law shall be publicly made and acted on by the election board, and the vote admitted or rejected, according to the evidence; every person claiming to be a naturalized citizen shall be required to produce his naturalization certificate at the election before voting, except where he has been for ten years, consecutively, a voter in the district in which he offers his vote; and on the vote of such person being received, it shall be the duty of the election officers to write or stamp on such certificate the word "voted," with the month and year; and if any election officer or officers shall receive a second vote on the same day, by virtue of the same certificate, excepting where sons are entitled to vote by virtue of the naturalization of their fathers, they and the person who shall offer such second vote, upon so offending shall be guilty of a high misdemeanor, and on conviction thereof, be fined or imprisoned, or both, at the discretion of the court; but the fine shall not exceed one hundred dollars in each case, nor the imprisonment one year; the like punishment shall be inflicted on conviction, on the officers of election who shall neglect or refuse to make, or cause to be made, the indorsement required as aforesaid on said naturalization certificate. *Ibid.*

The same rules and regulations shall apply at every special election, and at every separate city, borough or ward election, in all respects, as at the general elections in October. *Ibid.* § 7.

Citizens of this state temporarily in the service of the state or of the United States governments, on clerical or other duty, and who do not vote where thus employed, shall not be thereby deprived of the right to vote in their several election districts, if otherwise duly qualified. *Ibid.* § 19.

That so much of every act of assembly as provides that only white freemen shall be entitled to vote or be registered as voters, or as claiming to vote at any general or special election of this commonwealth, be and the same is hereby repealed; and that hereafter all freemen, without distinction of color, shall be enrolled and registered, according to the provisions of the first section of the act approved April 17th 1869, entitled "An act further supplemental to the act relative to the elections of this commonwealth," and shall, when otherwise qualified under existing laws, be entitled to vote at all general and special elections in this commonwealth. Act 6 April 1870, § 10. *Purd.* 1603.

VI. DUTIES OF PEACE OFFICERS.

It shall be the duty of every mayor, sheriff, deputy-sheriff, alderman, justice of the peace and constable or deputy-constable, of every city, county and township or district within this commonwealth, whenever called upon by any officer of an election, or by any three qualified electors thereof, to clear any window, or avenue to any window, at the place of the general election, which shall be obstructed in such a way as to prevent voters from approaching the same; (a) and on neglect or refusal to do on such requisition, said officer shall be deemed guilty of a misdemeanor in office, and on conviction, shall be fined in any sum not less than one hundred nor more than one thousand dollars; and it shall be the duty of the respective constables of each ward, district or township within this commonwealth, to be present in person or by deputy, at the place of holding such elections in said ward, district or township, for the purpose of preserving the peace, as aforesaid. Act 2 July 1839, § 111. *Purd.* 376.

It shall be the duty of every peace officer, as aforesaid, who shall be present at any such disturbance at an election as is described in this act, to report the same to

(a) In discharging this duty, the officer ought to give notice to the people to remove themselves, before proceeding to violent measures; but having given this notice, he has the right to use as much force as may be

necessary to accomplish the object, and every citizen who is called on to assist him is bound to do so. *Com. v. Hamilton, Lancaster Q. S.,* 22 January 1849. *MS.*

the next court of quarter sessions, and also the names of the witnesses who can prove the same; and it shall be the duty of said court to cause indictments to be preferred before the grand jury against the persons so offending. *Ibid.* § 112.

If it shall be made appear to any court of quarter sessions of this commonwealth, that any riot or disturbance occurred at the time and place of holding any election under this act, and the constables who are enjoined by law to attend at such elections have not given information thereof, according to the provisions of this act, it shall be the duty of said court to cause the officer or officers, so neglecting the duty aforesaid, to be proceeded against by indictment for a misdemeanor in office, and on conviction thereof, the said officer shall be fined in any sum not exceeding one hundred dollars. *Ibid.* § 113.

It shall be the duty of the several courts of quarter sessions of this commonwealth, at the next term of said court after any election shall have been held under this act, to cause the respective constables in said county to be examined on oath, as to whether any breaches of the peace took place at the election within their respective townships, wards or districts; and it shall be the duty of said constables respectively to make return thereof as part of their official return at said court. (a) *Ibid.* § 114.

VII. OF THE CLOSING OF THE POLLS.

When the poll shall be closed, the boxes wherein the tickets shall have been deposited, shall be opened one by one, and the inspectors, in the presence of the judge, shall deliberately take out such tickets, and shall each read aloud the name or names written or printed thereon, respectively, and the clerks shall each carefully enter, as read, each ticket as it is taken from the box, and keep account of the same on papers prepared for the purpose, so that the number of votes for each candidate tallied thereon may be readily cast up and known. Act 2 July 1839, § 72. *Purd.* 377.

If, upon opening any ticket, as aforesaid, there be found any more names written or printed on any of them than there ought to be; (b) or if any two or more such papers be deceitfully folded together, such tickets shall be rejected and not counted among the votes; but no ticket shall be rejected by reason of its containing fewer names than the proper number. *Ibid.* § 73.

As soon as the election shall be finished, the tickets, list of taxables, one of the lists of voters, the tally papers, and one of the certificates of the oath or affirmation, taken and subscribed by the inspectors, judges and clerks, shall all be carefully collected and deposited in one or more of the ballot-boxes, and such box or boxes, being closely bound round with tape, shall be sealed by the inspectors and the judge of the election; and, together with the remaining ballot-boxes, shall within one day thereafter be delivered, by one of the inspectors, to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents, to answer the call of any persons or tribunal authorized to try the merits of such election; (c) and the other list of voters, tally papers and certificates, shall be inclosed by the said inspectors and judge in a sealed cover, directed to the prothonotary of the court of common pleas of the county, and shall by some one of them be delivered into his office within three days thereafter, where the same shall be filed. *Ibid.* § 74.

As soon as all the votes given for any office shall be read off and counted, the judge shall publicly declare the number of votes given for each person for such office; and the inspectors and judge of each election district shall make out a certificate under their hands and seals, setting forth in words at length, the number of votes given for the several persons voted for, and distinguishing the office or station in respect to which the votes were given. *Ibid.* § 75.

The said judge shall then take charge of the certificate aforesaid, and on the third day after the day of election shall produce the same at a meeting of one judge

(a) See act 19 March 1869, as to Bradford county. P. L. 441.

(b) It has been held in New York that ballots for a state officer, containing, in addition to the names of the candidates for state officers, a vote for county judge, should be counted for

the state officer. Their statute forbids inserting in the same ballot more than one name for the same office. 8 N. Y. 68, 85.

(c) See act 1 May 1861, as to the disposition of the ballot-boxes, &c., in Philadelphia. *Purd.* 396.

from each district within the same county, at the court-house of the said county, and for the city and county of Philadelphia, at the state-house in the city of Philadelphia, except where such judge by sickness or unavoidable accident is unable to attend, in which case one of the inspectors or clerks shall take charge of said judge and perform the duties required of said judge: *Provided*, That if the day after the election shall be Sunday, the meeting shall be held on the Monday next following. Ibid. § 76.

When the qualified voters of more than one ward, township or district meet at the same place to hold their election, it shall be the duty of the respective judges of said election districts, in addition to the certificates required in the section of this act, to make out a fair statement and certificate of all the votes which shall have been then and there given for each candidate, distinguishing the office or station which he shall have been voted for; and one of said judges shall take charge of said certificate, and also of the several certificates made out for each election district, as before directed, and produce the same at a meeting of the judges in the county, in the manner prescribed in the 78th section of the act. Ibid. § 77.

VIII. MEETING AND DUTIES OF THE RETURN JUDGES.

The judges of the several election districts, in each county, being so selected, shall select one of their number to act as president of the board; and also suitable qualified electors of the county, either members of the board, or persons qualified to act as clerks, who, before entering on their duties, shall be severally sworn and affirmed to perform the duties of their office with honesty and fidelity; and when the board being so formed, it shall be the duty of the several return judges to produce the certificates of election, in their respective districts, to the president of the board, who shall cause the clerks, in presence of said board, to add to each certificate the number of votes, which shall appear, by said certificates, to have been given for any person or persons, in respect to each office or station; (a) and said clerks shall be return judges, and not return judges, shall be allowed two dollars per day, in full for their services, and when return judges, fifty cents, in addition to the pay allowed by law for clerks, which, in either case, shall be paid out of the county treasury, on a certificate of the commissioners of the proper county, signed by the president of the board. Act 2 July 1839, § 78. *Purd.* 377.

The clerks shall, thereupon, in presence of the judges, make out returns in the manner hereinafter directed, which shall be signed by all the judges present, and attested by said clerks; and it shall not be lawful for said judges or clerks to recasting up the votes which shall appear to have been given, as shown by said certificates under the 76th and 77th sections of this act, to omit or reject any vote thereof, except where, in the opinion of said judges, such certificate is so defective as to prevent the same from being understood, and computed in addition to the number of votes; in which case, it shall be the duty of said clerks to make out a true and exact copy of said paper or certificate, to be signed by said clerks, and attested by said judges, and attached to, and transmitted with said certificate (where the same is directed to be transmitted) to the secretary of the court of common pleas, and the original paper shall be deposited in the prothonotary's office by said officer copied and transmitted, with the return of said election, to the prothonotary as aforesaid.

1. Duplicate returns of all the votes given for every person and person who shall have been voted for, for any office or station, which the electors of the county are entitled to choose of themselves, unconnected with any other county or counties.

2. Like returns of all the votes given in the county, for every person who has been elected as governor.

3. Triplicate returns of all the votes given for any person voted for in the county, as electors of president and vice-president of the United States.

When the returns shall be completed, the president of the board of electors aforesaid shall forthwith lodge one of each of such returns in the office of the prothonotary of the court of common pleas of the county; and in the case of the election of electors for president and vice-president of the United States,

(a) If a majority of the votes have been cast for a disqualified person, the person who received the next highest number of votes shall be returned as elected. 6 P. F. Sm.

turns in the same office; and the other duplicates shall be transmitted as follows:

In the case of a governor, the remaining duplicate shall be inclosed in an envelope directed to the speaker of the senate, and indorsed according to the fact, having been sealed, shall be inclosed in another envelope, sealed and directed to the secretary of the commonwealth, and the same shall forthwith be placed, by the president, in the nearest post office.

In case of electors of president and vice-president of the United States, and members of the house of representatives of the United States, and of county judges to be commissioned by the governor, the remaining duplicate shall be inclosed in an envelope, sealed and directed to the secretary of the commonwealth, in the manner placed, by the said president, in the nearest post office.

In case of the election of a senator or senators of this commonwealth, the duplicate shall be inclosed in an envelope, sealed and directed "to the senate of Pennsylvania" and in case of the election of a member or members of the house of representatives of this commonwealth, the same shall, in like manner, be inclosed in an envelope, sealed and directed "to the house of representatives of Pennsylvania" and each of said returns shall be inclosed in an envelope, and directed to the secretary of the commonwealth, and in like manner placed, by said president, in the nearest post office. Ibid. § 80.

In case of election of county commissioners and county auditors, one copy of each of election shall be inclosed in an envelope, sealed and directed "to the proper officers" of the proper county. Act 13 June 1840, § 8. Purd. 378.

When two or more counties shall compose a district for the choice of a member of the senate of this commonwealth, or of the house of representatives of the United States, or of this commonwealth, the judges of the election, in each having met, as aforesaid, the clerks shall make out a fair statement of all the votes which shall have been given at such election, within the county, for each person voted for, as such member or members, which shall be signed by said clerks and attested by the clerks; and one of the said judges shall take charge of the certificate, and shall produce the same at a meeting of one judge from each county, at such place, in such district, as is or may be appointed by law for the purpose; which meeting shall be held on the seventh day after the election. Act of July 1839, § 81. Purd. 378.

The judges of the several counties having met, as aforesaid, shall cast up the election returns, and make duplicate returns of all the votes given for each person in each county district, and of the name of the person or persons elected, and one duplicate return, for each office, shall be deposited in the office of the prothonotary of the court of common pleas of the county in which they shall meet, and the same shall be by said judges deposited in the nearest post office, sealed and directed to the secretary of the commonwealth, in the manner directed in parts two and three of the eighteenth section of this act. Ibid. § 82.

It shall also be the duty of the return judges, in every case, to transmit to each person elected to serve in congress, or in the senate, or in the house of representatives of this commonwealth, a certificate of his election, within five days after the day of making up such return. Ibid. § 83.

The return judge shall be allowed out of the treasury of his proper county, the sum of ten cents for every mile he shall necessarily have travelled in going to the meeting appointed by law for the meeting of return judges, and in returning to his own house. Ibid. § 94.

It shall be the duty of the prothonotary of every county to whom the return of election shall be delivered by the judges, as aforesaid, where said judges are to send a copy of said return to the secretary of the commonwealth, to send a copy of such return, certified under his hand and official seal, and to transmit such copy, under a sealed cover, to the secretary of the commonwealth, by placing the same in the nearest post office. It shall also be the duty of the prothonotary of every county to record all the election returns in a book to be procured for that purpose; and to lay the returns of the election of county commissioners and county auditors, and of all township officers, before the quarterly sessions of such county. Ibid. § 84.

It shall also be the duty of every prothonotary to give a certified copy of the list of voters and other papers deposited in his office by the judges of an election, to any person applying for the same, on payment of the usual fees as in other cases. Ibid. § 85.

IX. TOWNSHIP ELECTIONS.

The constable or constables of every township within this commonwealth, shall give public notice of the township elections, by ten or more printed or written advertisements, affixed at as many of the most public places therein, at least ten days before the election, and in every such advertisement they shall enumerate, designate and give notice as sheriffs of counties in cases of general elections and directed, by the 1st and 2d divisions of the 18th section (a) of the act to which this is a supplement; and in case of the neglect, refusal, death or absence of the aforesaid constable or constables, the duties herein enjoined on them, shall be performed by the supervisors or assessor of the proper township, but said supervisors or assessor of the proper township shall not be required to give more than five days' notice; and said elections shall be held and conducted under the regulations, not inconsistent herewith, prescribed in the aforesaid act; but nothing in this act, or in the act to which this is a supplement contained, shall be construed to prohibit a judge, inspector or clerk of election from being voted for to fill any township office, or render either or any of them ineligible to hold the same. Act 13 June 1840, § 2. Purd. 385.

All elections for city, ward, borough, township and election officers shall hereafter be held on the second Tuesday of October, subject to all the provisions of the laws regulating the election of such officers, not inconsistent with this act; the persons elected to such offices at that time shall take their places at the expiration of the terms of the persons holding the same at the time of such election; but no election for the office of assessor or assistant assessor shall be held, under this act, until the year 1870. Act 17 April 1869, § 15. Purd. 1557.

It shall be the duty of the said inspectors and judge, to make out a certificate of the election of each township officer aforesaid, which shall be signed by them and delivered to the constable of the proper ward, district or township; and by him delivered to the said officer or left at his usual place of abode within six days thereafter. Act 2 July 1839, § 54. Purd. 385.

The clerk of the court of quarter sessions of every county within this commonwealth shall, within fifteen days after the township elections, in each year, are returned into his office, (to) make out, certify and deliver under his hand and seal of office, to the commissioners of his proper county, a list of the names of the persons elected to the offices of assessor and assistant assessors, and the names of the wards, townships, incorporated districts and boroughs, within their respective counties, for which they were respectively elected; and shall be allowed therefor the usual fees for equal or similar services, to be paid out of the county treasury. Act 13 June 1840, § 9. Purd. 385.

Every judge as aforesaid, shall be allowed six cents per mile, for each mile necessarily travelled in delivering the return of the township election of his proper township, to the clerk of the court of quarter sessions; said mileage to be computed circular, and paid out of the county treasury, on orders drawn by the commissioners in the usual manner: *Provided*, That no compensation shall be paid where the return is not delivered within the time prescribed by law; and no daily pay shall be allowed for making returns of township elections. Ibid. § 10.

Constables, supervisors or assessors, as the case may be, of any ward, township, incorporated district or borough, shall be allowed and paid out of the county treasury, two dollars for advertising ward, township, district and borough elections; said constables shall also be allowed and paid, as aforesaid, twenty cents for delivering to each township officer a certificate of his election, as directed by this act and the act to which this is a supplement. Ibid. § 11.

When any new township shall be erected in any county of this commonwealth it shall be lawful for the court of quarter sessions of the proper county to authorize the citizens of said new township to hold an election for justices of the peace

her township officers, upon such notice as the court may direct. Act 59, § 32. Purd. 385.

Whenever it shall become necessary for the citizens of any township in any of the counties of this commonwealth, which has been or shall be divided in any way into any election district or districts, to elect justices of the peace, judges of the courts of elections, assessors, constables, school directors or other township officers, in pursuance of any act or acts of assembly, the qualified voters of such township shall meet at the usual place of holding their annual township elections, and shall then and there proceed to elect such officers in the manner provided for by law, and the returns of such elections shall be made out in the same manner as is now provided for by the laws of this commonwealth; and any township election so held in any township which may be divided as aforesaid, shall be held and conducted only by the judge, inspectors and clerks residing in the township where the place of holding the township election is or may be located, to the contrary notwithstanding: *Provided*, That whenever a vacancy happens by death, resignation, removal or otherwise, then the judge or inspector residing in the township and district nearest to the place of holding the township election shall hold and conduct the same. Act 7 March 1840, § 27. Purd 385.

It shall be the duty of the judge and inspectors holding and conducting such township election to keep as many separate boxes and separate lists of voters for the different election districts or parts of election districts as there are election districts or parts of election districts in such township respectively, in which they shall deposit the votes of the voters residing within the limits of such district or parts of districts for judges of the courts of the general elections in their particular districts, and the returns of such elections shall be made out and certified in conformity with the provisions of the act of July, Anno Domini 1839, entitled "An act relating to the elections of township officers;" and in cases where part only of the township forms in conjunction with other parts of other townships a general election district, the judge of such township election shall meet the judge or judges from the other townships, forming part of such general election district, at the place of the general election, and the said judges shall then and there proceed to receive a general return from their respective returns, which shall be signed, and returned with their several returns in like manner as is now provided. Ibid. § 28.

It shall be lawful for the electors of any township, ward or district, to change the place of holding the elections for inspectors and other officers of such township, in the manner following, to wit:

When the requisition in writing of at least thirty of the electors of the township, ward or district, in case there are one hundred or more taxables in said township, ward or district, or of ten electors in case there are less than one hundred taxables in said township, ward or district, the constable shall give notice by at least ten written handbills, set up in the most public places within such township, ward or district, at least fifteen days before the time appointed for the purpose, that a meeting of the electors of the township, ward or district, as the case may be, will be held at the usual place of holding elections therein, at a certain day and hour to be named in such notice, for the purpose of determining upon the expediency of changing the place of holding such elections.

At least fifty electors of said ward, district or township, provided there be one hundred or more electors in said township, ward or district, or twenty electors in case there are less than one hundred electors in said township, ward or district, provided there be less than one hundred electors in said township, ward or district, be present at the time appointed, the constable shall organize the meeting; and if at such meeting a majority of the electors present shall determine by ballot that it is expedient to change the place of holding such elections, two certificates thereof and of the names of the qualified citizens, voting at such meeting, shall be made out and signed by the officers of the meeting and delivered to the constable, one of which shall be delivered by the constable to the clerk of the court, if there be one, and the other to the prothonotary of the court of common pleas of the county, to be filed in his office. Act 2 July 1839, § 56. Purd. 386.

The petition of one-third of the qualified voters of any election district of this commonwealth, presented to the court of quarter sessions of the proper city or

county for the purpose, it shall be lawful for such court to order an election district upon the question of the location or change of the place of the general, special and township elections for such district, subject to the provisions not inconsistent herewith of the 56th section of the act of the 1st July, Anno Domini 1839, entitled "An act relating to the elections of the commonwealth," and the elections directed by said section shall be conducted by the officers of the last preceding general election, who shall conduct the same in the same manner in which the general elections are by law required to be held and conducted, with the same penalties and punishments for frauds or misconduct of persons offering to vote or others as is prescribed by said act and its supplements and in case of the absence or inability of any such officer to serve, the vacancies shall be filled in the same manner described by said acts. Act of April 1854, § 1. Purd. 386.

Whenever the place for holding the general elections in any borough, ward or other election district within this commonwealth has been, or shall be, or the destruction of the building used therefor, or by the conversion of the same from a public to a private use, be rendered unfit for holding such elections, it shall be lawful for the proper court to fix a place for holding such elections, and, however, to be changed in the mode provided in and by the act entitled "An act in relation to establishing and changing the place for holding general elections throughout the commonwealth," approved the 20th day of April 1854, April 1866, § 2. Purd. 1424.

The courts of quarter sessions shall have authority within their respective counties, to divide any borough, ward or township into two or more election districts, to alter the bounds of any election district, or to form an election district out of two or more adjoining townships, so as to suit the convenience of the inhabitants thereof, and to fix the place of holding elections and appoint the election officers pursuant to the provisions of section 2d of this act: (a) *Provided*, That no district so formed, shall contain less than one hundred voters, and the proceeding in the case of such division or alteration shall be the same as in the erection of new election districts. (b) Act 20 April 1854, § 2. Purd. 386.

The judge, inspectors and clerks of each election district of any borough, ward or township in the counties of this commonwealth, which shall have been divided by the court into separate election districts, under the provisions of the act of April 1854, shall make out a complete return of all the votes given at any borough, ward or township election, designating the number of votes each person has given, and the judge and inspectors shall appoint one of their number for return, who shall meet the other return judge or judges of the said borough, ward or township election, at the oldest election place, on the third day after any borough, ward or township election, and then add together the number of votes given for each candidate, and vote, and make out the returns, as the nature of the election may require, complying in all respects with the provisions of existing election laws; and the performance of said duties, appoint one of their number, by consent, to deliver the full returns to the court of quarter sessions of said county, in the manner now provided by law, for making township returns: *Provided*, That the provisions of this act shall not affect any existing election law relative to the city of Philadelphia, city of Pittsburgh, and Erie. Act 2 April 1860, § 1. Purd.

(a) The act 31 January 1855, provides that in all cases in which new townships, boroughs or election districts shall be erected, or the bounds of any election district changed under the provisions of the act; the court of quarter sessions erecting or changing the name, shall fix the places for holding the elections, which shall continue to be the place for holding elections until the same shall be changed according to the provisions of this act; and the said courts shall also appoint the officers for holding the first election in any township, borough

or election district so erected. Purd. 386. The act 17 April 1866 provides that in which any court of quarter sessions shall declare any borough incorporated by a separate election district, the said court shall fix the place for holding the general elections therein; and the same shall continue to be the place for holding such elections, until the same shall be changed in the manner provided by existing laws. Purd.

(b) The act 26 April 1854 does not affect the proceedings under this act. 5 P. F.

X. CONTESTED ELECTIONS.

eral courts of quarter sessions(*a*) shall have jurisdiction to hear and all cases in which the election of any county or township officer, (*b*) by the the respective county, may be contested. (*c*) Act 2 July 1839, § 153.

e petition in writing of (*d*) at least twenty qualified electors of the proper township, as the case may be, complaining of an undue election (*e*) or of any such officer, the court shall appoint a suitable time for hearing complaint, notice of which shall be given to the person returned at least ten days before such hearing: *Provided*, That no order shall be taken on such petition, unless accompanied by the oath or affirmation of at least two (*g*) of such electors, setting forth that the facts therein stated are true, to the best of their knowledge and belief. *Ibid.* § 154.

pective courts of quarter sessions shall have authority to compel the production of any officer of such election, and of any other person capable of testifying to the same, and also to compel the production of all books, papers, (*h*) tickets, and other documents which may be required at such hearing in the same manner, and to the same extent as in other cases litigated before such courts. The court shall have all the powers which are conferred upon committees of the court by the several provisions of this act. *Ibid.* § 155.

erson who shall be subpoenaed, and attend or be examined at such hearing, shall be entitled to receive the same daily pay and mileage as are by law allowed to persons attending such court in other cases, which shall be paid out of the treasury of the proper county or township, as the case may be. *Ibid.* § 156. Judges of such court, or a majority of them, shall certify that such complaint is without probable cause, the petitioners, and every of them, shall be liable for the costs of such hearing. (*i*) *Ibid.* § 157.

of contested elections of county officers, the court shall determine who shall pay the costs, but if the complaint shall be made without probable cause, the court shall pay the costs; and in such cases the county commissioners shall recover the same by attachment issued by the said court. (*m*) Act 31 July 1839, § 3. *Purd.* 392.

jurisdiction to determine contested elections of prothonotaries, &c., is given to the courts of quarter sessions, by act 2 July 1839. *Purd.* 817. The issuing of the peace by act 13 June 1839, § 1. 590. The issuing of a commission to the governor, does not oust the jurisdiction of the courts. *W. & S.* 372. 1 *Brewst.* 67.

does not give them power to decide on the validity of elections of inspectors and judges. *Obs.* 12.

court is to decide whether there be any ground for a new election. *W. & S.* 209. But the court has no power to order a new election.

§ 10. The party having the next election, and who is contesting the election, has no power to interfere with the proceedings. 1 *Brewst.* 11.

not a compliance with the act to require the signatures of twenty qualified electors to drawing up the complaint, or of being thereto appended, or of the parties giving their signatures for the complaint, or of the parties authorizing them to be so appended, or of the petition being presented, expressed in such manner that their names should stand on the complaint. 1 *Phila.* 446.

as the petition set forth such facts as to show the result, the court will not order an investigation. 2 *P.* 553. 2 *Phila.* 203. If it be defective in substance, it may be amended.

2 *P.* 553. 2 *Phila.* 199. 1 *Brewst.* 140. 2 *Leg. Gaz.* 57. If the ground be fraud, the petition must state with precision wherein the fraud consists. 2 *P.* 537. 2 *Phila.* 204. See 2 *Leg. Gaz.* 57.

(*g*) It is not sufficient that it be sworn to by two other voters resident in the ward. 2 *P.* 521.

(*h*) The court will not notice papers filed in the prothonotary's office, not referred to, nor made part of the petition and record. 2 *P.* 537. See 27 *N. Y.* 65.

(*i*) They will not order the ballot-boxes to be re-counted, without some specific charge or allegation of fraud or mistake, sustained by affidavits. 2 *P.* 553. 1 *Brewst.* 67, 93.

(*k*) They will not direct an issue. 2 *P.* 553.

(*l*) They are, nevertheless, competent witnesses to prove for whom they voted. 2 *P.* 553. 1 *Luz. Leg. Obs.* 12. An elector is not bound to disclose for whom he voted. 3 *Y.* 66. 2 *P.* 553, 592. But this is the privilege of the voter, and it is one that he may waive, and voluntarily appear and disclose on oath for whom he voted, when he deems it necessary to do so; and there is nothing in the constitution or laws which prohibits his so doing. 2 *P.* 553. 1 *Cong. El. Cas.* 520. An illegal voter must disclose for whom he voted. 3 *P. L. J.* 310.

(*m*) This act only applies to the city of Philadelphia.

XL. WAGERS ON ELECTIONS.

If any person or persons shall make any bet or wager upon the result of an election within this commonwealth, or shall offer to make any such bet or wager either by verbal proclamation thereof, or, by any written or printed advertisement challenge or invite any person or persons to make such bet or wager, upon conviction thereof, he or they shall forfeit and pay three times the amount so bet or offered to be bet. (a) Act 2 July 1839, § 115. *Purd.* 380.

It shall be the duty of every judge, sheriff, mayor, alderman, justice of the peace or constable, knowing of any person having offended against the provision of the 115th section of this act, to commence proceedings against the person offending; and it shall be the duty of the grand juries of the respective counties within this commonwealth to make a presentment of all such offences coming within their knowledge. *Ibid.* § 116.

It shall be the duty of the inspectors and judge of the election to reject the vote of all persons, they, or any of them, shall know, or who shall be proven before them to have made, or who are in any manner interested in any bet or wager on the result of said election; and on the request of any qualified elector, said inspectors and judge shall receive proof to show the person so offering to vote has not made any such bet or wager, or is or is not interested therein. (b) *Ibid.* § 117.

It shall be the duty of the several constituted authorities having care and charge of the poor in the respective counties, districts and townships of this commonwealth, knowing or being informed, under oath, of any person or persons having made any bet or wager of any land, goods, money or thing of value, on the result of any election within this commonwealth, or deposited the same in the hands of any person within their respective counties, districts or townships, to bring suit in the name of the commonwealth of Pennsylvania, for the use of the poor of said county, district or township, against such depositor or stakeholder, where said money is deposited in the hands of a third person; or against the party winning said bet when the same is not so deposited, for the recovery of the amount so bet; and, on the trial it shall be made appear that said lands, goods, money or thing of value was bet on the result of any election within this commonwealth, said guardians, directors or overseers of the poor shall be entitled to recover the amount or value thereof for the use of the poor from said stakeholder, or person winning said bet where there is no stakeholder: *Provided*, Said suit is brought within two years from the time of making said bet. (c) And the stakeholder is hereby prohibited during said time to pay over the amount so bet to either of the parties, and shall be liable for the same whether such bet is paid over or delivered to the parties, either of them, or not, and the party winning shall in like manner be liable to the payment of the whole amount so bet, where the same is received by him. As said bet, or the value thereof, may be recovered as debts of like amount are by law recoverable; and if said guardians, directors or overseers of the poor shall neglect or refuse to bring such suit, they shall be guilty of a misdemeanor in office, and on conviction shall be fined in any sum not less than the amount so bet, nor more than double the amount. *Ibid.* § 118.

Wagering or betting on the event of an election, held under the constitutional laws of the United States, or the constitution or laws of this commonwealth, is hereby prohibited, and all contracts or promises founded thereon are declared to be entirely null and void. (d) Act 24 March 1817, § 1. *Purd.* 380.

(a) A wager as to who will be president of the United States, is a wager on the event of an election. 2 *Leg. & Ins. Rep.* 18. For form of indictment, see 8 *W.* 212.

(b) It seems, that this section is in violation of the constitution. 9 *P. F. Sm.* 108, 112.

(c) On a deposit being made, to secure a bet on an election, the money, *eo instanti*, vests in the guardians of the poor; and their omission to sue for it within the time limited by the statute, does not give to either of the wagering parties the right to recover any portion of the

sum deposited. 3 *P. L. J.* 388. See 71 294, 343. 3 *W. & S.* 405. 6 *W. & S.* 402 H. 18. 3 *P. L. J.* 413. If the directors of the poor do not sue within two years, the lost party may recover back his deposit from the stakeholder. 3 *P. F. Sm.* 138.

(d) The act was intended to avoid all bets paid or unpaid, and to suppress anything connected with the subject; it cannot, therefore, be eluded by an appended agreement which would give to an actual wager the similarity of something else. 7 *W.* 343. Nor can

XII. PENALTIES FOR MISCONDUCT.

Justices or supervisors of any township, ward or district, shall neglect or perform the duties herein required of him or them, they shall respectively, be fined in any sum not less than fifty nor more than one hundred dollars. 2 July 1839, § 97. *Purd.* 381.

Any person elected to serve as inspector or judge as aforesaid, and having notice thereof, shall neglect or without good cause refuse, to attend on election at the time appointed by law, he shall in every such case forfeit twenty dollars. *Ibid.* § 99.

Any inspector, judge or clerk, as aforesaid, shall neglect or refuse to take upon the duties of such office, he shall forfeit and pay the sum of fifty dollars, or if he shall afterwards neglect or refuse to perform the duties according to law, he shall forfeit and pay the sum of one hundred dollars for every such offence. *Ibid.* § 100.

Any inspector, judge or clerk of an election, shall presume to act in such capacity making and subscribing the oath required by this act, he shall on conviction be fined in any sum not less than fifty, nor more than two hundred dollars.

Any inspector, judge or clerk, (a) as aforesaid, shall be convicted of any wilful neglect or discharge of his duties, as aforesaid, he shall undergo an imprisonment for not less than three, nor more than twelve months, and be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, and shall for one year thereafter be disabled from holding any office of honor, trust or profit in this commonwealth, and shall moreover be disabled for the term aforesaid, from voting at any general or special election within this commonwealth. *Ibid.*

Any inspector or judge of an election, shall knowingly reject the vote of any citizen, or knowingly receive the vote of any person not qualified, or conspire with any fellow officers any fact on the knowledge of which such vote should be rejected or rejected, each of the persons so offending, shall, on conviction, be fined in the manner prescribed in the 107th section (b) of this act. *Ibid.*

Any inspector or judge shall receive the vote of any person whose name is not returned on the list furnished by the commissioners or assessor, withholding the evidence directed in this act, the person so offending shall, on conviction, be fined in any sum not less than fifty, nor more than two hundred dollars. § 104.

Any inspector or judge of an election, inspector, clerk or other person, before the poll shall be opened, shall unfold, open or pry into any ticket, with a design to discover the name of any candidate therein, every person so offending shall on conviction be fined in any sum not less than fifty nor more than one hundred dollars, and imprisoned for not less than one nor more than three months. *Ibid.* § 105.

Any person shall embezzle or unlawfully deface, alter, change, substitute or destroy any ticket, list of voters, tally paper or certificate, taken or made at any election as aforesaid, he shall on conviction suffer imprisonment for a term not less than one month nor more than three years, at the discretion of the court, and pay any sum not less than one hundred nor more than one thousand dollars.

Any assessor shall intentionally neglect or refuse to assess any citizen of this

State by any mode of evidencing such a claim that it can be enforced by law. 7 *H. 18.*

And money deposited in the hands of a creditor cannot be recovered back. 3 *P. L. J.* 388. But if paid by a creditor of the loser cannot be recovered by attachment. 6 *W. & S.* 485.

In New Jersey, to be bet on the election, may be recovered in the absence of any proof that betting on elections is against the law of New Jersey. 2 *H. 18.*

(a) The inspectors, judges and clerks cannot be joined in the same indictment, where the offences are different, and the duties distinct and separate. 2 *P.* 480.

(b) That is, by a fine of not less than \$50, nor more than \$200. The 98th, 107th and 109th sections of this act appear to be supplied and repealed by act 13 June 1840, § 15.

commonwealth, who is or shall be subject to assessment by law; or shall neglect or refuse to return the name of the person so assessed to the commissioners of the proper county; or intentionally neglect or refuse to perform any other duty enjoined on him by the provisions of this act, he shall, on conviction thereof, be fined in any sum not less than fifty nor more than two hundred dollars. Ibid. § 108.

If any person shall prevent or attempt to prevent any officer of an election from holding such election, or use or threaten any violence to such officer, or shall interrupt or improperly interfere with him in the execution of his duty; or shall block up or attempt to block up the window, or avenue to a polling place where the same may be held; or shall riotously disturb the peace at such place, or shall use or practise any intimidation, threats, force or violence, with intent to influence unduly, or overawe any elector, or to prevent him from exercising the freedom of choice, such person, on conviction, shall be fined in any sum not exceeding five hundred dollars, and be imprisoned for any time not less than six nor more than twelve months. And if it shall be shown to the court that at the trial of such offence shall be had, that the person so offending was not a resident of the city, ward, district or township, where the said offence was committed, he shall be entitled to vote therein, then, on conviction, he shall be sentenced to pay a fine of not less than one hundred nor more than one thousand dollars, and be imprisoned for any term not less than six months nor more than two years. Ibid. § 110.

If any person, not by law qualified, shall fraudulently vote at any election in this commonwealth, or, being otherwise qualified, shall vote out of his proper district, or if any person knowing the want of such qualification, shall aid or procure any person to vote, the person or persons so offending, shall, on conviction, be fined in any sum not exceeding two hundred dollars, and be imprisoned for any term not exceeding three months. Ibid. § 119.

If any person shall vote at more than one election district, or otherwise fraudulently vote more than once on the same day, or shall fraudulently fold or alter his ticket, or to the inspector two tickets together, with the intent to illegally vote, or to procure another to do the same, or if any person shall advise and procure another so to do, he, she or they so offending, shall, on conviction, be fined in any sum not less than fifty, nor more than five hundred dollars, and be imprisoned for any term not less than three months nor more than twelve months. Ibid. § 120.

If any person not qualified to vote in this commonwealth, agreeably to the constitution, (the sons of qualified citizens,) shall appear at any place of election, for the purpose of issuing tickets or of influencing^(b) the citizens qualified to vote, he, she or they so offending, shall, on conviction, be fined in any sum not exceeding one hundred dollars, and be imprisoned for any term not exceeding three months. Ibid. § 121.

If any person shall wilfully and corruptly make or procure any person to make or swear falsely any oath or affirmation, required or authorized by this act, such person shall, on conviction, suffer such penalties and disabilities as are incurred on conviction of perjury, or subornation of perjury. Ibid. § 124.

If any person shall knowingly publish, utter or make use of any false receipt or certificate, with intent to impose the same upon, or deceive any elector, or judge, at any election as aforesaid, such person shall, on conviction, be fined in any sum not less than fifty, or more than five hundred dollars, and suffer imprisonment for any term not less than six months nor more than two years. Ibid. § 125.

If any prothonotary or sheriff shall neglect or refuse to perform any duty hereby enjoined upon him, or shall wilfully misbehave in the discharge of his duty, he shall, on conviction thereof, be fined in any sum not less than one hundred dollars, and shall suffer imprisonment for a term not less than six months nor more than twelve months. Ibid. § 126.

If any justice of the peace shall refuse to receive any ballot-box delivered to him as is hereinbefore provided, or having received the same, shall neglect

(a) To constitute this offence, there must be a preconceived intention to intimidate the officers, or interrupt the election. 3 Y. 429.

(b) It is not necessary, to complete the

offence, that the party should have acted in his endeavors to induce others to do so. 8 Y. 65.

ereof, he shall, on conviction of any such refusal or neglect, be fined in
ot less than one hundred, nor more than one thousand dollars. Ibid.

specific fine or forfeiture imposed by this act, may be recovered by action in the name of the commonwealth, as debts of like amount are by law recoverable, or by indictment in the court of quarter sessions of the proper county; and if the fine and forfeiture is not specific, the proceeding shall be by indictment in the court of quarter sessions of the proper county: *Provided*, That all such suits and actions shall be instituted within one year next after the cause thereof accrues, unless otherwise herein provided. Ibid. § 128.

any officer or officers required to perform any duty by the provisions of this act, who neglect or refuse to perform the same, he or they so offending, shall be deemed and adjudged guilty of a misdemeanor in office, and shall, on conviction, be fined any sum not less than twenty, nor more than two hundred dollars, and shall perform the duties required of any officer herein named are the same as those required by the provisions of the act to which this is a supplement, the penalties inflicted by the provisions of the act for violation of such duty, be, and the same are hereby extended to the provisions herein required. Act 13 June 1840, § 15. Purd. 383.

lector, authorized to vote at any public election, shall directly or indirectly or receive, from any person, any gift or reward in money, goods or valuable thing, under an agreement or promise, express or implied, that such elector shall give his vote for any particular candidate or candidates at such election; or shall accept or receive the promise of any person that he shall thereafter give his vote for any particular candidate or candidates at such election; or shall receive any gift or reward in money, goods or other valuable thing, any office, honor or employment, public or private, or any personal or pecuniary advantage, under such an agreement or promise, express or implied, such elector shall be guilty of a misdemeanor, and shall, on conviction of either of the offenses herein provided for, be sentenced to pay a fine not exceeding one hundred dollars, and to imprisonment not exceeding six months. Act 31 March 1860, § 50.

son who shall directly or indirectly give, or offer to give, any such gift or any such elector, with the intent to induce him to vote for any particular or candidates at such election, or shall directly or indirectly procure or ve any such gift or reward to such elector, with the intent aforesaid, or the intent to influence or intimidate such elector to give his vote for any candidate or candidates at such election, give, offer or promise to give r, any office, place, appointment or employment, or threaten such elector isal or discharge from any office, place, appointment or employment, rivate, then held by him, in case of his refusal to vote for any particular or candidates at such election, the person so offending shall be guilty of a or, and, on conviction, be sentenced to pay a fine not exceeding five ollars, and undergo an imprisonment not exceeding two years. Ibid. § 51. election officer shall refuse or neglect to require such proof of the right as is prescribed by this law or the laws to which this is a supplement, person offering to vote whose name is not on the list of assessed voters, or t to vote is challenged by any qualified voter present, and shall admit n to vote without requiring such proof, every person so offending shall, ction, be guilty of a high misdemeanor, and shall be sentenced, for every ce, to pay a fine not exceeding one hundred dollars, or to undergo an nt not more than one year, or either or both, at the discretion of the t 17 April 1869. § 6. Purd. 1558.

rothonotary, clerk, or the deputy of either, or any other person, shall
al of office to any naturalization paper, or permit the same to be affixed,
or cause or permit the same to be given out, in blank, whereby it may
ntly used, or furnish a naturalization certificate to any person who shall
een duly examined and sworn in open court, in the presence of some of
thereof, according to the act of congress, or shall aid in, connive at, or
permit the issue of any fraudulent naturalization certificate, he shall
f a high misdemeanor; or if any one shall fraudulently use any such
f naturalization, knowing that it was fraudulently issued, or shall vote.

or attempt to vote thereon, or if any one shall vote, or attempt to vote, on any certificate of naturalization not issued to him, he shall be guilty of a high misdemeanor; and either or any of the persons, their aiders or abettors, guilty of either of the misdemeanors aforesaid, shall, on conviction, be fined in a sum not exceeding one thousand dollars, and imprisoned in the proper penitentiary for a period not exceeding three years. Ibid. § 12.

Any person who, on oath or affirmation, in or before any court in this state, or officer authorized to administer oaths, shall, to procure a certificate of naturalization, for himself or any other person, wilfully depose, declare or affirm any matter to be fact, knowing the same to be false, or shall in like manner deny any matter to be fact, knowing the same to be true, shall be deemed guilty of perjury; and any certificate of naturalization issued in pursuance of any such deposition, declaration or affirmation shall be null and void; and it shall be the duty of the court issuing the same, upon proof being made before it that it was fraudulently obtained, to take immediate measures for recalling the same for cancellation; and any person who shall vote, or attempt to vote, on any paper so obtained, or who shall in any way aid in, connive at or have any agency whatever in the issue, circulation or use of any fraudulent naturalization certificate, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall undergo an imprisonment in the penitentiary for not more than two years, and pay a fine not more than one thousand dollars for every such offence, or either or both, at the discretion of the court. Ibid. § 13.

Any assessor, election officer or person appointed as an overseer, who shall neglect or refuse to perform any duty enjoined by this act, without reasonable or legal cause, shall be subject to a penalty of one hundred dollars; and if any assessor shall assess any person as a voter who is not qualified, or shall refuse to assess any one who is qualified, he shall be guilty of a misdemeanor in office, and on conviction be punished by fine or imprisonment, and also be subject to an action for damages by the party aggrieved; and if any person shall fraudulently alter, add to, deface or destroy any list of voters, made out as directed by this act, or tear down or remove the same from the place where it has been fixed, with fraudulent or mischievous intent, or for any improper purpose, the person so offending shall be guilty of a high misdemeanor, and on conviction, shall be punished by a fine not exceeding five hundred dollars, or imprisonment not exceeding two years, or both, at the discretion of the court. Ibid. § 14.

If any person, upon any false representation, or by the production of any forged, false or spurious naturalization certificate, or upon any such certificate not duly issued according to the act of congress, shall cause his name to be placed, or shall attempt to have his name placed, upon any extra assessment list for election purposes, or upon any list of qualified electors authorized or required to be made by any law of this commonwealth, or shall vote or attempt to vote at any general or presidential election, every such person, on conviction thereof, shall be adjudged guilty of a high misdemeanor, and shall be sentenced to imprisonment in the jail of the proper county for a term of not less than twelve months; and every person who shall aid or abet any other person in any such false representation or attempt shall, on conviction thereof, be adjudged guilty of a high misdemeanor, and suffer the like penalty. Ibid. § 38.

If any person, not a citizen of this commonwealth, shall vote, or attempt to vote, at any special, general or presidential election, held in this commonwealth, he shall be guilty of felony, and on conviction be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not less than two nor more than five years. Act 6 April 1870, § 6. Purd. 1803.

If any person shall, through solicitation, invitation or device, persuade or prevail on any person, not a citizen of this commonwealth, to vote, or attempt to vote, at any special, general or presidential election in this commonwealth, or shall, by any means, aid, encourage or abet any such attempt, the person so offending shall be guilty of felony, and on conviction shall be sentenced to pay a fine not exceeding five hundred dollars and undergo an imprisonment, by separate or solitary confinement at labor, not less than two nor more than five years. Ibid. § 7.

Any person who shall unlawfully strike, wound or commit any assault and battery

person of any elector, at or near any election poll, during the holding of an election, shall be deemed guilty of a high misdemeanor, and upon conviction shall be fined not less than one hundred dollars or more than five hundred dollars, or be imprisoned for a term not less than three months or more than one year. *Ibid.* § 9.

XIII. MISCELLANEOUS PROVISIONS.

It shall be lawful for the governor of this commonwealth, on the representation of the board of health, or of the municipal authority of any city, borough, town or ward or district in this commonwealth, that from the prevalence of any malignant contagious disease, in such city, borough, town or district, the lives of the people may be in danger by attending at the places fixed by law for holding elections, to direct the sheriff of the proper county to give notice that an election for such city, borough, town or district, will be held at such place within the same, or in the neighborhood of the same, as he, the governor, may judge most convenient, and it shall be the duty of such sheriff to give public notice of the election, in the manner hereinbefore required, at least seven days before the election, under the same penalty, as is hereinafter provided. Act 2 July 1844. *Purd.* 383.

It shall be lawful for the governor of the United States, or of this commonwealth, to present, either armed or unarmed, at any place of election within this commonwealth, during the time of such election: *Provided*, That nothing herein contained shall be so construed as to prevent any officer or soldier, from exercising the right of suffrage in the election district to which he may belong, if otherwise permitted according to law. *Ibid.* § 95.

In cases where a sheriff is directed to perform any duty by the provisions of law, and said sheriff is absent from the district, or there is any vacancy in said office, any duty directed to be performed by the sheriff, shall be done and performed by the proper officer or person of the proper county, who shall be entitled to the same fees and emoluments as the sheriff. *Ibid.* § 96.

It shall not be lawful for any county treasurer, county commissioner or commissioner of any collector of taxes, in any township, ward or district, nor for any person on his or their behalf, to receive payment or give any receipt for the payment of any taxes that have not been duly assessed, and returns of said assessments according to law; nor shall any such treasurer, or commissioner, or any other person on his or their behalf, receive payment or give any receipt for the payment of any taxes, from the payment of which the party assessed has been exonerated, according to law, unless the party so exonerated shall himself or herself be his own proper person, and tender payment of the taxes from which he or she is so exonerated; and it shall not be lawful for any commissioner or commissioner of any county, or for any other person on his or their behalf, to add any names to the duplicate return or list of taxables made or furnished by the proper assistant assessor of any township, ward or district; and if any such person, commissioner, commissioners or collector, or other person on his or their behalf, shall violate any of the provisions of this section, he shall, upon conviction before any court having competent jurisdiction, pay a fine of one hundred dollars to the commonwealth, and shall moreover be forthwith removed from office; and any vacancy thereby occasioned in either of said offices shall be filled or supplied in the same manner as in other cases of vacancies in such office. Act 27 May 1841, § 8. *Purd.*

It shall be lawful for five or more citizens of the county, stating under oath that they believe that frauds will be practised at the election about to be held in said county, it shall be the duty of the court of common pleas of said county, if the court is in vacation, or if not, a judge thereof in vacation, to appoint two judicious, sober and intelligent citizens of the county, to act as overseers at said election; said overseers shall be selected from different political parties, where the inspectors belong to different parties, and where both of said inspectors belong to the same political party, both of the overseers shall be taken from the opposite political party; and said overseers shall have the right to be present with the officers of the election during the whole time the same is held, the votes counted and the returns

made out and signed by the election officers; to keep a list of voters, if they see proper; to challenge any person offering to vote, and interrogate him and his witnesses, under oath, in regard to his right of suffrage at said election, and to examine his papers produced; and the officers of said election are required to afford to said overseers so selected and appointed every convenience and facility for the discharge of their duties; and if said election officers shall refuse to permit said overseers to be present and perform their duties as aforesaid, or if they shall be driven away from the polls by violence or intimidation, all the votes polled at such election district may be rejected by any tribunal trying a contest under said election: *Provided* That no person signing the petition shall be appointed an overseer. Act 17 April 1869, § 15. Purd. 1557.

The respective assessors, inspectors and judges of the elections shall each have the power to administer oaths to any person claiming the right to be assessed or the right of suffrage, or in regard to any other matter or thing required to be done or inquired into by any of said officers under this act; and any wilful false swearing by any person in relation to any matter or thing concerning which they shall be lawfully interrogated by any of said officers, shall be punished as perjury. Ibid. § 9.

Embezzlement.

ACT 31 MARCH 1860. Purd. 228, 287.

SECT. 62. If any officer of this commonwealth, or of any city, borough, county or township thereof, shall loan out, with or without interest or return therefor, any money or valuable security received by him, or which may be in his possession, or under his control by virtue of his office, he shall be guilty of a misdemeanor in office, and on conviction be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years; and if still in office, be adjudged thereafter incapable of exercising the same, and the said office shall be forthwith declared vacant by the court passing the sentence.

SECT. 63. If any such officer shall enter into any contract or agreement with any bank, corporation or individual, or association of individuals, by which said officer is to derive any benefit, gain or advantage from the deposit with such bank, corporation or individual, or association, of any money or valuable security held by him, or which may be in his possession, or under his control by virtue of his said office, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding one year; and if still in office, be adjudged thereafter incapable of exercising the same, and the said office shall be forthwith declared vacant by the court passing sentence.

SECT. 65. If any state, county, township or municipal officer of this commonwealth, charged with the collection, safe keeping, transfer or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use, by way of investment in any kind of property or merchandise, any portion of the public money intrusted to him for collection, safe keeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the state, county or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of the money embezzled.

113. If any person, being a trustee of any property for the benefit, either partially, of some other person, or for any public or charitable purpose, with intent to defraud, convert or appropriate the same, or any part thereof, to his own use or purpose, or the use or benefit of any other person, or shall, without aforesaid, otherwise dispose of or destroy such property, or any part thereof, he shall be guilty of a misdemeanor.

114. If any person, being a banker, broker, attorney, merchant or agent, (a) being intrusted, for safe custody, with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge or in any manner convert the same to or for his own use, or the use of any other person, such property, or any part thereof, he shall be guilty of a misdemeanor.

115. If any person intrusted with any power of attorney, for the sale or conveyance of any property, shall fraudulently sell or transfer, or otherwise convert the same to or for his own use or benefit, or the use or benefit of any other person, he shall be guilty of a misdemeanor.

116. If any person, being an officer, director or member of any bank, or any other body corporate or public company, shall fraudulently take, convert or apply the same to or for his own use, or the use of any other person, any of the money or other property of such bank, body corporate or company, or belonging to any person or persons, or to any association, and deposited therein, or in possession thereof, he shall be guilty of a misdemeanor.

120. If any person shall receive any money, chattel or valuable security, which shall have been so fraudulently disposed of, as to render the party disposing thereof guilty of a misdemeanor, knowing the same to have been so fraudulently disposed of, he shall be guilty of a misdemeanor, and may be indicted and convicted thereof whether the party guilty of the principal misdemeanor shall, or shall not, have been previously convicted.

121. Every person found guilty of a misdemeanor under either of the provisions of the sections of this title, wherein the nature and extent of the punishment prescribed, shall be sentenced to an imprisonment not exceeding two years, or to a fine of any amount not exceeding one thousand dollars, or both, or either, at the discretion of the court.

122. Nothing herein contained shall affect any remedy at law or in equity, which any party aggrieved might have heretofore had, nor affect or prejudice any action brought at law or in equity, or any security given, by any trustee, having for its object the recovery or repayment of any trust property misappropriated.

123. No such trustee, banker, merchant, broker, attorney, agent, director, or member as aforesaid, shall be enabled or entitled to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question propounded or interrogatory in any civil proceeding in any court of law or equity, but no such answer, question or interrogatory, shall be admissible in evidence against any such person charged with any of the said misdemeanors.

124. The word "trustee" herein, shall mean a trustee on some express trust created by deed, will or instrument in writing, and shall also include the heir, executor, and personal representative of any such trustee, and all executors, administrators and assignees; the word "property" shall include every description of real or personal property, money, debts and legacies, and all deeds and instruments tending to evidence the title or right to recover or receive any money or goods, and shall also include not only such property as may have been the original subject of the trust, but any property in which the same may have been converted, and the proceeds thereof, respectively, or anything acquired by such proceeds.

125. If any consignee or factor having the possession of merchandise, or authority to sell the same, or having possession of any bill of lading, permit, license, receipt or order for the delivery of merchandise with the like authority, shall convert, or dispose of, or pledge such merchandise or document, consigned or intrusted to him as aforesaid, as a security for any money borrowed, or negotiable instrument issued by such consignee or factor, and shall apply or dispose of the same to his own use, or the use of any other person, in violation of good faith, with intent to defraud the owner of such mer-

chandise, and if any consignee or factor shall, with like fraudulent intent, apply or dispose of, to his own use, any money or negotiable instrument, raised or acquired by the sale, or other disposition of such merchandise, such consignee or factor, in every such case, shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two thousand dollars, and undergo an imprisonment not exceeding five years. (a)

SECT. 126. If any person engaged in carrying or transporting coal, iron, lumber or other articles of merchandise, or property whatsoever, within this commonwealth, shall fraudulently sell or dispose of, or pledge the same or any part thereof, without the consent of the owner thereof, such offence shall be deemed a misdemeanor, and the offender shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, not exceeding one year; or if any person shall knowingly buy and receive the said merchandise, knowing the same to have been sold, disposed of or pledged fraudulently, he shall, on conviction, be sentenced to the like punishment.

ACT 1 MAY 1861. Purd. 85.

SECT. 38. Every president, director, cashier, teller, clerk or agent of any bank who shall embezzle, abstract, or wilfully misapply any of the moneys, funds or credits of such bank, or shall, fraudulently and without authority from the directors, issue or put in circulation any of the notes of such bank, or shall, without such authority, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, sign any note, bond, draft, bill of exchange, mortgage or other instrument of writing, or shall make any false entry on any book, report or statement of the bank, with an intent, in either case, to injure or defraud such bank, or to injure or defraud any other company, body corporate or politic, or any individual person, or to deceive any officer or agent appointed to inspect the affairs of any bank, shall be deemed guilty of a misdemeanor; and upon conviction thereof, shall be confined in the penitentiary, at hard labor, not less than one, nor more than ten years.

ACT 1 MAY 1861. Purd. 238.

SECT. 1. Whenever any person in the employ of any railroad company, whether such company is incorporated by this or any other state, shall fraudulently neglect to cancel or return to the proper officer, company or agent, any coupon or other railroad ticket, with the intent to permit the same to be used in fraud or injury of any such company; or if any person shall steal or embezzle any such coupon or other railroad ticket, or shall fraudulently stamp or print, or sign any such ticket, or shall fraudulently sell or put in circulation any such ticket; any person so offending, shall, upon conviction thereof, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, at labor, not exceeding five years.

ACT 22 APRIL 1863. Purd. 1296.

SECT. 1. The 124th section of the act to which this is a supplement, (b) shall also extend to and include any guardian or guardians of a minor child or children, appointed by the orphans' court of the respective counties, in the same manner as executors, administrators and assignees.

(a) See 11 Pitts. L. J. 313.

(b) Act 31 March 1860, *supra*.

Embracery.

Provisions of the Penal Code.

II. Judicial decisions.

ACT 31 MARCH 1860. Purd. 219.

1. If any person shall unlawfully dissuade, hinder, prevent or attempt to hinder or prevent any witness from attending and testifying, who may be required to attend and testify either before any committee of the legislature of this state, or before any civil or criminal court, judge, justice or other tribunal thereof, by virtue of any writ of subpoena or other legal process, and who may have been recognised to attend as a witness on behalf of the commonwealth of any defendant, before any court having jurisdiction, to testify in any pending or about to be tried in such court, any person so offending shall be guilty of a misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year.

3. If any person shall attempt to corrupt or influence any juror in a civil court, or any arbitrator appointed according to law, by endeavoring in conversation or by written communication, or by persuasion, promises, gifts, or by any other private means, to bias the mind or judgment of such arbitrator, as to any cause pending in the court to which such juror has been summoned, or in which such arbitrator has been appointed or chosen, except the length of evidence or the arguments of himself or his counsel during the hearing of the case; he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, or suffer an imprisonment not exceeding one year, or both, or either, at the discretion of the court.

Writing a letter to the sheriff, by an agent of a party, in the name of the party, requesting him to summon the agent and two others, all of whom were parties to the trial of the cause, is an indictable offence, although not accompanied by an offer of a bribe. *Lewis' Cr. L. 126. 2 Y. 443.*

Embracery (which is usually classed under the head of bribery) is an attempt to corrupt a party, or a stranger, to corrupt or influence a jury, or to incline them to a particular side, by gifts or promises, threats or persuasions, or by instructing them in the law, or any other way, except by opening and enforcing the evidence by the parties or otherwise at the trial, whether the jurors gave a verdict or not, and whether the verdict be true or false. *Lewis' Cr. L. 124. 5 Cow. 504. 1 Phila.*

It is a criminal misdemeanor and a high contempt in an individual, to come into a court with a grand jury in reference to any matter which is, or may come before them. *3 P. L. J. 442.*

It is a gross misbehavior for any person to speak to a jurymen, or for a jurymen to converse with any person to converse with him respecting the cause he is trying, at any time after he is summoned, and before the verdict is delivered. *1 S. & R. 173.* The attempt to labor a jury, merits the most severe punishment, as such attempts are the first sources of justice. *Ibid. 174.*

It is highly improper for any person to converse with, or in the presence of, a jurymen concerning a cause, pending the trial of the same, and subjects the person so offending to a fine. *2 Luz. Leg. Obs. 83.*

Engrossing, Forestalling and Regrating.

ENGROSSING is the purchasing of large quantities of provisions, with intent to sell them again at a high price. 4 Bl. Com. 158. It can be committed only with respect to the necessaries of life. 3 Eng. L. & Eq. 46. And is an offence at common law. 2 Chit. Cr. L. 527. 1 East P. C. 143.

FORESTALLING is the buying or contracting for any species of provisions or merchandise on the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; any of which practices make the market dearer to the fair trader. 4 Bl. Com. 158. It is indictable at common law. 2 Chit. Cr. L. 527.

REGRATING is the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place; for this also enhances the price of the provisions, as each successive seller must have a successive profit. Ibid.

The act of 6th April 1802, provides that "It shall and may be lawful for any person or persons to sell or expose to sale provisions, vegetables or fruit, in the markets of any city, borough or corporate town within this commonwealth: *Provided always*, That such provisions, vegetables or fruit shall not have been previously purchased within the limits of such city, borough or corporate town." Purd. 697.

There is no law which prevents any person buying any quantity of a commodity at any price that he likes, whether to use himself, or to sell again in gross or by retail, or to give away, or to prevent another having it; provided always that he do not commit the common law offence of forestalling, regrating or engrossing, and make no false representation in order to effect the purchase. 3 Eng. L. & Eq. 46.

Escape.

I. Provisions of the penal code.
II. Judicial decisions.

III. Warrant against a constable for an escape.

I. ACT 31 MARCH 1860. Purd. 217.

SECT. 3. If any person arrested and imprisoned, charged with an indictable offence, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed, was a crime or misdemeanor punishable on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable on conviction, by simple imprisonment without labor. If any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offence, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and, upon conviction of said offence, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him.

SECT. 4. If any person shall aid or assist a prisoner, lawfully committed or detained in any jail for any offence, to make or to attempt to make his escape therefrom, although no escape be actually made, or if any person shall convey, cause to be delivered, to such prisoner, any disguise, instrument or arms proper

Wherever a person is lawfully arrested, and afterwards escapes, the house may be broken open to take him, on refusal of admittance. 2 Ha 137.

In an action on the case against a sheriff [or constable] for an escape, the amount of damages is the actual loss which the plaintiff has sustained; hence, it is incumbent for the defendant to prove that the defendant in the execution was at the time of his escape; but in an action of debt, the plaintiff is entitled to recover the amount of his judgment and execution. 5 W. & S. 455. 3

If an action of escape be brought in debt, the jury, if they find for the plaintiff, must find the whole debt and costs; but if brought in case, they must find such damages as they think proper. 3 Barr 269. 2 Greenl. Ev. § 265. 4 Y. 47. 7 S. & R. 273.

In an indictment for a voluntary escape, it is unnecessary to allege, that the defendant knew the person or persons escaping to be guilty. 5 Pittsburg 311.

If a party imprisoned upon an indictment found, or upon a regular commitment under the hand and seal of a justice of the peace, break prison and escape, he is guilty of a misdemeanor, under the act of 1860; and that without being indicted, tried or convicted of the principal offence. 2 Ash. 61.

A refusal to prosecute, or a return of *ignoramus* by the grand jury for the principal offence, is no acquittal; nor is it any bar to an indictment for breaking prison, whatever might be the effect of an acquittal by a jury. Ibid.

An indictment, under the 7th section of the act of 31 March 1860, for a breach of the law, to execute *lawful* process, should show, by proper averments, that the process was lawful. 2 Curt. C. C. 153.

III. WARRANT AGAINST A CONSTABLE FOR AN ESCAPE.

MONTOUR COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of N—— Township, in the County of Montour, greeting:

WHEREAS a certain A. B. of N—— township aforesaid, tailor, was on the 1st day of May, A. D. 1860, at N—— aforesaid, charged, on oath, before J. R., one of our justices of the peace in and for the said county, with stealing sundry goods and chattels from the house of T. R., of G—— aforesaid, store-keeper, [or as the offence may be.] Whereupon our said justice did then and there make a certain warrant, under his hand and seal, in due form of law, directed to C. D., constable of R—— township, in the said county, requiring him to bring the body of the said A. B. before our said justice, to answer the said charge, which warrant was then and there delivered to the said constable of R—— township aforesaid, to be executed; and whereas complaint has been made before our said justice, that the said C. D., constable as aforesaid, did, by virtue of said warrant, on the same day and year aforesaid, at G—— aforesaid, take and detain the body of the said A. B., and him in his custody for the said offence had, but not in pursuance of the duty of his office in that behalf, unlawfully and negligently did permit the said A. B. to escape and go at large, out of the custody of him, the said C. D., to the great contempt of justice, and in contempt of our laws. You are therefore hereby commanded to take the said C. D. and bring him before the said J. R., to answer the premises, and further to be dealt with according to law. Witness the said J. R. at N—— the 20th day of May, A. D. 1860.

R., Justice of the Peace.

Evidence.

eral rules of evidence.
written evidence.
ol evidence.
k entries and accounts.
accounts.
ositions, how to be taken.

- VII. Handwriting.
- VIII. Hearsay.
- IX. Witnesses.
- X. When a party to a suit may be a witness.
- XI. Miscellaneous cases.

DENCE signifies that which demonstrates, makes clear or ascertains the
be very fact or point in issue, either on the one side or on the other; and
ce ought to be admitted to any other point. 3 Bl. Com. 367.
ce is of two kinds, either written or *parol*, that is, by word of mouth. 3
368.

ce consists of that which is proved, and, under particular circumstances,
hich is not proved. 10 W. 104. 17 Pitts. L. J. 117.

general rule, that the best evidence shall be given which the nature of
admits of. But necessity, either absolute or moral, is a sufficient ground
sing with the usual rules of evidence. 4 B. 326. The rule which ex-
condary evidence, in a contest with primary, does not mean that every-
econdary, which is not of the highest order, but only that which discloses
ence of other evidence, the non-production of which, may be supposed to
ground that, if produced, it would work against the party offering it. 1

a party admits, or what another asserts in his presence, and he does not
t, is received as evidence against him; but not what is said by his wife,
her member of his family in his absence. Peake's Ev. 11.

distinction must be made between an admission and an offer of compro-
r a dispute has arisen. An offer to pay a sum of money in order to get
action is not received as evidence of a debt; but admissions of *particu-*
es of an account are good evidence. Bull. N. P. 236. 2 Barr 182.

positive and direct evidence is not to be looked for, the proof of circum-
d facts consistent with the claim of one party and inconsistent with that
her, is deemed sufficient to *presume* the particular fact which is the sub-
ontroversy. Long and undisputed possession of any right, or property,
presumption that it had a legal foundation, and, rather than disturb men's
as, even records have been presumed. So, if a landlord gives a receipt for
at one time, and afterwards claims rent due at a time *preceding*, it fur-
strong presumption that such preceding rent has been paid; and where
emand is made, the very circumstance of its coming late, in all cases
he mind to suspect that it has not a just foundation, and in many has
n as complete evidence of the non-existence or payment of it; but these
ing on presumption, and not on positive proof, very slight evidence is
to rebut and overturn them, and to call on the different parties to estab-
respective rights by the ordinary rules of evidence. Peake's Evid. 13.
Ev. § 33-48.

proved to have been done by a party at a time when it was against his
o do it, may afterwards be given in evidence in his favor or in favor of
ming under him. 1 C. 332.

stions of identity and personal skill, a witness may testify to a belief not
n knowledge, but the rule is otherwise in respect to facts which may be
to be within the compass of memory. 8 W. 406. Ibid. 227.

relevancy of facts offered in evidence depends upon special scientific prin-
ey must be offered in connection with, or after evidence is given of, the
s that reveal their importance, or their relevancy cannot appear. 1 C. 95.
lateral facts that are, in any direct manner, capable of affording a reason-
umption or inference as to the principal fact or matter in dispute, are
t subjects of proof. 8 C. 111.

Evidence is not to be rejected because it does not prove the party's whole case, if it be a link in the chain of proof. 11 C. 308.

Evidence of a demand made by a plaintiff upon a person in the employment of the defendant, is not admissible as evidence of a demand upon the defendant, there being no proof that the demand was communicated to him. 2 Wh. 200.

A party cannot, after examining a witness, give in evidence his former testimony and declarations, ostensibly to discredit him, but in truth to operate as independent evidence. 8 W. 447.

In an action brought "for the use of" another, it is not competent for the defendant to prove that the transfer was obtained by fraud. 6 W. 309.

II. OF WRITTEN EVIDENCE.

Evidence by records and writings, is where acts of assembly, judgments, proceedings of courts, deeds, &c., are admitted as evidence.

A record may be proved by its production, or by a copy.

Copies of records are either exemplifications, copies made by an authorized officer, or sworn copies.

Exemplifications are copies under the great seal or under the seal of some particular court, which seals prove themselves.

Where the law intrusts a particular officer with the making of copies, it gives credit to them in evidence, without further proof. Bull. N. P. 229.

Not only records, but all public documents which cannot be removed from one place to another, may be evidence by a copy proved on oath to have been examined with the original.

Records and enrolments prove themselves, and a copy of a record or enrolment sworn to, may be given in evidence. Co. Litt. 117, 262.

An office paper taken out of the files by one who has no connection with it, and produced in court, cannot be given in evidence; it must be produced and authenticated by the proper officer, in whose custody it was. 9 W. 311.

A copy of the laws published annually by the authority of the legislature, is evidence of the statutes contained in it, whether they be public or private. 2 W. & S. 156.

A printed copy of an act of assembly, published under the authority of the legislature of another state, may be read in evidence. 12 S. & R. 203.

Foreign laws cannot be judicially noticed, but must be proved as facts; and in making such proof, the general principle is applicable that the best evidence the nature of the case admits of must be given. But this rule may be relaxed, or changed, as necessity, either physical or moral, may require; and where a rigid adherence to it may produce extreme inconvenience and manifest injustice. 10 W. 158. 1 Greenl. Ev. § 486-8.

In all suits or causes where it shall be necessary for either party to give in evidence the proceedings had before a justice or justices of the peace or alderman of any other state, a transcript of the docket, proceedings or record of the said justice or justices or alderman, certified by the same, respectively, and verified by the certificate of the clerk or prothonotary of a court of record in the city or county wherein the said justice or alderman has jurisdiction, under the seal of the court, setting forth the official character and authority of the said justice or alderman, attested by the judge thereof, shall be legal evidence of the judgment entered in such case. Act 29 March 1860. Purd. 426.(a)

Subscribing witnesses are not necessary to the validity of a deed, (1 Lev. 25.) and therefore if there be none, or the subscribing witness being called, denies having seen the instrument executed; (Peake N. P. 146. Dougl. 216. 1 Black. 865;) or it appears that the name of a fictitious person is put as a witness, by the

(a) The act 12 March 1869 provides that the aldermen of Philadelphia shall have public official seals, with which they shall authenticate all their acts, instruments and attestations; and that their official acts, so certified,

shall be received in evidence of the facts therein certified, in all suits, without a further certificate of their official character. For this service, they are allowed a fee of twenty-five cents. Purd. 1573.

self who executed the deed; (Peake N. P. 23. 5 T. R. 371;) or the ally attesting is, at the time of the execution of the deed, interested in it, uses so at the time of the trial; in these cases proof of the handwriting by the party will be sufficient.

Instrument or deed, under which land has been occupied and claimed for thirty years, may be given in evidence without proof of its execution by subscribing witnesses. 1 W. & S. 533. 1 Greenl. Ev. § 21.

Record of a deed, as contained upon the record book, brought into court in which it belongs, is legal evidence. 10 W. 67.

Deed so acknowledged or proven as to be properly admitted to record, is in evidence, without further proof of execution. 4 Barr 13. 5 Gilm.

Deed with the seal torn off, allowed to be read in evidence. 1 Binn. 538.

Evidence in general is esteemed secondary in its nature to written evidence. Where an agreement has been reduced into writing, the writing must be produced. Esp. 213.

Copy, whenever an original writing is of a public nature, and would be produced, an immediate sworn copy thereof will be evidence; but an original writing is of a private nature, a copy is not evidence, unless the original is lost or destroyed. 3 Salk. 154.

Where a party destroys a thing that is designed to be evidence against himself, a copy will supply it, and therefore the defendant having torn his own note from him, a copy sworn was admitted to be good evidence to prove it. *Copy* *Ld.*

Partial entry, upon proof of the loss of the other part of the record, is competent evidence; and parol evidence may be given of the contents of that part of the record which is lost. 10 W. 63.

In case of private deeds or other instruments, the production of the original, and in the power of the party using it, is always required; till this is done, no evidence whatever of the contents can be received; but where the original has been destroyed, or lost by accident; or being in the hands of the party, notice has been given him to produce it, then an examined copy, or evidence of the contents, being the best evidence in the power of the party to be received; it being first proved, in case a copy is offered, that the original it purports to be a copy was a genuine instrument. 10 Co. 92. 3 T. R. 526, 70. 1 Atk. 446. 10 Johns. 363.

Preliminary proof necessary to admit secondary evidence of the existence of a lost deed, must be based on the acts and declarations of the party whose title is to be affected by such evidence. 5 C. 875.

Secondary evidence can be given of a lost deed, it is necessary to prove that the deed was executed and delivered, and if the person whose title is to be affected was not named in the deed, and did not sign it, that such person was in some way connected with the deed. *lost* *Recd* *Ibid.*

A diligent search and inquiry by the proper custodian, is sufficient to let parol evidence of the contents of a lost document, unless it be traced to other source. C. 489.

Receipt is not conclusive evidence against the party signing it, but he may be allowed to prove he did not receive the sum or thing in question. 2 T. R. 367.

Receipt in full is conclusive evidence when given under a knowledge of all the facts then depending between the parties; *aliter*, when given without such knowledge. 2 Esp. 175. But when such a receipt is obtained by fraud, &c., it is a nullity. Campb. 394.

Production against a justice of the peace by a parent, to recover the penalty for the birth of his minor son, the entry in the family Bible of the son's birth, proved by the plaintiff, is competent evidence of the minority of the son. 10 W. 82. An entry in 1811 in the handwriting of the pastor of a church in a book kept as a registry of baptisms and births, the object of which entry was to record the baptism of a person and not his birth, and in which the time of the birth

is introduced merely by way of description, is not evidence of the date of the 5 W. & S. 266.

The practice of admitting an account sworn to by the plaintiff as conclusive evidence against the defendant, is not only illegal, but highly unreasonable and unjust, as it gives to the dishonest man a power over his neighbor's purse incompatible with every rule of equity or justice. However convenient to the plaintiff, or whatever facility in the transaction of business it may afford to the practice, the practice, if it has prevailed, ought to be discontinued. And in proceedings of justices founded upon such practice are invariably set aside by the court. 2 D. 77, 114.

A paper handed upon request to the opposite counsel, and inspected by the court, does not, in consequence thereof, become evidence for both parties. 6 S. & L. 100.

A memorandum proved by a witness, who can swear to no more than that it was accurately made by him, at the time, to perpetuate his memory of the fact, is not competent evidence. 3 Barr 414.

III. PAROL EVIDENCE, WHEN ADMITTED TO AFFECT A WRITTEN CONTRACT.

The general rule is, that parol evidence is admissible to *explain*, but not to *contradict, alter, add to*, or diminish a written instrument. 4 D. 340.

But the rule which forbids parol evidence to be received, to contradict or vary a written agreement, has reference exclusively to the *terms* in which the written agreement is couched. The plain and unequivocal terms of an agreement may not be altered by parol; but such explanations of the subject-matter may be proved as will give to the written terms the effect intended by the parties. 5 C. 92.

Parol evidence is admissible to defeat a written instrument on the ground of fraud, or mistake, or to apply it to its proper subject-matter; or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases, the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to operate at all, or proves what is essential in order to give the instrument its legal effect. 1 Bouv. Inst. 358.

As a preliminary to every question of the interpretation of a writing, it must be proved or assumed that it is genuine and authentic; that it is free from fraud or mistake in its creation; that the makers of it were competent; that the subject-matter of it is lawful; and that it is executed according to law: and for these purposes, parol evidence is proper, in order to put the instrument into the hands of the judge for interpretation and construction. 7 C. 252.

The judge must receive by admissions, or by testimony, all the information which is necessary, in order to put himself in a position to interpret and construe the writing with intelligence: that is, to apply it to persons, things and events, according to the intention under which it was written. He must, as far as possible, place himself in the same circumstances of time and place, as the author of the writing was when he wrote it. Ibid.

In Pennsylvania, in consequence of our liberal allowance of set-offs, defences, and equitable defences, parol evidence is often admissible in an action on a contract, in order to extend the field of inquiry to the whole transaction, of which the particular contract forming the basis of the action forms a part. Ibid.

Although a contract may be provable only by writing, yet, if it be only a part of a more comprehensive transaction, so far as the remedies are plastic enough, the court will administer the legal and equitable rights growing out of it, its other parts being required to be in writing, may be proved by parol. Ibid.

In such cases, the parol evidence is not admitted for the purpose of affecting the interpretation of the particular writing which the party is called upon to make, but for the purpose of enlarging the sphere of juridical action, so as to embrace the whole transaction to which the writing belongs, and define the rights growing out of the whole case. Ibid.

Whatever material to the contract was expressed and agreed to when the contract was concluded and the article drawn up, may, if not expressed in the article,

parol, unless, perhaps, it be expressly contrary to the writing. 16 S. & Greenl. Ev. ch. 15.

Evidence is admissible to prove that when a bond was *executed*, it was should be void, in a particular contingency. 1 Y. 132.

Always admissible to show that a formal conveyance, with a defeasance some time afterwards, constituted in fact, a mortgage, and not a condition. 9 C. 181.

A mortgagor by deed and defeasance, under a mistaken apprehension of the defeasance upon the rights of third parties, executed a release of redemption, parol evidence is admissible to show that the parties did thereby to affect their relation of mortgagor and mortgagee. *Ibid.*

Evidence is admissible, in such case, not to contradict the release, but to the effect and operation intended by the parties, and to prevent its being with a different effect, and for a different purpose. *Ibid.*

Evidence is admissible to show fraud in the formation of a written instrument, and its fraudulent use of it afterwards. 4 R. 141.

Evidence of what took place, at and immediately before the execution of a instrument, is admissible to prove fraud and plain mistake in drawing the instrument to establish a trust, or to rebut an equity. 2 Ash. 813.

In an action on a contract for the delivery of specific articles, parol evidence is admissible to prove that the parties agreed upon a place where the delivery was to be made.

In such case, parol evidence is admissible to rebut the presumption that the delivery would otherwise arise as to the place of delivery. 7 C. 265.

Evidence of the understanding of the parties in relation to the construction of an agreement, may be given to explain that which is otherwise ambiguous. 9.

Evidence is admissible in an action by the indorsee against the indorser, *indorsed in blank*, to show that *at the time* of the indorsement the indorsee received the note under an agreement that he should not have recourse to the indorser. 5 S. & R. 363.

Incompetent to give parol evidence to explain a written receipt, and show that it was given for a note and not for money. 1 W. & S. 321.

Parol admissions or parol promises of a party to an instrument of writing are admissible in evidence to change its character or legal effect, and make it conform to what it purports to be. 7 W. 517.

Parol evidence is not admissible to alter or contradict written instruments, but applies only to cases between the parties to the instrument, their agents, and those claiming under them, but not to strangers. 1 Wh. 803.

For rent on an indenture of lease, parol evidence was held to be admissible to show that at the time of executing the lease, it was agreed by the parties that the lease should terminate upon a certain day, being about nine months earlier than the time expressed in the lease. 16 S. & R. 345.

IV. BOOK ENTRIES AND ACCOUNTS.

An action cannot be founded on a book account and the defendant question the validity of the account, and demand, it is most assuredly the duty of the justice before whom the cause is brought, to require of the plaintiff to produce his proofs of the existence of the account, the subject of the action be goods sold and delivered, or work and labor performed, or the usual course of business, for the defendant, the plaintiff's day-book must be produced. The book, accompanied by the oath or affirmation of the plaintiff, who made the entries, (whether it was the plaintiff or his clerk,) that the entries were truly made, (1 Y. 321,) at the times then specified, will not only be evidence of the sale and delivery, but likewise of the value of the goods, or of the price if a price be put upon them in the book, (1 Y. 347.) The book thus sworn to, must be the plaintiff's original book of entries, and not a transcript from the original; for the strength of this evidence is derived from the absolute authenticity of the original entries. The authenticity may be strengthened or diminished by the appearance of the book itself; by the manner

Subsequent decision

Book
 of the entries made against other persons; by the consistency of the date, &c. The plaintiff's book being thus made competent (if I may so speak) as a witness, must evidence its own credibility; its credibility will rest upon the fairness and regularity of the entries, unless it be reasonably accounted for; an interlineation, particularly with ink of a color different from that with which the body of the entry was made; crowding more words into a smaller space than the general handwriting of the book required, and the like, are circumstances of fraud which should not only invalidate the specific entry under consideration, but perhaps destroy the testimony of the book altogether. Grayd. Just. 116, 117. 1 Greenl. Ev. § 117.

Books of original entries made by the party, and verified by his oath, are competent evidence of goods sold and delivered, and work done, and of the prices; but not of money lent or paid. 1 Y. 347. 1 Smith Lead. Cas. 354.

The book of original entries of a tradesman is not evidence of the delivery of the goods to be sold on *commission*. 2 Wh. 33.

A book of entries verified on oath is not competent evidence of the delivery of goods under a previous contract, for their delivery at different periods. 10 W. 249. 4 W. & S. 290. Nor of labor performed under a special contract. 2 C. 384.

Books of original entries are not evidence of the casual sale of an article not in the course of the party's business, and of which it is usual to take other proof or evidence of sale: thus, a sale of a horse, by a dry goods merchant or tradesman, would not be evidenced by an entry in his book of account. 1 J. 310-12.

The book of original entries, although *prima facie* evidence of the prices of goods sold, or work done, is not conclusive; either party may go into other proof of the prices, and the judgment of the jury [or justice] is to be formed on the whole. 1 Y. 347. 9 P. F. Sm. 346.

The book of original entries of a physician is not conclusive as to the value of the services charged. The jury [or justice] may make an abatement for unreasonable or excessive charges. 2 Phila. R. 17.

If the defendant be not the *original* debtor, but *assume* to pay the debt of another, the entry in the plaintiff's book, *proved by his own oath*, cannot be received in evidence: proof must be made by an indifferent witness, or by some instrument of writing. 1 D. 238.

Unconnected scraps of paper containing, as alleged, accounts of sales, by an agent, of articles on account of his principal, irregularly kept on their face, are not admissible as a book of original entries. 13 S. & R. 126.

A mutilated piece of paper, which appears to have been torn out of a book in which the name neither of the plaintiff nor defendant appears, which contains no charges against the defendant, and which is unintelligible, *without explanation by the plaintiff*, is not admissible in evidence as a book of original entries. 4 R. 291.

A book purporting to be a book of original entries, containing entries of the sale of goods made when the goods were ordered, but *before they were delivered*, is not competent evidence of goods sold and delivered. Nor are arbitrary signs or marks affixed to the entries of each article, not for the purpose of charging the defendant, but of informing the porter, so as to prevent a second delivery of a similar article, evidence of delivery, particularly when it appears that the signs or marks were not always made by the person who made the charge, nor by the plaintiff, or a clerk in his employ. 4 R. 404.

Where a plaintiff makes an entry of goods sold, upon a card, with pen and ink, and the *same evening, or the next day*, transcribes the entries into a book, the book is to be considered as the book of original entries of the plaintiff, and may be read in evidence to the jury; and the material on which the entry was first written, or its size and shape, are indifferent. Ibid. 408.

In order to the validity of a book entry as evidence, it must be a registry of a sale and delivery, actually made, of the things therein contained *at the time* of their being so entered. 4 W. 258. An entry on a card or slate is but a memorandum preparatory to permanent evidence of the transaction which must be perfected, at or near the time, and in the routine of business. In *Ingraham v. Bockius*, 9 S. &

and Patton v. Ryan, 4 R. 410, the entries were transferred the same evening next morning, and they ought in every instance to be so, in the course of the succeeding day. Ibid.

A plaintiff, a blacksmith, to recover for work done, produced a book containing a list of which he swore were made by himself not later than the second day evening after the work was done, and were partly taken from a slate and partly on his own head—a witness was also produced, who testified that he made the entries by copying them from the plaintiff's slate on the evening of the day in which they were made, or in the course of the next day: *Held*, that the book was admissible in evidence. 6 Wh. 189.

A purchaser at a store selects the articles he wants, and has them set aside for him, or to be sent to him by the merchant, then is the time to make an entry of a charge against the purchaser, and such entry is evidence. 9.

Goods are sold to be delivered at a distance, the proper time to make the entry in the book is when they are loaded and started; and entries thus made are admissible in evidence to prove the sale and delivery. 5 W. & S. 377.

Entries in a day-book, in order to their validity as evidence of a charge, must be made, as to time, in the ordinary course of that business in which the charge is made, and who makes the charge. If they be delayed over *one day*, they are inadmissible in evidence to charge a defendant unless under peculiar circumstances. 8

Entries made in the course of delivering out goods to customers make *memoranda*, and on the same night, or next day, entries are made by the master in books from these *memoranda*, such books are books of original entries, and are admissible in evidence, if made with the writer's oath, as evidence to charge a customer. 9 S. & M. 10.

If a book appear, on inspection, or examination of the party by the court, not to be a book of original entries, the court may reject it as incompetent. If this clearly appears, it must be submitted to the jury, [or the justice,] to decide whether it is or is not. 1 R. 3.

In an action upon a book account of a decedent, it is only necessary to prove that the book is a book of original entry, to admit them to go to the jury as evidence, and the entries be afterwards given as to the time when the entries were made, this is sufficient, with the books, to the jury. 1 W. & S. 256.

The handwriting of a plaintiff who has made original entries of charge in a book, if he is absent from the state, may be proved, and upon such proof the entries are admissible. 8 W. 77. And so in case of a clerk (who has made the entries) if he is absent from the state. 2 W. & S. 137.

Entries of original entries manifestly erased and altered in a material point cannot be admitted as entitled to go to the jury as a book of original entries, and ought to be rejected by the court, unless the party offering it give an explanation which will remove the presumption arising from its face. 6 Wh. 146.

Entries in a book of original entries must be original, but the elements which make them so may have been reduced to writing previously; the competency of such entries made by a clerk, depends not on his own knowledge of their correctness, but on the presumption that what he did in the course of his master's business, was done so. 2 Phila. R. 35.

A book which admits shop-books in evidence is founded in necessity, and being so, it should be made by the party himself, should be subjected to severe scrutiny. And, when the books of a tradesman have acquired a general reputation for honesty, and through fraud or carelessness false entries have been made, and the entries are so omitted, so frequently as to destroy the confidence of his customers in his books, there is no reason why credence should be given to them. The general character of a deceased shopkeeper, who made the entries, for honesty in his book-keeping, is pertinent and proper testimony to discredit the books.

A book of original entries of a party claiming for goods sold, or work and labor

Books may be inspected

done, is not the best or only evidence of the claim, which may be proved *aliunde*. 3 Wh. 75.

V. OF ACCOUNTS.

An account rendered to a party indebted, by his creditor, and not objected to in a reasonable time, is *prima facie* evidence against the party to whom rendered. 6 C. 75.

An account presented to a party indebted, by a creditor, and corrected by the parties, is an account stated, and binding upon the representatives of the debtor, as to items not objected to by the decedent. 12 C. 156.

A copy of an account taken from a book, from which a settlement had been made, was delivered to the party, and retained five months without objection: *held*, that a copy of that copy, and the book from which it was taken showing the same balance, were evidence. 2 Barr 323.

Even an account current furnished by one party to the other, if not objected to in a reasonable time, becomes a settled account. Bald. 536. 4 W. & S. 109.

Where an account sales has been rendered, and the consignor directs the balance to be shipped, making no objection to the items of the account, he thereby assents to it, and makes it an account stated. 7 Barr 281.

It is the settled law merchant, that an account rendered is allowed, if not objected to without unnecessary delay; but the time within which objections must be made cannot be definitely fixed; it depends on the circumstances of the case. 3 H. 236.

Receiving an account rendered without objection, does not preclude the party from afterwards showing an unobserved error which passed without notice by the common blunder of all parties. 3 W. & S. 109.

Such an error might be corrected even in a settled account, where neither party had been prejudiced by the acquiescence. *Ibid*.

The accounts exhibited by one party to another, are evidence against him who exhibits them, as to the *articles* which they contain, but not conclusive as to the value of the items. 1 D. 147.

Entries in a book of payments made for another may be given in evidence, if accompanied with proof that the person had constant access to the books, and assented to the entries. 8 W. 39.

If, when one party calls for the other party's books, but when they are produced declines using them, the mere calling for them will not make them evidence for the adverse party, even though they are inspected by the party who calls for them. 7 S. & R. 10.

VI. DEPOSITIONS,—HOW TO BE TAKEN UNDER A RULE OF COURT.

A *deposition* is the testimony of a witness, called a *deponent*, and put down in writing, to interrogatories exhibited, [or questions asked,] for that purpose, in courts of equity, [or law;] and the copies of such depositions, regularly taken and published, are read, as evidence, at the hearing of the cause. Pract. Att. 234.

The necessity of issuing rules to take the depositions of witnesses is caused by their residing at a distance from the place where the cause is to be tried. A. sues B. in the county of Allegheny. The cause is expected to be tried at the ——— term of the district court to be holden in Pittsburgh. C., the attorney of A., makes application to the court, and obtains a rule to take the depositions of witnesses in Philadelphia, to be read when the cause shall be tried. C., having obtained the rule, sends notice to the attorney of B., or to B. himself, as the law, or the practice, may require, of the time and place at which he purposes to examine the witnesses. A notice in the following form will answer this purpose:

"A. vs. B. In the District Court of Allegheny county. To B., the defendant:—Sir, you are hereby notified, that, under a rule of court, of which the above is a copy, depositions will be taken, in said cause, between the hours of 9 A. M. and 5 P. M., on the 19th day of June, A. D. 1860, at the office of J. B., Alderman, No. 36 South Sixth street, in the city of Philadelphia, before the said J. B., or some other alderman of said city.

C., Attorney for the Plaintiff.
Pittsburgh, June 4th 1860."

To B., the defendant.

If application, for that purpose, be made to the alderman, before the rule is to be executed, he should issue subpoenas for the witnesses. If they do not attend, he has a right, on application, and due proof that the subpoenas were personally served, to issue an attachment, give it to the constable, and compel the attendance of the witnesses, as in other cases. See act 26 February 1831. *Purd.* 423. The parties and witnesses being in attendance, and ready to proceed to the execution of the rule, the magistrate should write, at the top of a sheet of paper, a heading of the following, or a similar character :

"Depositions of witnesses produced, sworn [or affirmed,] and examined, at the office of J. B., one of the aldermen of the city of Philadelphia, No. 36 South Sixth Street, in said city, on the 19th day of June, A. D. 1860, between the hours of 9 A. M. and 5 P. M., of said day, in obedience to the rule of court, and notice, hereto attached, to be read in a case depending in said court, in which A. is plaintiff and B. defendant."

Having sworn, or affirmed, the witness, in the usual manner, counsel, or the parties, or their agents, will, if there be no interrogatories filed, proceed to the examination, and cross-examination of the witness. Where there are interrogatories filed, let the justice, previously to reading the interrogatories, note on the sheet of paper on which he is about to write the answers of the witness, a short heading, in these, or similar words—"To the first interrogatory on the part of the plaintiff the witness answers,"—[inserting the answer of the witness]; and so proceed, with every interrogatory, or with the examination, until every question shall be answered, and the answers committed to paper. Care should be taken that a return be made to *every* interrogatory.

The writer, from some experience, recommends to the justice, who shall commit the examination to writing, on all occasions, to take down, as nearly as may be, *all* the witness may say, and in the very words of the witness. If he wish to correct anything he may have said, let the correction also, be committed to paper in the words of the witness. Much, very much may depend upon the turn of an expression, or the placing of one word before, or after, another. It is better to allow the witness to correct his statements, and to change his words, than to *erase* some words, and insert others. The witness, in correcting himself, in speaking in his own words, in giving his recollections as they present themselves, is brought more freshly, and more truly, before the court than he could be by *erasures and insertions*. The trust confided to justices, in the examination of witnesses under a rule of court, and committing the language of the witnesses to paper, is a very important one; and he will best discharge it, who shall labor most diligently and successfully to bring the witness, in all his peculiarities of language, most faithfully before the court, so that, as far as possible, his deposition shall make the same impression upon those who hear it read, as the witness himself would make, if he were personally present, orally delivering his testimony.

If there shall be any paper produced, in relation to which the witness shall be examined, let it be marked thus: A. "The witness being shown the paper marked A, hereto attached, deposes and says," &c. Before attaching the paper, write on it thus—"This is the paper A, referred to this day, June 19th 1860, by the witness, H. M., on his examination before J. B., Alderman." (See 7 W. & S. 393-4.)

The examination being finished, let the witness subscribe his name at the foot of it; if he cannot write, let him put his mark. All the papers being arranged and attached to the examination, and the rule of court and notice, the alderman should, at the foot of it, give a certificate, in the form following:—"I certify that the above witnesses were duly qualified and examined at the time and place stated in the caption, and subscribed their depositions in my presence. Before J. B., Alderman, Phila. June 19, 1860." (See 3 H. 51.)

The whole of the papers should be put under an envelope, and addressed to the prothonotary of the court from whence the rule issued, and directed to the county town of the proper county where the office of the prothonotary is kept.

A rule to take depositions implies, without being so expressed in it, that they are to be taken before a judge or justice of the peace. 5 S. & R. 246.

A notice to take depositions should have sufficient certainty as to time and place to enable the opposite party to attend, without any extraordinary search. 3 B. 139. 4 H. 305.

Depositions taken *ex parte*, under a rule of court, after the hours named in the rule, cannot be read; but, if the opposite party, having notice, did not attend at the hour, they may. 2 B. 72.

The person before whom depositions are to be taken, has no power to adjourn from time to time without consent and without notice. 5 S. & R. 70.

It is irregular to give a notice to take a deposition upon two days, although they be consecutive. 8 W. 406.

Notice of the taking of a deposition, served on the attorney in the cause, is good unless he object at the time of service. 8 S. & R. 41. 3 H. 65.

A deposition taken in pursuance of a rule of court cannot be read in evidence, unless it appear by the certificate of the justice, that it was taken at the time and place mentioned in the notice. 4 W. & S. 113.

It must particularly appear *when* and *where* the depositions were taken. 4 W. C. C. 186.

The witness should be sworn *before* his testimony is reduced to writing, but if the party being present make no objection before the justice, it will be considered as waived. 6 W. 266.

If the deposition be *ex parte* it must appear that it was taken before a person duly qualified to administer an oath, either officially or by delegation from the court. 8 H. 130.

The letters "J. P." subjoined to the name of the person before whom a deposition is taken, are a sufficient designation of his official character as a justice of the peace. 8 C. 514. 3 Conn. 171. 2 Gratt. 216. 11 Ibid. 516.

A party who attends and cross-examines witnesses, on a short rule to take depositions, waives all objections to the sufficiency of the notice. 11 C. 111.

A cross-examination, under a rule of court, does not prevent objection, afterwards, to the competency of the witness. 1 D. 275. But objections to leading questions must be taken at the time of the examination. 3 B. 133.

The rule of court is, that the depositions shall be taken *before a justice*. It ought, therefore, to be reduced to writing, from the mouth of the witness, in the presence of the justice, though it need not be drawn by him. 12 S. & R. 410.

It is not competent for the justice to make the *attorney of one of the parties* his clerk, to take a deposition, unless with the *express consent* of the other party, or in the presence of his attorney, and acquiesced in by him. 1 P. R. 454.

The part of a deposition which is in the handwriting of the agent, or attorney of the party, cannot be read; although an agent of the other party was present, and cross-examined the witness, after having objected to his competency, on the ground of interest. The cross-examination, in the handwriting of the justice, is not exceptionable, and may be read. 2 P. R. 200.

If a deposition be drawn by an attorney, agent, party or relation of a party, having or feeling an interest in the cause in which it is to be read, it is good ground for rejecting it. 3 P. R. 41.

It is a fatal objection to a deposition that it was not orally delivered before the examiner, in a regular course of judicial examination, and reduced to writing by him or some proper person with his authority. 8 W. 406.

A deposition drawn up privately by one of the counsel in the cause, from the mouth of the witness, and afterward sworn to before a justice, under a rule to take depositions, is not admissible in evidence. 12 S. & R. 405.

A deposition, taken before a justice under a rule, ought to be reduced to writing, from the mouth of the witnesses in the presence of the justice. 12 S. & R. 405.

Testimony taken under a *commission* in another state cannot be read in evidence, if the attorney of one party was *present* when it was taken, though he took no part in the examination, and was not employed to attend. The practice is to disallow depositions taken by a commissioner, when the party procuring it was present with the commissioner at the time of taking it. The party, his solicitor or agent, present

Cross-examination
in another
state

attendance of the witnesses before the commissioner, but must *withdraw* being taken. 6 Barr 450.

A deposition is taken before a justice on interrogatories, it is the duty of the justice to put the interrogatories severally to the witness and obtain distinct answers to each. 4 S. & R. 298.

Interrogatories which are directed to be put to the witnesses on behalf of one party, should not be put to the witnesses of the other. 1 B. 436.

It is not necessary that the interrogatories should be incorporated into the body of the deposition. It is sufficient that they have been severally answered. 10 H. 353.

A difference of opinion in taking down the words of the witness, the justice should decide. 12 S. & R. 410.

It is not necessary that depositions taken under a commission should be submitted to the witness. 1 S. & R. 291. 1 W. C. C. 144.

A certificate need not be a certificate by the justice at the conclusion of each deposition taken from him. The general caption and certificate are sufficient. 3 H. 51.

On the return to a commission should be addressed to the prothonotary; if the deposition, though received by the plaintiff, was submitted to and examined by the defendant's attorney, and was afterwards filed, the irregularity of the return was held not to be a sufficient reason for excluding it. 10 H. 353.

VII. HANDWRITING.

Direct evidence to prove the handwriting in question, is that of a witness who saw the party write it. Such direct evidence cannot, however, always be obtained, and in general, to prove the handwriting of a person, any witness may be called who has, by sufficient means, acquired such a knowledge of the *general* handwriting of the party as will enable him to swear to his *belief* in the handwriting in question is the handwriting of that person. 2 Stark. Ev. reeul. Ev. § 577. 1 H. 641.

The handwriting of a party to a receipt may be proved by a witness who has seen him *write*, but who, in the course of dealing with him, has received his money which he has *paid*; if the witness swears affirmatively, from his knowledge of these facts, that he *believes* the signature produced to be the proper handwriting of the party. 19 Johns. 134.

A witness, who has seen much of the party's acknowledged writing, though he has *never seen him write*, was held competent to prove his signature as an attestation to a will. 2 N. & M. 400.

Handwriting may be proved by one who has become familiar with it, in a long course of intercourse with the writer, although he may never have seen him write. 3 P. C. 133.

A witness whose only knowledge of the handwriting of a party is derived from seeing such party write his signature once, may be admitted to testify as to the handwriting of such person, when it comes in question: but the rule is not extended beyond this. 2 C. 388.

A witness who has never seen a party write, and who has had no correspondence with him, and no knowledge of his handwriting, except that which he derived from letters written to others, which *purported* to have been written by the party, is not competent to testify as to the handwriting of such party. 4 C. 318.

A comparison of handwriting with others, admitted as proved to be genuine, may be used as a means of getting a writing in evidence. 5 C. 378. To prove the genuineness of a writing by the mere judgment of a witness, who grounds that judgment solely on a comparison with other writings, which in his judgment are genuine, is going beyond the cases warrant. 4 C. 329.

A comparison of handwriting is legal evidence, after evidence *has been given* in evidence of a writing which may then be compared with other writing of the party, where there is no doubt. 5 B. 349. 6 Wh. 284.

To authorize the admission of the writing offered as a test or standard, nothing is required by a person who saw the party write the paper, or admission by the witness of its being genuine, or evidence of equal authority, is sufficient. 6

Printed impressions of hands are *not* evidence in a *criminal* case. 4 W. C. C. 729.

But the same rule applies in *criminal* as in *civil* cases, that after evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with other writing, concerning which there is no doubt. 6 S. & R. 571.

Such proof is legitimate in attacking a writing as false or forged; and especially where other evidence has been given casting suspicion upon the genuineness of the proposed writing. And in such cases, experts may be called in, to aid in the comparison, by giving their opinions as witnesses. 5 C. 378.

Where the witness's recollection of the character of the party's handwriting has been effaced by time, he may be permitted to revive his memory of it, by the inspection of a writing which he knows to be genuine; but if such comparison fails to refresh his recollection, so that he can testify independently of the comparison, he is incompetent to prove the handwriting. 2 C. 388.

The best evidence of the execution of an instrument is the testimony of the subscribing witness: the next best is, proof of the handwriting of the witness, and this will be admitted when the witness is *dead*, or *out of the jurisdiction of the court*. 3 B. 192. 2 S. & R. 80.

If the subscribing witness to a bond be out of the jurisdiction of the court, and, upon diligent search, no person can be found within its jurisdiction, who can prove his handwriting, evidence of the handwriting of the obligor is admissible. 3 B. 192.

VIII. HEARSAY.

The few instances in which *hearsay* evidence can be admitted, are such as are in their very nature incapable of positive and direct proof. Of this kind are all those which can only depend on *reputation*. The excluding of *hearsay* evidence in questions of *pedigree*, would prevent all testimony whatever. There is no other way of knowing the evidence of deceased persons, but by the relation of others, of what they have been heard to say. In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who from their situation were likely to know the facts. Peake's Ev. 11. 1 Greenl. Ev. § 103-4.

To prove *pedigree*, evidence was permitted to be given of *hearsay*, a great length of time before any dispute had arisen. 1 D. 14. 1 Wall, Jr. App. iii.

Hearsay evidence admitted to prove ancestors to have been Indians. 1 W. C. C. 123.

Evidence of hearsay, from the father and mother, is not admissible in a question of age. 1 D. 9.

The declarations of a former owner, in relation to the boundary of the land of which he was in possession, are competent evidence. But they are not evidence of his right to hold by a different line from that by which he was then holding. 8 C. 302.

The declarations of a deceased person touching the locality of a boundary between adjoining owners, have been admitted in evidence, where the survey was made by the person making the declarations, or where they were made by an adjoining owner, who pointed out the line at the time. 3 C. 333.

But the declarations of a deceased person who did not make the original survey, nor subsequently examine it, or run the lines upon the ground, and who was not an adjoining owner, and did not point out the lines at the time, are not admissible. The admission of such declaration, is not to be extended beyond the cases already adjudicated. *Ibid*.

A vendor's declarations, after he has parted with the title, are not evidence to impeach the title of his vendee. 9 C. 411.

The declarations of a person not in possession of the land, nor the owner of it at the time the declarations are made, cannot be received to impeach a title derived from such person; especially, if not made in the presence of the party against whom they are offered, or communicated to him afterwards. 4 C. 492.

The declaration of a party made to a third person after he has remitted money of the kind and amount sent, is inadmissible as part of the transaction. 4 C. 501.

Where a son receives money from his father to enable him to embark in business, and gives his note for the amount at the time, the transaction cannot be changed

to a gift or advancement by the loose declarations of the father, that he may give money to his son. 5 C. 125.

A witness is called to state what was sworn at a former trial by another witness, and may testify to the substance, and need not state the exact words of the witness. 5 S. & R. 14. The same rule applies when the witness is out of the country. 1 S. & R. 419.

Notes of Counsel showing what a deceased witness testified on a former trial of the same parties, touching the same subject-matter, are evidence, when the witness is correct in substance; although the counsel does not recollect the testimony independently of his notes, and does not recollect the cross-examination. 3 W. & A. 300.

IX. WITNESSES.

A witness in *civil* cases is compelled by means of a subpoena, a judicial writ, commanding the witness to appear at the trial to testify for or against the plaintiff or defendant, under pain of forfeiting [one hundred dollars] in case of disobedience. If a witness wilfully neglect to attend upon the subpoena, he is in contempt of court, for which he is liable to an attachment. He is also liable to damages at common law, in an action on the case by the party injured. 1 W. & A. 77, 79. 1 T. & H. Pr. 543.

A witness has no privilege from the service of a subpoena. 4 D. 341.

If a subpoena is in the hands of a third person, the production is commanded by means of a writ of *subpoena duces tecum*. By this writ the witness is commanded to produce all documents in his possession, unless he have a lawful excuse to the contrary—of the validity of the excuse the court [or judge] is to decide, and not the witness, is to judge. 4 D. 86, 87.

A subpoena with a *duces tecum* cannot issue to a public officer to bring original documents, when certified copies would be evidence. 1 Y. 403.

Rules. By the principles of the common law, every person not incompetent and not of infamous character, may be a competent witness. 2 B. 165.

Persons excluded by reason of infamy, are such as have been convicted of treason, or of the *crimen falsi*. 1 Greenl. Ev. § 373.

A conviction of the offence of conspiracy to cheat and defraud creditors does not render a person incompetent. 9 C. 463. Nor of receiving stolen goods, knowing the same to be stolen. 217.

A person is not incompetent by reason of an assault and battery with intent to kill. 3 W. & A. 338. 1 Gr. 331.

The penal code has provided that where any person shall be convicted of a crime which is not punishable with death, and shall endure the punishment which the law prescribes, he shall be adjudged for the same, the punishment so endured shall have the effect of a pardon by the governor, as to the felony or crime of which he was so convicted: provided that the provisions of this act shall not extend to the case of a party convicted of wilful and corrupt perjury. Act 31 March 1860, § 181. Purd. 247.

Persons, idiots, and lunatics, during their lunacy, are incompetent witnesses. Lunatics, in their lucid intervals, when they have recovered their understanding, are competent. Children not able to comprehend the moral obligation of an oath, cannot be examined; but children may be examined on oath, if capable of distinguishing between good and evil. Com. Dig.

A person, under confinement in a lunatic asylum, is admissible as a witness, if the court consider him competent in point of understanding, and to be aware of the sanction of an oath. 5 Eng. L. & Eq. 547. But see 6 Moore P. C. 341. And such infidels as profess no religion that can bind their consciences to the truth, are excluded from being witnesses. Bull. N. P. 292.

The competency of a witness is not affected by his religious principles, or by his beliefs in the existence of a God who will punish him if he swears falsely. 1 W. & A. 262. But whether the punishment will be temporary or eternal, or in this world or that to come, is immaterial in the question of competency.

The existence of a future state of rewards and punishments is not essential to the com-

petency of a witness; nor is it cause of exclusion that he does not be inspired character of the Bible. 2 C. 274.

In such case, the judge or justice must judge whether the credibility be affected by his belief in the extent of the penalty to be incurred by swearing, and his disbelief of the Christian religion. Ibid.

A witness, while in a state of intoxication, ought not to be sworn to testify. 15 Johns. 143. 15 S. & R. 285.

And the court before which the witness is produced may decide for or against him, view, whether the witness be in such a situation that he ought to be sworn.

One who is born deaf and dumb may, if he have sufficient understanding, give evidence by means of an interpreter, or by writing, if able. 1 Str. 411. in note.

Of their privileges. Where a question is asked, the answer to which would expose the witness to punishment, or to a criminal charge, as to countenance the offence of usury, he cannot be compelled to answer, and therefore such answer ought not to be put. 1 Phil. Ev. 262.

In Pennsylvania, a witness is not bound to answer any question which would render him infamous or disgrace him, or involve him in shame or dishonour. P. R. 415.

A witness will be allowed to refer to an entry or memorandum made after the occurrence of the fact to which it relates, in order to refresh his memory. 1 Phil. Ev. 262.

Of their examination. It is a general rule, that leading questions are inadmissible on examination of a witness in chief; questions to which the answer would not be conclusive, are not in general objectionable. 1 Str. 81. On cross-examination, counsel may lead a witness so as to bring him directly to the point to the answer. Ibid.

A leading interrogatory is one, which is expressed in such a manner as to indicate to the witness the answer which it is wished he should make. P. R. 171.

It is always competent for a party to show that the witness has related the facts in a different manner, whether under oath or not. 4 W. & S. 55.

The party examined must depose to those facts only of which he has actual knowledge and recollection. He may refresh his memory with a copy of his deposition, or himself from a day-book; and if he can then speak positively, as to his deposition, it is sufficient; but if he have no recollection further than finding the facts in the book, the book itself must be produced. 2 T. R. 754.

Though witnesses can in general speak only as to facts, yet in questions of fact, persons versed in the subject, as physicians, may deliver their opinions, as to the case proved by the other witnesses. Ibid.

In cases of life, no evidence is to be given against a prisoner but in his own defence. 2 Hawk. P. C. 590.

A party may call as many witnesses as he thinks necessary to make out his case, if the court will not interfere unless he be guilty of oppression. [The same rule applies to magistrates.] 1 B. 46. 3 B. 414.

A Jew must be sworn on the Old Testament and with his hat on. A Jew refusing to be sworn as a witness on his Sabbath (Saturday) is incompetent. 2 D. 213.

A Mohammedan must be sworn upon the Koran. 2 Str. 1104.

The evidence of a Gentoo, sworn according to the ceremonial of his own religion, is admissible; and the testimony of all infidels, who are not atheists, is admissible. 1 Atk. 21.

The usual form of administering the oath has frequently been dispensed with, as where Dr. Owen, vice-chancellor of Oxford, refusing to lay his hand on the book and kiss it, was permitted to have the book held open before him, and to lift up his right hand. In like manner, a Scotch covenanter was permitted to swear by holding up his right hand; for as Lord Chief Baron observes, "oaths are to be administered to all persons according to the usual form, and as it most affects their consciences." 1 Atk. 42. 2 Cow. 601. Purd. 760-1.

3rd immunities from self

*Jews
Attorneys*

X. WHEN A PARTY TO A SUIT MAY BE A WITNESS.

als and judicial proceedings an executor, administrator, trustee or other
ing in a fiduciary or representative character, although a party to the
not having any interest in the subject-matter of controversy, may be
as a witness, and the right to claim commissions or compensation shall
med or taken to be an interest disqualifying such person from being
s any other witness. Act 27 March 1865, § 1. Purd. 1389.

ion of assumpsit by an administrator, the plaintiff having proved that
for which the suit was brought had been placed by the decedent in the
e defendant, *in trust*, it was held, that under this act, the defendant,
stee, was a competent witness in his own behalf. 6 P. F. Sm. 243. And
Sm. 441.

s are competent witnesses to sustain a will, under an issue awarded by
6 P. F. Sm. 370.

y in any civil action or proceeding, whether at law or in equity, may com-
erse party, or any person for whose immediate and adverse benefit such
ceeding is instituted, prosecuted or defended to testify as a witness in
in the same manner and subject to the same rules as other witnesses:
however, That no party shall be allowed to compel an answer to a bill
y from an adverse party, and also to compel him to testify. Act 27
5, § 1. Purd. 1889.

called as a witness by his adversary, is thereby made a competent wit-
purposes. 2 P. F. Sm. 210. 7 Ibid. 404.

act does not allow a party to examine the wife of his opponent. 1
2. Where the wife has a direct and certain interest in the success of
ff, it is contrary to the policy of the law to admit the husband as a
ugh neither husband nor wife be named in the record. 9 P. F. Sm.
see 27 Leg. Int. 109. 2 Leg. Gaz. 108.

e steps must be taken to procure the testimony of a party to the cause,
a continuance in case of his absence, as if he were a stranger to the
Leg. Int. 222.

il actions now pending, or hereafter brought, where there are more than
f or defendant, and either party shall compel one of the adverse parties
under the act to which this is a supplement, the co-plaintiff or co-plain-
defendant or co-defendants of the party so compelled to testify, shall
wed to give evidence. Act 10 April 1867, § 1. Purd. 1462.

est nor policy of law shall exclude a party or person from being a wit-
civil proceeding: *Provided*, This act shall not alter the law, as now
d practised in the courts of this commonwealth, so as to allow husband
o testify against each other, nor counsel to testify to the confidential
tion of his client; and this act shall not apply to actions by or against
administrators or guardians, nor where the assignor of the thing or con-
on may be dead, excepting in issues and inquiries *devisavit vel non* and
ecting the right of such deceased owner, between parties claiming such
volution on the death of such owner.(a) Act 15 April 1869, § 1.

to the record of any civil proceeding in law or equity, or a person for
ediate benefit such proceeding is prosecuted or defended, may be
as if under cross-examination, at the instance of the adverse party, or
n, and for that purpose may be compelled, in the same manner, and
the same rules for examination, as any other witness to testify; but the
g for such examination shall not be concluded thereby, but may rebut
or testimony. Ibid. § 2.

mony of witnesses authorized by this act may be had by deposition or
issued, as the case may require, with such notice to the party to be
nd to the adverse party, as is now or may hereafter be prescribed by
the proper court, touching the taking of depositions and testimony on
Ibid. § 3.

Under this act, a wife is a competent witness *for* her husband, but not *against* him. 2 Leg. Gaz. 108. 27 Leg. Int. 109.

A party is a competent witness as to transactions between himself and an executor; he is only incompetent where the subject-matter of the litigation affects the rights of the decedent as against himself. 27 Leg. Int. 109. But an accountant is not a competent witness to sustain his own claim against the estate of his intestate. 2 Leg. Gaz. 285.

In all actions or civil proceedings in any of the courts of this commonwealth, brought by or against executors or guardians, or in actions where the assignee of the thing or contract in action may be dead, no interest or policy of law shall exclude any party to the record from testifying to matters accruing since the death of the person whose estate, through a legal representative, is a party to the record Act-9 April 1870, § 1. Purd. 1605.

XI. MISCELLANEOUS CASES.

Husband and wife are incompetent to testify against each other. This rule is so inviolable that no consent will authorize the breach of it. Cases temp. Hard. 264. 2 T. R. 263. 4 T. R. 678. 1 Str. 504.

But when the husband has been guilty of personal violence, or ill treatment of the wife, she may from the necessity of the case be examined as a witness against him. Peake's Evid. 122.

In some cases, in an action against the husband, though the wife cannot be admitted a witness, yet her confession may be given in evidence to charge him; as where an action was brought against him for nursing his child, the plaintiff was allowed to give evidence, that the wife declared the agreement to have been for so much per week, because such matters are usually transacted by women. 1 Str. 527. But neither the declarations of husband nor wife can affect the title of the other. 14 Wr. 261.

It is clearly settled, that a woman who is not legally the wife of a man, though she has been in fact married to him, may be a witness against him. Peake's Evid. 122.

A wife, after a divorce, is incompetent to prove a contract or anything else, which happened during the marriage. Peake's Evid., Appendix 87. 4 Barr 374. 1 Greenl. Evid. § 254. She is incompetent, after the death of her husband, to prove that he confessed to her that he had committed perjury in a deposition read in the cause. 13 Pet. 209. Whatever has come to the knowledge of either party by means of the confidence which marriage implies cannot afterwards be divulged, though the other party be no longer living. 4 P. F. Sm. 110.

Attorneys to whom facts are related professionally during a cause or in contemplation of it, are neither obliged nor permitted to disclose the facts so divulged, during the pendency of that cause, or at any future time; and if a foreigner, in communicating with his attorney, have recourse to an interpreter, he is equally bound to secrecy. But where the attorney himself is, as it were, a party to the original transaction, as if he attest the execution of a fraudulent deed, or was employed as an agent, and did not gain his knowledge merely by the relation of the client, the rule does not apply. 4 T. R. 431, 754. Peake's Evid. 126.

An attorney is a competent witness on behalf of his client, though the amount of his fee depend on his success in the cause. 1 D. 241. 1 S. & R. 32. 17 B. & R. 312. 8 Barr 520. 2 J. 235.

By act 4 March 1870, husband and wife may testify against each other in proceedings for divorce, where there is a personal service, or an appearance and defence. Purd. 1605. But the court will not grant a divorce on the unsupported testimony of either party, though made competent by this act. 27 Leg. Int. 196, 197.

Execution, its Service and Return.

of an execution for debt.

general authority of an execu-

service of the execution—con-
stable's returns, and justice's docket
ies.

requirements in an execution.

right to enter special bail after

execution shall have issued.

VI. Judicial decisions relating to execu-
tions.

VII. Articles exempt from levy on an exe-
cution.

VIII. Form of an execution and constable's
return against a corporation.

IX. Form of an execution, &c., in tree-
pass.

I. FORM OF AN EXECUTION FOR DEBT.

PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

constable of Walnut Ward, or to the next constable of the said city, most con-
be Defendant, greeting:

[A. B.] on the [first] day of [May,] 1860, obtained judgment before the
J. B., one of our aldermen in and for the said city, against [C. D.] for the
[twenty-five] dollars [ten] cents, together with [one] dollar [20] cents costs, which
remains unsatisfied: Therefore we command you that you levy the said debt,
arrest thereon, with the said costs, on the goods and chattels of the said debtor,
hereon the time you make your levy, and, hereon, or on a schedule to be
fixed, a list of the same, and, within twenty days from the date hereof, expose
sale, by public vendue, you having given due notice thereof by three or more
posts, put up at the most public places in your ward, and returning the overplus,
of the said sale, to the said debtor*. And of your proceedings herein, together
with execution, make return to our said alderman, on or before the [twenty-first]
day of [May,] 1860.

our said Alderman, at Philadelphia, who hath hereunto subscribed his name,
his seal, the [first] day of [May,] Anno Domini 1860.

J. B., Alderman, [SEAL.]

's return.—"Money paid into office, May 12th. J. H., Constable."

judgment be for the recovery of money collected by any public officer, or
misconduct, (the only cases arising from contract in which a justice is
by the act of 1842, to issue an execution authorising the arrest or
seizure of the person,) then the following clause should be inserted after

want of sufficient distress, that you take the body of the said debtor into cus-
tody, convey to the debtor's apartment, there to be kept by the sheriff or keeper
until the debt, interest and costs hereon indorsed, be fully paid.

form of an execution for debt, here given, is believed to embrace all the
cases and requirements of the acts of assembly. A careful perusal of the
form in most other cases, will enable the constable faithfully to discharge his

the constable is not authorized in any case, even where arrest in execution
has been abolished by law, to take the defendant into custody, unless there be a
sufficient distress." If the debtor shall give the constable "goods and
other valuables of any kind, out of which he is satisfied he can make the
debt and costs, called for by his execution, then the constable has no right
to take the body of the debtor into custody." But if he cannot give such property,
on which the constable may levy and make sale, then he is authorized
to be conveyed to him "to the debtor's apartment." Having delivered
him to the keeper, he will indorse the execution in this manner: "I certify
that the within named defendant is in my custody, W. B., keeper of the debtor's
August 10, 1860," which execution, so indorsed, being returned to the
justice, shall be "deemed sufficient," and the constable, on the docket of the justice,
being freed from all responsibility on the said execution. The justice should in
all other cases where the constable makes a written return, enter it on his

Every execution should, when returned by the constable, be indorsed in such a way, that the indorsement may be a proper return to the execution when entered on the docket of the justice. For example, "Money paid into office." "No goods." "Levied, and not sold for want of time." "Levied, and not sold for want of indemnity, the goods levied on being claimed by a third person, D. M." "Levied, sold and money paid into office." "Money paid to plaintiff, whose receipt is on the back of the execution." "Bonded and discharged by the prothonotary." Every return made by the constable should be *signed* with his name as constable, and *dated*.

IV. By the 22d section of the act 20 March 1810, it is provided that "no execution, issued by a justice, shall be set aside for informality, if it shall appear, on the face of the same, that it is issued: 1. 'In the name of the commonwealth of Pennsylvania.' 2. 'After the expiration of the proper period of time' [for which it may have been stayed by the entry of bail, plea of freehold, or any other privilege which the defendant may have claimed and been allowed, or by agreement of parties.] 3. 'And for the sum for which judgment had been rendered, together with interest thereon and costs.' 4. 'And a day mentioned on which return is to be made by the constable.' 5. 'And that the cause of action shall have been cognisable before a justice of the peace.' " A justice of the peace who has his blank executions printed in a correct manner can hardly fail to fill them up so as to meet all which the law requires.

V. If the execution shall issue before twenty days after judgment shall have been rendered, still the defendant within that time has a right to enter bail for stay of execution, or an appeal on payment of the "costs accrued on the execution," and for putting in bail. The same privilege under the like payment of costs may be exercised by a freeholder, *at any time*, before the expiration of the stay of execution allowed by law, on the amount for which judgment had been entered against him. 1 Ash. 407.

VI. When a justice has opened his judgment on the affidavit of the defendant, that he was absent from home when the summons was served, &c., and a re-hearing has been had, and the former judgment is confirmed, the *stay of execution* runs from the day on which the *last* judgment was entered. Com. Pleas, Phila. MS. 1815.

A defendant is not entitled to stay of execution upon a judgment obtained against him as bail for stay of execution on any former judgment. Act 25 April 1850, § 28. Purd. 431.

Nor in an action of debt on a judgment obtained in another state. 2 Am. L. R. 446.

A constable cannot presume to disobey an execution issued by a justice on the ground of irregularity in the proceedings, as where the case was commenced by attachment without a legal bond having been given; if he do so, he will be liable to the plaintiff. 11 Leg. Int. 126.

Goods distrained, but replevied, may be taken in execution. 2 D. 31.

Stock in a bank or other corporation, standing in the name of a defendant in an execution, is not liable to be sold as his, under the act of 29th March 1819, if it actually be the property of another. 6 Wh. 117.

A loan of personal property, subject to be turned into a sale by a compliance with certain conditions, does not vest in the bailee such an ownership as subjects the property to levy and sale upon an execution for his debt. 7 W. 375.

Freeholder
Masters
+
Friends of F

execution issued by a justice of the peace shall be a lien on the property of the defendant before a levy made thereon. Act of 28th March 1820, § 4. 2 D. 131. A seizure is generally necessary to constitute a valid levy of goods, yet a defendant may dispense with it for his own accommodation; and if he do, as between him and the officer, the levy is good. 6 W. 468.

To constitute a good levy on personal property, it is not necessary that an inventory be made, in the first instance, of the property, or that the sheriff [or constable] immediately remove the goods, or put a person in possession of them. If the sheriff is within the power or control of the sheriff [or constable] when the levy is made, it will be good if followed up within a reasonable time, by his taking possession of the property in such a manner as to apprise everybody of the fact that they have been levied on in execution. 3 R. 401.

A constable having several executions against the same defendant in his hands at the same time, makes a levy, and indorses a schedule of the goods levied on one of the executions; this is a good levy on all the executions. 8 P. R. 280.

A constable levies an execution issued by a magistrate on personal property, and afterwards suffers it to be removed beyond his bailiwick, upon a bond given by a third person to restore it at a given time, the lien of his execution is not lost, as against an intervening levy of another execution creditor. 2 M. 81. Where removal of the property beyond the constable's bailiwick, with his consent, amounts to an abandonment of the lien of his execution, as against the lien of another execution creditor, not a party to the transaction. Ibid. If the constable suffers the property to be removed, he becomes liable for their value to the plaintiff. 1 Wr. 187. A constable have reason to doubt about the ownership of property in the possession of a defendant in an execution, he may require the plaintiff to indemnify him; if he refuse to sell, not having done so, he becomes liable. 8 W. 220.

A constable who remains in possession of the defendant's premises, under an execution, more than a reasonable time, is liable to an action. 16 Eng. L. & Eq. 501. A constable of personal property by a constable upon an execution, gives a good title to the plaintiff, although the same property had been levied by a prior execution creditor of the sheriff. The controversy between the execution creditors must be determined by an appropriation of the proceeds of sale. 2 W. & S. 264.

A sale of personal property by a constable on execution, made to the plaintiff in the presence of the constable being present at the sale, is illegal and void. There can be no public sale without bidders or bystanders. 3 H. 90.

A constable cannot lawfully purchase at his own sale, and one deputed by him to sell is subject to the same disability. But where the constable personally superintends the sale, and employs one merely as a crier, the latter is not liable at the sale. 8 H. 842. 5 Wr. 135.

An execution is not abated by the plaintiff's death, but shall be proceeded in. It is a uniform practice, where a plaintiff dies after judgment, is for the executor to be substituted, without a *scire facias*, and even without an application to the court, and to take an execution when he is, in other respects, entitled to it. 10 D. 19.

A justice is regular to issue a second execution until the first is returned, for the court [the justice] ought to know what proceedings have been had on the first execution, and they issue another. 2 Am. Dig. 235. 5 P. L. J. 430.

Money collected upon an execution by a constable cannot be recovered back from the officer upon the allegation of its having been paid a second time. 5 D. 459.

If the defendant has been in execution upon a *ca. sa.*, and discharged by the plaintiff, the action is at an end. 4 B. 24, 82.

If a defendant be discharged at his own request, another execution may be issued. 432.

If a plaintiff consent to discharge one of several defendants taken on a joint *ca.*, he cannot afterward retake him, or take any of the others. 6 T. R. 525.

If a defendant, in custody on an execution, gives bond, with surety, to take him out of the insolvent laws, and forfeits his bond, a second execution may be issued against him. But if, when he is in custody under the second execution, the plaintiff discharges him from prison, without the assent of the surety, the debt is

satisfied, and no action can be maintained against the surety upon the bond 2 R. 272.

When a bond is forfeited by the failure, on the part of the debtor, to file his petition in time to be heard at the general period fixed for the term, execution may be issued against him the moment it can be legally ascertained that he has not complied with the terms of the law. 1 Ash. 85.

VII. ARTICLES EXEMPT FROM LEVY.

In lieu of the property now exempt by law from levy and sale on execution, issued upon any judgment obtained upon contract, and distress for rent, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all bibles and school-books in use in the family (which shall remain exempted as heretofore), and no more, owned by or in possession of any debtor, shall be exempt from levy and sale on execution, or by distress for rent. Act 9 April 1849, § 1. Purd. 482.

The sheriff, constable or other officer charged with the execution of any warrant issued by competent authority, for the levying upon and selling the property, either real or personal, of any debtor, shall, if requested by the debtor, summon three disinterested and competent persons, who shall be sworn or affirmed, to appraise the property which the said debtor may elect to retain under the provisions of this act, for which service the said appraisers shall be entitled to receive fifty cents each, to be charged as part of the costs of the proceedings; and property thus chosen and appraised to the value of \$300, shall be exempt from levy and sale on the said execution or warrant, excepting warrants for the collection of taxes. Ibid. § 2.

All sewing-machines belonging to seamstresses (a) in this commonwealth shall be exempt from levy and sale on execution or distress for rent, in addition to any articles or money now exempt by law. Act 17 April 1869, § 1. Purd. 1566.

An unmarried defendant is entitled to the benefit of the act. 3 Gr. 30.

An unsuccessful plaintiff in an action of trover, against whom an execution is issued for the costs, is entitled to the benefit of the exemption law. 2 Gr. 424.

But a defendant in an action for deceit, is not entitled to the benefit of the act. 3 Lux. Leg. Obs. 375.

The defendant in a suit commenced by attachment, under the 27th section of the act of 12 July 1842, is entitled to the benefit of the exemption law, if the original demand were on a contract. 18 Leg. Int. 68.

A constable, against whom execution is issued upon a judgment obtained for official misconduct, is not entitled to the benefit of the exemption law. 5 C. 176.

Individual partners are not severally entitled, under the act of 1849, to retain out of the partnership effects levied on, specific articles to the value of \$300. 1 Phila. 352. 8 Wr. 442.

The act must be so construed as to admit a dealer to enjoy \$300 of his capital in trade; a new stock purchased with the proceeds of other articles retained under the exemption law, is protected. 6 C. 261.

A defendant cannot claim the benefit of the exemption law out of property which he has conveyed in fraud of his creditors. The conveyance, though void as to the creditors, is nevertheless conclusive on the debtor for all purposes. 5 C. 219. 1 P. F. Sm. 90. He cannot claim to have goods set apart to him, to which he disclaims title. 10 C. 187. If he falsely deny to the constable his ownership of the property levied on, he forfeits his right under the exemption law. 2 Wr. 190. And see 25 Leg. Int. 229.

The exemption may be claimed out of any bank notes, money, stocks, judgments, or other indebtedness to the defendant in the execution. Purd. 434. See 12 C. 130.

The exemption of property to the amount of \$300, from execution, is a privilege which may be waived by the defendant; and when he does waive it in writing he cannot afterwards claim it. 2 P. 279. 6 W. 36. 11 H. 93. 3 Gr. 132.

When made at the time the debt is created, the waiver is based upon the same

(a) The act 4 March 1870, extends this exemption to sewing-machines used and owned by private families. Purd. 1606.

tion as that upon which rests the liability to pay, and is, therefore, irrevocable. C. 225.

al agreement to waive the exemption, made without consideration, is not binding on the debtor. 2 Pitts. L. J., 6 January 1855. And a prospective waiver is not binding, unless made in clear and unequivocal language. 6 P. F. Sm. 161. A defendant cannot waive the exemption in favor of a junior lien creditor, nor assign it to a third person; any such arrangement is void, and amounts, in effect, to an abandonment of his claim. 9 H. 210. 8 C. 160. 12 C. 373. 1 Wr. 315. 8 Wr. 395.

A claim for the benefit of the exemption law, must be, generally, made in the writ which is the instrument of affecting the sale. 8 C. 276. Where several writs are issued to the constable's hands at the same time, one demand is sufficient as to all, but a demand is different as to successive writs. 2 Gr. 197, 375. He must claim the exemption against every execution creditor. 2 Wr. 190.

Where the temporary absence of the owner, any person left in charge of the property, and especially a child of proper age, is authorized to claim the benefit of the exemption law, in case of a levy under an execution. 8 C. 82. A demand by the defendant's wife and counsel is sufficient. 18 Leg. Int. 68. But a wife must demand affirmatively that she is entitled to claim as her husband's agent; the mere fact of the marital relation is not enough. 2 Leg. Gas. 125.

A demand for an appraisement must be made at such a time as to cause no injury to the plaintiff; after the property levied on has been put up for sale, and the proceedings have commenced, it is too late. 7 H. 255. 1 C. 182. 2 P. 279.

It must be made before the day of sale, and unless under special circumstances, before the advertisements are put up. 3 Wr. 213. 6 P. F. Sm. 402. The object of the legislature was, to prevent the sale of the property; and every evasion of the debtor, which amounts to an acquiescence in, or an affirmation of, the sale, is in direct contravention of that object. 9 H. 247. 8 Wr. 206.

A constable is authorized to administer the oath or affirmation to the appraisers. 4. His fees for all services under the exemption law are fixed at one pound. 469.

If the apparent value of the goods levied on is less than the amount exempted, it is unnecessary to make any further specification than is implied in the writ, at least, until after the appraisement. 8 C. 82.

If the property, or justice, may set aside the appraisement before the return of the writ, where it is manifestly below the market price. 1 Phila. 348. If the appraisement be not publicly conducted, it is sufficient cause for setting it aside. 353.

A debtor can the defendant entitle himself to any portion of the proceeds of the sale of real property. The act speaks of property, not money. It requires him to specify the goods he wishes to retain, and have them appraised; and the property so specified and appraised shall be exempt from levy and sale. 7 H. 255-7.

If a debtor sell the property exempt from execution, the money is liable to be attached in the hands of the purchaser; and so are the damages recovered by the plaintiff in an action of trespass for taking it in execution, for such recovery transfers the property, and has the effect of a sale. 11 H. 489. But the debt itself is not defalked against the plaintiff's damages. 8 C. 82.

A refusal of non-compliance by the officer with the debtor's claim to the exemption, is only a remedy by action. 7 H. 255. 10 C. 36. This decision appears to be in line with great harshness against the unfortunate debtor, since the court has decided that the damages, when recovered, are liable to be attached.

An officer refusing to allow the exemption, becomes a trespasser *ab initio*. 4 C. 264. And either case or trespass will lie against him. 10 C. 201.

The following form of election and appraisement may be used :

B. } Execution issued by J. R., Justice.
D. } Debt \$50 and costs. S. S., Constable.

I, the defendant above named, do elect to retain the following articles of personal property under the second section of the act of 9th April 1849, to wit:

W^e, the subscribers, having been summoned by S. S., constable, to appraise the property retained by the above-named defendant, and having been respectively sworn or affirmed, do value and appraise the same as follows, viz.:

VIII. FORM OF AN EXECUTION AGAINST A CORPORATION.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Fifth Ward, or to the next constable of the said city, most convenient to the defendant, greeting:

WHEREAS, [A. B.,] on the [first] day of [May] 1860, obtained judgment before the subscriber, J. B., one of our aldermen in and for the said city, against [the Philadelphia Bank] for the sum of [ninety] dollars [twenty] cents, together with [one] dollar [fifty] cents costs, which judgment remains unsatisfied: Therefore we command you that you levy the said debt, and the interest thereon, with the said costs, on the goods and chattels of the said bank, and indorse hereon the time you make your levy, and hereon, or on a schedule to be hereto annexed, a list of the same, and, within twenty days from the date hereof, expose the same to sale by public vendue, you having given due notice thereof by three or more advertisements, put up at the most public places in your ward, and returning the overplus, if any, of the said sale, to the said bank.

And of your proceedings herein, together with this execution, make return to our said alderman, on or before the [twenty-first] day of [May] 1860.

WITNESS our said alderman, at Philadelphia, who hath hereunto subscribed his name, and affixed his seal, the [first] day of [May,] Anno Domini 1860.

J. B., Alderman. [SEAL.]

IX. FORM OF AN EXECUTION IN TRESPASS.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Fifth Ward, or to the next constable of the said city most convenient to the defendant, greeting:

WHEREAS, [A. B.,] on the [first] day of [May] 1860, obtained judgment before the subscriber, J. B., one of our aldermen in and for the said city, against [C. D.,] for the sum of [eighty-six] dollars [ten] cents damages, in trespass, together with [two] dollars [twenty] cents costs, which judgment remains unsatisfied: Therefore we command you that you levy the said debt, and the interest thereon, with the said costs, on the goods and chattels of the said defendant, and indorse hereon the time you make your levy, and hereon, or on a schedule to be hereto annexed, a list of the same, and, within twenty days from the date hereof, expose the same to sale, by public vendue, you having given due notice thereof by three or more advertisements, put up at the most public places in your ward, and returning the overplus, if any, of the said sale, to the said defendant.

And for want of sufficient distress, that you take the body of the said defendant into custody, and him convey to the debtor's apartment, there to be kept by the sheriff or keeper thereof, until the damages, interest and costs hereon indorsed be fully paid. And of your proceedings herein, together with this execution, make return to our said alderman, on or before the [sixteenth] day of [June] 1860.

WITNESS our said alderman, at Philadelphia, who hath hereunto subscribed his name and affixed his seal, the [twenty-sixth] day of [May,] Anno Domini 1860.

J. B., Alderman. [SEAL.]

Constable's Return.—"No goods, and the defendant in custody.

May 20th 1860.

G. W., Constable."

Executors and Administrators.

- I. Who shall be executors and administrators, and their duties. III. Forms of summons, executions for executors and administrators, and constable's return.
 II. Statutes and judicial authorities.

I. An *executor* is the person to whom another commits, by will, the execution of his last will and testament. An *administrator* is he to whose care the goods of a deceased person are committed for distribution by a public officer, called the *ordinary* in England, and the *register of wills* in Pennsylvania. If the execution be committed to a woman, she is called an *executrix*. If a woman take out letters of administration, she is called an *administratrix*. If the deceased leave a will, but name no executor, an administrator *cum testamento anexo* [with the will annexed] is appointed. In case of the death or renunciation of a sole executor, or the death of a sole administrator, the register appoints, in the former case, an administrator *de bonis non* [of the goods not administered] *cum testamento anexo*; in the latter case, an administrator *de bonis non*.

In England, and in many of the United States, an executor of an executor represents the original testator; but the law is altered in Pennsylvania. Purd. 275. An executor or administrator must give notice of his appointment. Purd. 281. He must file, also, an *inventory* and appraisement within thirty days after his appointment. Purd. 280. He must take the following oath, "You do swear [or solemnly, sincerely and truly declare and affirm] that as executor of the last will and testament of A. B. [or as administrator of the estate of A. B.], deceased, you will well and truly administer the goods and chattels, rights and credits of said deceased, according to law; and also well and truly comply with the provisions of the law relating to collateral inheritances." Non-resident executors and administrators must likewise give bond, with two sufficient sureties, for the faithful performance of the duties of their office. Purd. 275.

II. ACT 24 FEBRUARY 1834. Purd. 286.

SECT. 26. The executors or administrators of any person who at the time of his decease was a party, plaintiff, petitioner or defendant in any action or legal proceeding depending in any court of this commonwealth, shall have full power, if the cause of action doth by law survive to them, to become party thereto, and prosecute or defend such suit or proceeding to final judgment or decree, as fully as such decedent might have done if he had lived; and if such plaintiff or petitioner die after judgment or decree in his favor, his executors or administrators may proceed to execution thereupon, as such plaintiff or petitioner might have done if he had lived.

SECT. 27. The court in which any action or legal proceeding may be depending as aforesaid, shall have power to require, by a writ of *scire facias*, such executors or administrators, within twenty days after the service thereof, to become party to such action or proceeding, or to show cause, at the next succeeding term, why they should not be made party thereto, by judgment of the court, and further proceedings be had in such action or proceeding; but in every such case, the executors or administrators, who shall become party as aforesaid, shall be entitled to the continuance of such action or proceeding during one term.

SECT. 28. Executors or administrators shall have power to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander, for libels and for wrongs done to the person; and they shall be liable to be sued in any action, except as aforesaid, which might have been maintained against such decedent if he had lived.

SECT. 29. The executors or administrators of every person who was the proprietor of any rent charge, or other rent or reservation in nature of a rent, in fee or otherwise, as mentioned in the 8th section of this act, shall and may have an action of debt for the arrearages of such rent due to the decedent, at the time of his decease, against the person who ought to have paid such rent, or his executors or administrators; or they may distrain therefor upon the lands or tenements which were

charged with the payment thereof, and liable to the distress of such decedent so long as such lands or tenements remain and are in the seisin or possession of the tenant who ought to have paid such rent, or in the possession of any other person claiming the same, from or under the same tenant, by purchase, gift or descent, in like manner as such decedent might have done if he had lived.

SECT. 30. The executors or administrators of any tenant for life, who shall die before or on a day on which any rent was reserved or made payable upon any demise or lease of any real estate, which determined on the death of such tenant for life, may have an action on the case, to recover from the lessee or under tenant of such real estate, if such tenant for life die on the day on which the same was made payable, the whole, or, if before the day, a proportion of such rent for the last year, or quarter of a year, or other current period of payment, according to the time elapsed at the decease of such tenant for life as aforesaid.

SECT. 31. No action or other legal proceedings, commenced by or against executors or administrators, shall be abated or otherwise defeated, by reason of the death, dismissal, resignation or renunciation of any one or more of them, nor by reason of the annulling or revoking of the letters or powers granted to them, or any of them; but such suit or proceeding may be prosecuted to final judgment or decree, by or against such other person or persons as may have been joined with them in the administration, or by or against such person or persons as may be their successors therein, in all cases, in like manner as if no such change had occurred or act been done; and in all cases of the vacancy of the administration as aforesaid, the successors therein shall be made party to such action or proceeding, in a manner provided by the 26th and 27th sections of this act.

SECT. 33. No execution for the levy or sale of any real or personal estate of any decedent, shall be issued upon any judgment obtained against him in his lifetime, unless his personal representatives have been first warned, by a writ of *scire facias*, to show cause against the issuing thereof, notwithstanding the *teste* of such execution may bear date antecedently to his death: and in all cases where property, real or personal, of a decedent is sold upon an execution, and more money raised than is sufficient to pay off liens of record, the balance shall be paid over to the executor or administrator for distribution; but before any such payment shall be made, such executor or administrator shall give bond, to the satisfaction of the court, conditioned for the legal distribution of such money: *Provided always*, That such money shall be distributed as the real estate of which it is the proceeds would have been.

SECT. 35. In every case of an execution against the executors or administrators of a decedent, whether founded upon a judgment obtained against such decedent in his lifetime, or upon a judgment obtained against them in their representative character, if it shall be made to appear to the satisfaction of the court issuing such execution, that there is reason to believe that the personal assets are insufficient to pay all just demands upon the estate, such court shall thereupon stay all proceedings upon such execution, until the executors or administrators shall have made application to the proper orphans' court for the sale of the real estate of the decedent, or for the apportionment of the assets, or both, as the case may require.

SECT. 37. The omission of an executor or administrator to plead to any action brought against him in his representative character, that he has fully administered the estate of the decedent or any other matter relative to the assets, shall not be deemed an admission of assets to satisfy the demand made in such action; also the omission of the plaintiff to reply to any such matter when pleaded, shall not be deemed an admission of the want of assets as aforesaid, nor shall such omission otherwise prejudice either party; and no mispleading, or lack of pleading, by executors or administrators, shall make them liable to pay any debt or damages recovered against them in their representative character, beyond the amount of the assets which in fact have come or may come into their hands.

Letters of administration, granted in a sister state, are a sufficient authority to maintain an action, in this state, to recover assets which were never liable to administration here. 6 Wr. 467. 17 Leg. Int. 308. But not to recover the choses in action of a non-resident decedent; such choses and assets being subject to our jurisdiction. 6 Wr. 467. The law in this respect, as held in 4 D. 292, and 1 B. 63, was intended to be altered by the act of 1832. Report of the Revisers of the

Civil Code. But letters granted in a *foreign* country, confer no power to sue in this state. 1 D. 456.

Since the act of 1834, an action of trover will lie against executors, upon a conversion by their testator, in his lifetime. 4 Phila. 87. And so will any other personal action, except suits for slander, libel or wrong to the person. 12 H. 122. 9 P. F. Sm. 327.

The executor of the plaintiff may be substituted, in case of his death, after the commencement of the action, without a *scire facias*, by suggesting the death upon the record. 10 S. & R. 119. 4 Barr 232.

An administrator *de bonis non* may be substituted as plaintiff, in a judgment obtained by the administrator whom he succeeds. 7 Barr 385. And the substitution may be made at any time. 11 S. & R. 131.

An executor is not bound to plead the statute of limitations. 1 Ash. 352. 2 J. 67. 1 Wh. 66. But where an estate is insolvent, each creditor has a right to oppose the bar of the statute, to the claim of another upon the fund. 5 H. 423.

In an action at law against an administrator, to recover a debt of the decedent, the statute of limitations is a bar, although less than six years from the time it accrued, had elapsed at the decease of the debtor. 7 C. 455.

But in a proceeding in the orphans' court for distribution, the limitation does not run in favor of the estate, after the decease of the debtor, if the claim were not then barred. The right of a creditor to his just proportion of the property of the debtor, vests at the death of the latter; and the law commits it to the care of the administrator, in trust for all whose debts are valid and subsisting at the death of the intestate. 5 C. 360.

An executor or administrator who, in good faith, prosecutes a claim of the estate, and fails, is not personally liable to the defendant for his costs. The judgment for costs is against the estate only. 11 H. 471.

Executors (or administrators) who act with ordinary diligence and attention, are not liable for a loss of the funds of the estate; nor are they liable for the mismanagement or insolvency of their agents, which they could not foresee nor control. 6 W. 185.

An executor who receives money of the estate, and pays it over to a co-executor who afterwards becomes insolvent, is not chargeable with it in favor of legatees, although he would be in favor of creditors. 6 W. 250.

An administrator is chargeable with the amount of a note due to his intestate, for the collection of which he delayed the institution of suit for several years after his intestate's death, when with proper diligence the debt might have been collected. 6 W. 46.

In an action by an administrator to recover a debt due to his intestate, the defendant will not be allowed to set off a debt due to him by the administrator, for services rendered to him in the course of his administration of the estate. 8 W. 74.

Executors (or administrators) will not be permitted, under any circumstances, to make profit for themselves out of the funds of the estate in their hands. 6 W. 250.

If an administratrix mix the funds of the estate with her own moneys, and employ both in trade, the parties in interest may, if they prefer it, insist on having a proportionable share of the profits, instead of interest on the amount of trust funds so employed. 12 C. 174.

III. FORMS OF SUMMONS, EXECUTIONS, &C.

SUMMONS FOR ADMINISTRATRIX AGAINST EXECUTORS.

BEAVER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Beaver, greeting:

We command you that you summon J. L. and E. W., executors of the last will and testament of T. B., deceased, so that they be and appear before J. R., one of our justices of the peace in and for the said county, on —, the 8th of March, instant, at three o'clock in the afternoon of that day, to answer S. C., administratrix of T. C., deceased, of a plea of debt, not exceeding one hundred dollars. Witness the said J. R., at S— aforesaid, the 1st day of March, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

Constable's Return.—"Served on both the defendants, personally, March 7th 1860, by producing to them the original summons, and informing them of the contents thereof.

R. R., Constable."

Robert T. H. Williams

Bar

**SUMMONS FOR SURVIVING EXECUTOR AGAINST ADMINISTRATORS WITH THE WILL ANNEXED.
BEAVER COUNTY, ss.**

The Commonwealth of Pennsylvania,

To the Constable of L—— Township, in the County of Beaver, greeting:

We command you, that you summon J. L., J. D., and R. R., administrators of C. W., deceased, with the will of the said C. W. annexed, so that they be and appear before J. R., one of our justices of the peace in and for the said county, on the seventh day of July next, at ten of the clock in the forenoon of that day, to answer G. B., surviving executor of the testament and last will of D. B., deceased, of a plea of debt or demand not exceeding one hundred dollars. Witness the said J. R., at L—— township aforesaid, the thirtieth day of June, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

Constable's Return.—"Served on R. R., by producing to him the original summons, and informing him of the contents thereof. J. L. and J. D. not found.

"July 6th 1860.

R. R., Constable."

EXECUTION FOR EXECUTRIX AGAINST ADMINISTRATORS.

BEAVER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of S—— Township, in the County of Beaver, greeting:

WHEREAS M. L., executrix of the testament and last will of M. L., deceased, on the third day of May, obtained judgment before J. R., one of our justices of the peace in and for the county of Dauphin, against R. R., administrator of all and singular the goods and chattels, rights and credits, which were of W. R., deceased, for a debt of forty dollars, together with two dollars and ten cents costs, and the said W. W. and R. R. having hitherto neglected to comply with the said judgment; we command you that of the goods and chattels which were of the said W. R., in the hands and possession of the said W. W. and R. R., administrators as aforesaid, you levy the debt and costs aforesaid, if you find so much in their hands which were of the said W. R. at the time of his death to be administered; and if so much in their hands you find not, then the costs aforesaid cause you to be levied of the proper goods and chattels of them the said W. W. and R. R., and indorse hereon the time you make your levy, and hereon, or on a schedule hereto annexed, a list of the same; and within twenty days thereafter expose the same to sale by public vendue, you having given due notice thereof by at least three advertisements put up at the most public places in your township, and returning the overplus, if any, to the said W. W. and R. R.; and of your proceedings herein, together with this execution, make return to our said justice on or before the [fourth] day of November, A. D. 1860. Witness the said J. R., at S—— township aforesaid, the fifteenth day of October, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

EXECUTION FOR SURVIVING ADMINISTRATORS AGAINST EXECUTORS.

BEAVER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of S—— Township, in the county of Beaver, greeting:

WHEREAS, H. L., surviving administrator of C. W., deceased, on the third day of May, obtained judgment before J. R., one of our justices of the peace in and for the said county, against L. K. and R. R., executors of the testament and last will of S. B., deceased, for a demand of six dollars and fifty cents, together with one dollar and sixty-two cents costs, and the said L. K. and R. R. having hitherto neglected to comply with the said judgment; we command you that of the goods and chattels which were of the said S. B., in the hands or possession of the said L. K. and R. R., executors as aforesaid, you levy the debt and costs aforesaid, if so much in their hands you find which were of the said S. B. at the time of his death to be administered they have; and if so much in their hands they have not, then the costs aforesaid cause you to be levied of the proper goods and chattels of the said L. K. and R. R., and indorse hereon the time you make your levy, and hereon, or on a schedule hereto annexed, a list of the same, and within twenty days thereafter expose the same to sale by public vendue, you having given due notice thereof, by at least three advertisements put up at the most public places in your township, and returning the overplus, if any, to the said L. K. and R. R.; and of your proceedings herein, together with this execution, make a return to our said justice on or before the fourth day of November, A. D. 1860. Witness the said J. R., at S—— township aforesaid, the fifteenth day of October, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

Constable's Return.—"Money paid into office, October 25th 1860.

G. H., Constable."

Extortion.

I. Remedy of party grieved for extorting illegal fees.

III. Provisions of the Penal Code.

IV. Authorities and decisions.

II. Penalty for extorting from travellers.

I. ACT 28 MARCH 1814. Purd. 472.

SECT. 26. If any officer whatsoever shall take greater or other fees than is hereinbefore expressed, and limited, for any service to be done by him, after the first day of September next, in his office; or if any officer shall charge or demand, and take, any of the fees hereinbefore ascertained, where the business, for which such fees are chargeable, shall not have been actually done and performed; or if any officer shall charge or demand any fee for any service or services, other than those expressly provided for by this act, such officer shall forfeit, and pay to the party injured, fifty dollars, to be recovered as debts of the same amount are recoverable. And if the judges of any court within this commonwealth shall allow any officer, under any pretence whatsoever, any fees under the denomination of compensatory fees, for any service not specified in this act, or some other act of assembly, it shall be considered a misdemeanor in office. (a)

II. ACT 13 JUNE 1836. Purd. 880.

SECT. 65. If any person working upon any road or highway, or if any one in company with such person, shall ask money or reward, or by any means whatever shall extort, or endeavor to extort, any money, drink or other thing, of or from any person travelling upon or near such road or highway, the person so offending shall, for every such offence, forfeit and pay a sum not exceeding five dollars.

III. ACT 31 MARCH 1860. Purd. 219.

SECT. 12. If any justice, clerk, prothonotary, sheriff, coroner, constable or other officer of this commonwealth, shall wilfully and fraudulently receive or take any reward or fee to execute and do his duty and office, but such as is or shall be allowed by some act of assembly of this commonwealth; or shall receive or take, by color of his office, any fee or reward whatever, not, or more than is allowed as aforesaid; he shall be deemed guilty of a misdemeanor in office, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year.

IV. *Extortion* is an abuse of public justice, and consists in any officer's taking by color of his office, from any one, any money or thing of value, where none at all is due, or not so much is due, or before it is due. Co. Litt. 368. An extortion in a large sense is taken for any oppression by power or pretence of right. 1 Hawk. P. C. 418.

"The writers on the common law consider extortion as more heinous than robbery itself, attended, as it usually is, with the aggravated sin of perjury." DUNGAN, J. 13 S. & R. 430.

The exaction of a fee by any officer, before it is due, is extortion at common law. 7 Pick. 279.

By act of 22d February 1821, "it shall be lawful for the recorder of deeds and register of wills, to receive the fees for recording the same at the time the deed or deeds, will or wills, are left at his office for recording, any law or usage to the contrary notwithstanding." Purd. 473.

And by act of 11th April 1850, it is provided that nothing in the act of 1814 shall be deemed to impose upon any sheriff, deputy-sheriff or constable, any penalty

(a) Re-enacted by the fee-bill of 18 April 1857. Purd. 473. The fee-bill of 1868, however, does not re-enact this law, and it may be

a question whether an action for the penalty of \$50 can be maintained for taking excessive fees under the latter act.

for taking the fee for service, or copy of any writ of summons or other original process, at the time of receiving such process to be served. *Purd.* 473.

In an indictment for extortion, it must be shown that the illegal charge was made "wilfully and fraudulently," but in an action for the penalty, given by the act of 1814, the officer is liable, although the charge was made by mistake, and without any intention to extort. In an indictment, the officer might not be liable for the misconduct of his deputies, if unauthorized and unsanctioned, but in a civil suit he is responsible for them. 5 H. 258.

The act of 31 March 1860 punishes criminally the offence of taking any fee or reward, not, or more than is allowed by law for the service rendered; but not the mere receipt of fees before the service is rendered; for this a penalty is given to the party grieved, by the act of 1814. *Report on the Penal Code* 13.

In an action against the sheriff to recover the penalty for taking fees for services not compensated by the fee-bill, it is sufficient to aver that they were taken for services other than those provided for by the act, without specifying for what alleged services they were demanded. 10 Barr 189.

A justice of the peace incurs the penalty for taking illegal fees, though he supposed, at the time, that they were legally demandable, and acted without any corrupt intent. 17 S. & R. 75.

Where a justice charges illegal fees, which are indorsed on the execution, and collected by the constable, the justice is liable for the penalty, although they are not paid over to him. 3 P. R. 519.

In an action against a justice of the peace for taking illegal fees, if it appear that he charged and received a greater sum for a specified item of service, than he was entitled to, it will not be compensated by his omission to charge as much as he was entitled to for another item of service. 5 W. 477.

Factories.

ACT 21 APRIL 1849. *Purd.* 452.

SECT. 2. Labor performed during a period of ten hours on any secular day in all cotton, woollen, silk, paper, bagging and flax factories, shall be considered a legal day's labor; and hereafter no minor shall be employed in or about any of said factories until he or she shall have obtained to the age of thirteen years.

SECT. 3. If any owner or employer of or in any of the said factories, or his, her or their agent, shall wilfully or knowingly employ any minor below the age of thirteen years as aforesaid, the person or persons so offending shall pay a penalty of fifty dollars for every such offence, to be sued for and recovered by any person suing for the same, as other debts of like amount are now by law recoverable, one-half of the same to belong to the persons suing for the same, and the other half to the county in which the offence was committed.

SECT. 4. No minor, who has attained the age of thirteen and is under the age of sixteen years, shall be employed in any of the factories aforesaid for a longer period than nine calendar months in any one year, and who shall not have attended school for at least three consecutive months within the same year; and any owner or employer of or in any of the factories aforesaid, offending against the provisions of this section, shall be liable to the penalty provided in the 3d section of this act, to be sued for, recovered and applied as therein provided.

SECT. 5. If any parent or guardian shall consent to, permit or connive at the employment of his or her child or ward, under the age of thirteen years, in any of the said factories; or if such parent or guardian shall consent to, permit or connive at the employment of his or her child or ward over the age of thirteen years, and under the age of sixteen years, for a longer period than ten hours in any secular day, the person so offending shall forfeit and pay the sum of fifty dollars for every such offence, to be sued for and recovered as provided in the 3d section of this act, and for the uses therein specified.

ACT 7 MAY 1855. Purd. 452.

SECT. 1. No male or female operative under the age of twenty-one years shall, under any contract, be employed in cotton, woollen, silk, flax, bagging or paper manufactories in this commonwealth, for a longer period than sixty hours in any one week, or more than an average of ten hours a day during the same period.

SECT. 2. If any person shall knowingly employ, or any parent or guardian consent to the employment of any male or female operative, under the age of twenty-one years as aforesaid, contrary to the preceding section, and proof be made thereof before any alderman or justice of the peace of the ward, borough or district where such offence is committed, he, she or they so employing such operatives, or consenting thereto as aforesaid, shall, for every such offence, forfeit and pay the penalty of not less than ten, nor more than fifty dollars, to be recovered before any alderman or justice of the peace of the proper ward, borough or district, in the same manner as the like penalties are now recovered, to be applied to the use of the public schools of the proper district: *Provided*, That no penalty shall be recovered under this act, unless sued for within one month after the same shall have occurred; nor shall any person recover more than one penalty for the working of any factory for the same period of time.

SECT. 3. All the ward, borough and township constables are hereby authorized and required, and it is hereby made their duty, to attend to the strict observance of the two preceding sections of this act, when complaint shall have been properly made to them of a violation of the same.

ACT 14 APRIL 1868. Purd. 1512.

SECT. 1. Eight hours of labor, between the rising and setting of the sun, shall be deemed and held to be a legal day's work, in all cases of labor and service by the day, where there is no contract or agreement to the contrary.

SECT. 2. This act shall not apply to or in any way affect farm or agricultural labor or service by the year, month or week; nor shall any person be prevented, by anything herein contained, from working as many hours over-time or extra work, as he or she may see fit, the compensation to be agreed upon between the employer and the employee.

SECT. 3. All other acts or parts of acts relating to the hours of labor which shall constitute a day's work in this state, are hereby repealed.

It seems, that it is an indictable offence at common law to overwork children in a factory. 2 Twiss's Life of Eldon 36, cited in Whart. Cr. L. § 3, note. Where, however, the statutory remedy is *applicable* to the case, the act of 1860 provides that its directions shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, further than shall be necessary for carrying the act into effect. Purd. 248.

If a statute prohibit a matter or *public* grievance, or command a matter of *public* convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. Whart. Cr. L. § 10. 13 S. & R. 429. 1 Barr 224.

Factors.

I. Act of assembly.

II. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 238.

SECT. 125. If any consignee or factor having the possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt or order for the delivery of merchandise with the like authority, shall deposit, or pledge such merchandise or document, consigned or intrusted to him as aforesaid, as a security for any money borrowed, or negotiable instrument received by such consignee or factor, and shall apply or dispose of the same to his own use, in violation of good faith, with intent to defraud the owner of such merchandise, and if any consignee or factor shall, with like fraudulent intent, apply or dispose of, to his own use, any money or negotiable instrument, raised or acquired by the sale, or other disposition of such merchandise, such consignee or factor, in every such case, shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two thousand dollars, and undergo an imprisonment, not exceeding five years.

NOTE.—Complaint, on oath or affirmation, being made to a magistrate that the above law has been violated, he shall issue a criminal warrant setting forth the offence charged; for example—“that A., the factor or consignee of B., having had 20 bales of cotton goods, of the value of \$4000, put into his possession by B., had, with intent to defraud said B., pledged or pawned said cotton goods, &c.” The defendant being brought up, and the testimony heard, it becomes the duty of the justice either to discharge, take bail, or commit the defendant for trial, at the next court of quarter sessions.

II. One who has consigned goods to a factor and received an advance thereon, has the right, *subsequently*, to limit the prices at which they should be sold. 3 N. Y. 62. Ibid. 78. 3 W. C. C. 151. But the consignee may sell to repay advances, after calling on the principal for reimbursement, unless there be an agreement between them, which controls or varies the right. 3 H. 234. Such an agreement may arise from accepting the consignment, accompanied by an order as to the sale. 14 Pet. 479. The existence of a usage to sell to pay advances, will not control an express contract between the parties as to the sale of the goods; and that the sale in violation of orders was made in *good faith*, is not a valid excuse. 3 H. 229. If the consignor stand ready to repay the advances, he may control the sale. 14 Pet. 479.

Where one has consigned goods to his factor, and received advances thereon, he cannot withdraw them, without payment, or an offer to pay, not only the amount of advances, but the commissions the factor would have been entitled to, if a sale had been effected. 1 P. 859.

Where goods are sent to a factor for sale without instructions as to the time or terms of sale, he is at liberty to sell at such time and on such terms, as in the exercise of a sound discretion he shall deem proper for the interest of his principal. 3 Comst. 62. 1 Y. 486.

If a factor sell below his instructions, although at the then market value, he takes the peril of a rise in the value of the goods at any time before the action is brought, and perhaps down to the time of trial. 3 N. Y. 78.

It is an established principle in the law of principal and factor, that when the latter renders an account of sales, the former should, with all reasonable diligence, specify in what particular such account is exceptionable. If the principal retain the account any unreasonable length of time, he is concluded from making objections, but must be considered as acquiescing in the report of the factor's transactions. 1 P. 859.

One who holds himself out to the world as a consignee cannot ordinarily refuse, without cause, to receive goods consigned to his care; and upon his refusal to re-

ceive goods so consigned, the owner may maintain an action against him for any damage occasioned by such refusal. 6 W. & S. 62.

Though a factor has a lien on the goods of his principal, yet he cannot retain against the order of the principal a large portion of the goods, though he may retain as much as will be sufficient to pay his debt. 1 W. C. C. 252. A factor can only claim a lien on goods lawfully in his possession. 4 N. Y. 497.

Although a warehouseman has not a general, he has a specific lien, and therefore may, on the storage of a large quantity of goods received under the same contract and belonging to the same individual, retain a sufficient quantity to repay himself. 7 W. & S. 466.

A factor who discounts for his own use notes received in payment for the goods of his principal, makes them his own, and becomes personally liable to his principal for the amount of the sales. 6 W. & S. 44. 3 Barr 323.

A warehouseman is liable only for negligence in preserving the property deposited with him. 6 C. 247.

False Imprisonment.

It is false imprisonment to detain another by threats of violence to his person, or to deprive him of the freedom of going where he will, by well-grounded apprehensions of personal danger, though no assault be made. 1 Bald. 571.

If a justice of the peace issue process for the arrest of a defendant, in a case in which it is forbidden by law, he obtains thereby no jurisdiction of the person of the defendant, all his proceedings in the case are null and void, and he renders himself liable to an action for false imprisonment. 4 N. Y. 883-4.

Thus, where a justice issued a warrant for the examination of a pauper, who was brought into court, examined, and removed to another town, by order of the justice and another magistrate who sat with him: for the reason that the warrant was delivered to, and served by a constable of another town than that mentioned in the statute, though in the same county, it was held, that the justice acquired no jurisdiction, and was liable in an action for false imprisonment. 7 Cow. 269.

In an action for a penalty, which is directed to be recovered as debts of like amount are by law recoverable; the defendant is not liable to arrest; an execution, therefore, in such case, authorizing the imprisonment of the person, is *void*, and the defendant may be discharged on *habeas corpus*. *Martin's Case*, Com. Pleas, Phila., 15 April 1854.

False Personation.

ACT 31 MARCH 1860. Purd. 220.

SECT. 16. If any person shall fraudulently and corruptly acknowledge, or procure to be acknowledged, any deed, or any writing authorized to be acknowledged, or any recognisance or judgment, in the name of any other person not privy thereto, or consenting to the same, the person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

False Pretences.

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| I. Cheats and frauds at common law.
II. Provisions of the Penal Code.
III. Meaning of the words "by any false pretence." | IV. Meaning of the words "any chattel, money, or valuable security."
V. Meaning of the words "with intent to cheat and defraud." |
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I. A mere private imposition, short of felony, and effected by a "naked lie," without the association of artful device, or false token, voucher, order, &c., is not indictable as a cheat at common law, unless it be public in its nature, and calculated to defraud numbers, or to injure the government or the public in general. 2 East P. C. 817, 821. Whart. Prec. 224. 7 P. L. J. 362. Such are the following among other frauds. Those affecting the administration of public justice, as counterfeiting a creditor's authority to discharge his debtor from prison. (2 East P. C. 826, 862), or endangering the public health, by selling unwholesome provisions, whether to the public generally (2 East P. C. 821), or under a contract with the government for supplies to particular bodies. 2 Campb. 12. So, in Pennsylvania, an indictment was sustained against a baker in the employ of the United States army, in baking 219 barrels of bread, and marking them as weighing 88 pounds each, when, in fact, they severally weighed but 68 pounds. 1 D. 47. Frauds calculated to affect all persons, as selling by false weights and measures (1 Bl. R. 273); counterfeiting tokens of public authenticity (Tremaine's P. C. 103); playing with false dice (1 D. 388); obtaining money from a soldier, on a false pretence of having power to discharge him (Litch 202); or getting the bounty by enlisting as a soldier, being an apprentice, liable to be retaken by a master (2 East P. C. 822); have all been held indictable as cheats at common law. But an indictment which charged that the defendant unlawfully and fraudulently did give, enter and file of record a certain bond and warrant of attorney, for \$600, to P. D., without any consideration, and with intent to cheat and defraud J. M. and other of his creditors, and that the defendant did cheat and defraud the said J. M. and other of his creditors; was held to charge no offence indictable at common law. 4 P. L. J. 58.

To remedy this imperfection of the common law, sundry statutes have been enacted in England and in the United States; which, in Pennsylvania, are embodied in the 111th and 112th sections of the revised Penal Code.

ACT 31 MARCH 1860. Purd. 236.

SECT. 111. If any person shall, by any false pretence, obtain the signature of any person to any written instrument, or shall obtain from any other person any chattel, money or valuable security, with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding three years: *Provided always*, That if upon the trial of any person indicted for such a misdemeanor, it shall be proved that he obtained the property in question in such manner as to amount in law to larceny, he shall not by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

SECT. 112. If any person, with intent to cheat or defraud, shall by any false or fraudulent representations, or by any false show or baggage, goods or chattels which are calculated to deceive any hotel, inn or boarding-house keeper, obtain lodging and credit in any hotel, inn or boarding-house, and shall subsequently refuse to pay for his board and lodging, the person so offending shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, or undergo an imprisonment not exceeding three months, or both or either, at the discretion of the court.

III. *By any false pretence.*—The term "*false pretence*" is very general and includes "false token or writing," and every extortion of money or goods with intent to defraud. 8 Chit. Cr. L. 997.

Where a carrier, falsely pretending that he had carried certain goods to A. B., demanded and thereupon obtained from the consignor 16 shillings for the carriage of them, it was held to be within the statute. 2 East P. C. 672. Where the foreman of a manufacturer, who was in the habit of receiving from his master money to pay the workmen, obtained from him by means of false written accounts of the wages earned by the men, more than the men had earned, or he had paid them, it was held to be within the act; the judges said that all cases where the false pretence creates the credit are within the statute. Ibid. 830. Where the defendant falsely pretended to J. N. that he was intrusted by the Duke de Lauzun to take some horses from Ireland to London for him, and that he had been detained so long by contrary winds that his money was all spent; by means of which representation he induced J. N. to advance him money: this was held to be within the act. 3 T. R. 104. So, where defendants, falsely pretending that they had made a bet with A. B. that one of them should run ten miles within an hour, prevailed upon J. N. to join them in the bet, and obtained from him 20 guineas as his share in it: held to be within the statute, though the pretence were one against which common prudence might have guarded. 3 T. R. 98.

If a person obtain goods from another on giving him in payment his check on a banker, with whom in fact he has no account, this (though not indictable as a fraud at common law) is a false pretence within the meaning of the act. 3 Campb. 370. Where a man obtained goods and money for a forged note of hand for 10s. 6d., it was held to be a false pretence within the act. 2 Russ. 1395. It will not avail the defendant that the pretence consists in a false representation of something to take place at a future time, as that a bet had been laid that a certain pedestrian feat would be performed, as in the case referred to above. 3 T. R. 98.

If a person procure a tradesman to sell him goods as for ready money, and direct him to send his servant with them to his lodgings, and there deliver fabricated bills in payment, retaining the goods, he may be found guilty of obtaining them under false pretences. 2 Leach 614. And a begging *letter*, making false representations as to the condition and character of the writer, by means of which money is obtained, is a false pretence within the statute. 1 Eng. L. & Eq. 533. s. c. 14 Jur. 533.

Every false promise or assertion made by a party with a view of fraudulently obtaining the property of another, is not, of course, a false pretence within the act; but the false pretences in the contemplation of the statute, are such as assert the *existence of some fact* calculated to impose upon a man of common and ordinary caution, which false pretence creates the credit given to the accused. 2 P. 309. The purchase of goods, for which the buyer is unable to pay, although his promise was specious and fair, also false when made, does not constitute a false pretence within the act. 2 P. 317. A false pretence, within the statute, must relate to *past*, and not future events. 19 Pick. 179. But the false assertion of possession of money or property, on the credit whereof goods are obtained, is within the act. 2 Barr 163. 6 P. L. J. 272. It is certain, that a fraudulent misrepresentation of the party's means and resources is within the English statutes, and *a fortiori* within our own. 2 Barr 164, per GIBSON, C. J. It has been held, however, not to extend to a false representation of the *quality* of goods, on which an advance of money is obtained, if they be the same in specie as represented. 40 Eng. L. & Eq. 589.

The following have been held to be false pretences within the statute: where the keeper of an intelligence office, by falsely pretending he had a situation in view, induced the prosecutor to pay him two dollars as a premium (Thacher's C. C. 24); where a person obtained goods under the false pretence that he lived with and was employed by A. B., who sent him for them (12 Johns. 292); and falsely to represent the notes of a broken bank to be good. 4 Met. 48.

But an indictment will not lie when the money is parted with as a charitable donation, although the pretences moving the gift be false and fraudulent, as where the defendant pretended he was deaf and dumb, and obtained *alms* by that means, and by a forged certificate. 17 Wend. 351. And where a person got possession of a promissory note, by pretending he wanted to look at it, and then carried it away, and refused to deliver it to the holder, it was held to be a mere private fraud, and not punishable criminally. 14 Johns. 371.

It is not necessary that the pretence should be in words; the conduct and acts

of the party will be sufficient, without any verbal assertion. 2 P. 332. Where a man assumed the name of another to whom money was required to be paid by a genuine instrument, it was held indictable. R. & R. 81. And where a person, at Oxford, who was not a member of the university, went, for the purpose of fraud, wearing a commoner's cap and gown, and obtained goods, it was held within the act, though not a word passed. *Ibid*.

It is not necessary to allege a *scienter*, when the defendant must, necessarily, have been conscious of the falsity of his own statement; but the defendant may show on the trial, that he did not know that his assertions were untrue in fact. *Com. v. Blumenthal*, Whart. Prec., § 528, note *f*. It is no less a false pretence because the party imposed upon might, by common prudence, have avoided the imposition. 10 H. 253.

Where the secretary of an Odd Fellows' Society falsely pretended to a member of the society that a sum of money was due by him to the society for fines, by means of which the secretary fraudulently obtained that amount from him; it was held, to be a false pretence within the statute. 1 Eng. L. & Eq. 537, s. c. 14 Jur. 465. So, passing off a flash note, as a Bank of England note, on a person unable to read, and obtaining from him goods in exchange for it, is a false pretence. 1 Eng. L. & Eq. 550, s. c. 14 Jur. 557. And where it was the duty of a servant, in the absence of his masters' chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale; and on one occasion, he falsely stated to the chief clerk that he had paid 2s. 3d. for kitchen stuff which he had bought for his masters, and demanded to be paid for it; whereupon the clerk paid him the amount out of money which his masters had furnished him with for that purpose; and the defendant applied the money to his own use; *held*, that this did not amount to larceny, but was a false pretence within the statute. 1 Eng. L. & Eq. 579, s. c. 14 Jur. 1123. (But a mere naked lie, in the transaction of business, does not constitute a false pretence. It must be a false statement, calculated to deceive a mind of ordinary caution and intelligence, and upon which the credit is given, and this should be clear to the jury to justify the finding of a bill [or to the justice to justify a binding over.] Judge KING's charge to the grand jury, Quarter Sessions, Phila., 4 February 1850.) And see *Vaux's Dec.* 80. *Ibid*. 101. *Ibid*. 152. But any pretence sufficient to impose on the individual to whom it is made, is an offence, if used with the intention to cheat and defraud. 2 P. 332. If the false statements were made on different occasions, it is a question for the jury whether they are so connected as to form one continuing representation. 20 Eng. L. & Eq. 588.

(A professed intent to do an act which the party did not mean to do, is the only species of false pretence to gain property which is not indictable. 2 Barr 164. A representation that the party could or would do a particular act, as that he could or would get a bill discounted, though he knew he could not, is not a false pretence within the act, but rather a breach of promise, and the false pretence must be of the existence of some fact. 1 Chit. Gen. Pr. 124. 2 P. L. J. 245.)

IV. *Any chattel, money or valuable security.*—These words include bonds, mortgages, promissory notes, bills of exchange, bank notes, all securities and orders for the payment of money or the transfer of goods or any valuable thing whatever. 3 Chit. Cr. L. 998.

A receipt obtained in discharge of a debt, which was paid with the worthless note of a broken bank, is not such property or *valuable* thing as is contemplated by the act. 8 Barr 260. If the defendant had obtained any money or merchandise, or anything of value from the prosecutor, his case would be within the provisions of the act; but as the receipt was for a preceding debt, if that receipt was obtained by fraudulent misrepresentations, and without value, it was neither a cheat at common law or within the statute. Paying an old debt with base coin, or a worthless note, is no payment, and the person receiving the base coin or the worthless note, has the same remedy at least to recover his debt that he had before the alleged payment took place. The debt was not extinguished by the receipt. It was not

the obtaining of money or goods by a false token or pretence: it was a fruitless attempt to pay and discharge an old account. *Ibid.* 264.(a)

If the subject-matter of the charge be land and the title to it, and the depriving of the owner of it by cheating, the offence is not indictable at common law or under the statute, 7 P. L. J. 362; unless the signature of the person defrauded be obtained, by such false pretence, to some instrument of writing. See 8 Barr 260. 9 Eng. L. & Eq. 532.

V. *With intent to cheat and defraud.*—No indictment will lie where the false pretence, if successful, will neither cheat nor defraud; nor should an *intent* to defraud be even implied in such a case. Therefore, where a constable, by means of false pretences, collected the amount of a judgment from the defendant against whom it was rendered, it was *held*, that an indictment under the act of 12th July 1842, could not be sustained, because he neither cheated nor defrauded thereby, but only obtained payment of an honest debt. 3 P. L. J. 250. *False representations*, inducing one to pay a debt he justly owes, are not indictable. 3 Hill 169. A false representation warrants the inference of an intent to defraud. 13 Wend. 87. An indictment will not lie, in New York, for obtaining money by false pretences, where the money is given in charity, though there be fraud in procuring it. 17 Wend. 351. If the accused can show to the satisfaction of the jury that he *did not know* that his assertion of facts was untrue, it might avail him as a defence to the allegation of an intention to cheat and defraud, for that is the essence of the charge. Whart. Prec. 528, note f, per PARSONS, J. The intention to defraud must exist at the time when the credit is given. 3 P. L. J. 223.

Fees.

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| I. Fees of aldermen, justices and constables. | III. Fees upon commitments to a house of refuge. |
| II. Fee-bill of Philadelphia. | IV. General provisions and authorities. |

I. FEES are certain perquisites allowed to officers who have to do with the administration of justice, as a recompense for their labor and trouble. Bac. Abr. The fees of aldermen, justices of the peace and constables, in this state, (with the exception of the city of Philadelphia,) for their services in civil and criminal cases, are fixed and regulated by the fee-bill of 1868.

ACT 2 APRIL 1868. Purd. 1502.

SECT. 10. The fees of aldermen and justices of the peace, except in the city of Philadelphia, (b) shall be as follows:—

	Dolls.	Cts.
Information or complaint on behalf of the commonwealth, for every ten words		2
Docket entry on behalf of the commonwealth		20
Warrant or <i>mittimus</i> , on behalf of the commonwealth		40
Writing an examination on complaint of defendant, or a deposition, for every ten words		2
Administering an oath or affirmation		10
Taking recognisance in any criminal case, and returning the same to court.		50
Entering judgment on conviction for fine.		20
Recording conviction or copy thereof, for every ten words.		2

(a) And see 9 Eng. L. & Eq. 532, that this would not be larceny, although the receipt was written on a stamp produced by the prisoner.

(b) This act is repealed as to the fees of

justices and constables in Berks county by the act 18 February 1869. Purd. 1567. Their fees are now regulated by the act 18 March 1863. Purd. 1335.

	Dolla. Cts.
Warrant to levy fine or forfeiture	40
Bail-piece and return, or <i>supersedeas</i>	25
Discharge to jailer	25
Entering discontinuance, in case of assault and battery	40
Entering complaint of master, mistress or apprentice	25
Notice to master, mistress or apprentice	25
Hearing parties, and discharging complaint	40
Holding inquisition under landlord and tenant act, or in case of forcible entry, each day	2 00
Precept to sheriff	50
Recording proceedings	1 00
Writ of restitution	50
Warrant to appraise damages	40
Warrant to sell strays	50
Warrant to appraise swine, entering return, advertising, et cetera	1 50
Entering action in civil case	25
Summons, <i>cap.</i> or <i>sub.</i> , each	20
Every additional name after the first	5
<i>Subpoena duces tecum</i>	25
Entering return of summons, and qualifying constable	15
Entering <i>capias</i> and bail bond	10
Every continuance of a suit	10
Trial and judgment	50
Entering judgment by confession, or by default	25
Taking special bail	25
Entering satisfaction	10
Entering amicable suit	20
Entry rule to take depositions of witnesses	10
Rule to take depositions of witnesses	10
Interrogatories, for every ten words	2
Entering return of rule	10
Entering rule to refer	10
Rule of reference	15
Notice to each referee	10
Notice to a party in any case	15
Entering a report of referee and judgment thereon	15
Execution	25
Entering return of execution, or stay of plaintiff, <i>nulla bona, non est inventus</i> , or otherwise	15
Entering discontinuance or satisfaction	10
<i>Scire facias</i> , in any case	30
Opening judgment for re-hearing	20
Return of proceedings in <i>certiorari</i> or appeal, including recognisance	50
Transcript of judgments, including certificates	40
Receiving amount of judgment before execution or where execution was issued and special bail been entered within twenty days after judgment and paying the same over, if not exceeding ten dollars	20
If above ten dollars, and not exceeding forty dollars	50
If above forty dollars, and not exceeding sixty dollars	75
If above sixty dollars	1 00
Entering complaint in writing, in case of attachment, and qualifying complainant	30
Attachment	30
Entering return, and appointing freeholders	15
Advertisements, each	15
Order to sell goods	25
Order for the relief of a pauper (each justice)	50
Order for removal of a pauper	1 00

	Dolla. Cts
Order to seize goods for maintenance of wife and children	30
Order for premium for wolf or fox scalps, to be paid by the county	15
Every acknowledgment or probate of a deed, or other instrument of writing	25
Taking and signing acknowledging on indenture of an apprentice, for each indenture	25
Cancelling indenture	25
Comparing and signing tax duplicate	50
Marrying each couple, making record thereof, and certificate to parties	3 00
Certificate of approbation of two justices to binding an apprentice by directors or overseers of the poor	50
Certificate to obtain land warrant	50
In proceedings under act of 1842 and 1845, attachment	40
Entering returns	25
Affidavit	10
Bond	25
Entering rule, &c., on garnishee, each	10
Interrogatories, every ten words	2
Notice to garnishee	10

Same fee for services not herein specially provided for as for similar services.

The provisions of this act shall apply to aldermen, justices of the peace and constables in the county of Lancaster.

By the act 18 April 1857, the fees for services under the laws of the United States, are as follows, namely:

For certificate of protection	50
For certificate of lost protection	25
For a warrant	25
For commitment	25
Summons for seamen in admiralty case	25
Hearing thereon, with docket entry	50
Certificate to clerk of district court to issue admiralty process	25

CONSTABLES' FEES.

SECT. 11. Executing warrant on behalf of the commonwealth, for each defendant	50
Conveying to jail, on <i>mittimus</i> or warrant, for each defendant	50
Arresting a vagrant, disorderly person or other offender against the laws (without process), and bringing before a justice	50
Levying a fine or forfeiture on a warrant	30
Taking the body into custody on <i>mittimus</i> , where bail is afterwards entered before the prisoner is delivered to the jailer	50
Serving <i>subpoena</i>	15
Serving summons or notice on referee, suitor, master, mistress or apprentice personally or by copy, each	25
Arresting on <i>capias</i>	50
Taking bail bond on <i>capias</i> , or for delivery of goods	20
Notifying plaintiff, where defendant has been arrested on <i>capias</i> , to be paid by plaintiff	20
Executing landlord's warrant, or serving execution	50
Taking inventory of goods, each item	2
Levying or distraining goods, or selling the same, for each dollar not exceeding thirty dollars	6
For each dollar above thirty dollars	4
And half of the commission shall be allowed where the money is paid after levy without sale; but no commission shall, in any case, be taken on more than the real debt.	
Advertising the same	50
Executing attachment	35
Copy of vendue paper, when demanded, each item	2

	Dolla. Cts.
Putting up notices of distress, at mansion-house, or other public place on the premises	20
Serving <i>scire facias</i> personally	20
Serving by leaving a copy	20
Executing a bail-piece	30
Travelling expenses in all cases, for each mile circular	6
Making returns to court	1 50
Attending general elections	2 00
Attending special, township, ward or borough election	3 00
Same fees for services not herein specially provided for as for similar services.	

The act of 1857 gives, in addition, the following fees :

For appraisement, and all other services, under exemption act of 9th April 1849	1 00
For serving precept and returning same in landlord and tenant proceeding	25
Executing writ of possession and returning same	50
When the rent shall be received from the lessee by the constable, such commission as is now allowed by law on writs of execution.	

II. ACT 3 FEBRUARY 1865. Purd. 1391.

SECT. 1. The fees to be received by aldermen in the city of Philadelphia, shall be as follows :

For information or complaint on behalf of the commonwealth	30
Docket entry of action on behalf of the commonwealth	25
Warrant, <i>mittimus</i> or <i>capias</i> , on behalf of the commonwealth	50
Writing an examination or confession of defendant	50
Hearing in criminal cases	50
Administering oath or affidavit in criminal or civil cases	10
Taking recognisance in criminal case	30
Transcript in criminal case, including certificate	50
Entering judgment on conviction for fine	50
Recording conviction	25
Warrant to levy fine or forfeiture	30
Bail-piece and return supersedeas	30
Discharge to jailer	35
Entering discontinuance in case of an assault and battery	50
Entering complaint of master, mistress or an apprentice	30
Notice to master, mistress or apprentice	25
Hearing parties	50
Holding inquisition, under landlord and tenant act, or in case of forcible entry, each day, each justice	2 00
Process, et cetera, to sheriff, each justice	75
Recording proceedings, each justice	1 50
Writ of restitution, each justice	75
Warrant to appraise damages	30
Warrant to sell strays	30
Warrant to appraise swine	30
Receiving and entering return of appraisement of swine	25
Publishing proceedings of appraisers of swine	75
Entering action, in civil case	25
Summons or <i>subpoena</i>	25
<i>Capias</i> in civil case	50
Every additional name after the first, (all witnesses' names to be in one <i>subpoena</i> , unless separate subpoenas be requested by the parties)	10
<i>Subpoena duces tecum</i>	25
Entering return of summons	25
Entering <i>capias</i> and bail-bond	25
Every continuance of a suit	25

	Dolla.	Cts.
Trial and judgment in case	50	
Taking bail or plea of freehold	25	
Entering satisfaction	15	
Entering discontinuance of suit	15	
Entering amicable suit	50	
Entering rule to take deposition of witnesses	15	
Rule to take depositions	25	
Interrogatories annexed to rule to take depositions	25	
Entering return of rule in any case	15	
Entering rule to refer	15	
Rule of reference	25	
Notice to each referee	25	
Entering report of referees and judgment thereon	30	
Written notice in any case	25	
Execution	30	
Entering return of execution	15	
<i>Scire facias</i> in any case	35	
Opening judgment for a re-hearing	25	
Transcript of judgment and certificate	50	
Return of proceedings on <i>certiorari</i> or appeal, including recognisances	1	00
Receiving the amount of a judgment and paying the same over, if not exceeding ten dollars	25	
If exceeding ten and not exceeding thirty dollars	35	
If exceeding thirty dollars	65	
Every search service, to which no fees are attached	20	
Affidavit in case of attachment	30	
Entering action in case of attachment	25	
Attachment in any case	35	
Recognisance	50	
Interrogatories	35	
Rule on garnishee	25	
Return of rule on garnishee	25	
Bond in case of attachment	50	
Entering return and appointing freeholders	25	
Advertisement, each	25	
Order to sell goods	35	
Order for the relief of a pauper	30	
Entering transcript of judgment from another justice or alderman	50	
Order for the removal of a pauper, each justice or alderman	1	00
Order to seize goods for the maintenance of wife and children	50	
Order for premium for wolf, fox or other scalps, to be paid by the county	25	
Every acknowledgment, or probate of deed or other instrument of writing, for first name	50	
Each additional name, after the first	25	
Taking and signing acknowledgment of indenture of an apprentice	50	
Assignment and making record of indenture	50	
Cancelling indenture	50	
Comparing and signing tax duplicates, each alderman	75	
Marrying each couple, making record thereof, and certificate to the parties	5	00
Certificate of approbation of two justices to the binding as apprentice of a person, by the directors of the poor, each justice	35	
Certificate to obtain land warrant	75	
Swearing or affirming county commissioner, assessor, director of the poor, or other township officer or county officer, and certificate	50	
Administering oaths or affirmations, in any case not herein provided for	25	
Justifying parties on bonds for tavern licenses	1	00
Entering complaint, in landlord and tenant proceedings, act 1830	25	
Issuing process, in landlord and tenant proceedings, act 1830	25	
Hearing and determining case, in landlord and tenant proceedings, act 1830	50	

	Dolls.	Cts.
Record of proceedings, in landlord and tenant proceedings, act 1830	50	
Writ of possession (and return), in landlord and tenant proceedings, act 1830	50	
When more than one magistrate is required, in landlord and tenant proceedings, the above fees shall be charged by each magistrate;		
Entering complaint, in landlord and tenant proceedings, act 1863	75	
Issuing process, in landlord and tenant proceedings, act 1863	75	
Hearing and determining case, act 1863	1	00
Record of proceedings, act 1863	1	50
Issuing writ of restitution (and return), act 1863	1	00
The fees for services, under the laws of the United States, shall be as follows:		
For certificate of protection	50	
For certificate of lost protection	25	
Warrant	25	
Commitment	25	
Summons for seamen, in admiralty case	25	
Hearing thereon, with docket entry	50	
For certificate to clerk of the district court, to issue admiralty process	25	

ACT 3 APRIL 1866. Purd. 1428.

SECT. 1. The fees to be received by constables in the city of Philadelphia shall be as follows:

For executing warrant on behalf of the commonwealth	1	00
For taking body into custody, or conveying to jail on <i>mittimus</i> or warrant	1	00
For arresting a vagrant, disorderly person or other offenders against the laws (without process), and bringing before a justice	75	
For levying a fine or forfeiture on a warrant	50	
For serving <i>subpoena</i>	50	
For taking the body into custody on <i>mittimus</i> , where bail is afterwards entered before the prisoner is delivered to the jailer	1	00
For serving summons, notice on referee, suitor, master, or mistress or apprentice, personally, each	50	
For serving by leaving a copy	50	
For executing attachment personally	50	
For arresting on <i>capias</i>	1	00
For taking bail-bond on <i>capias</i> , or for delivery of goods	50	
For notifying plaintiff, where defendant has been arrested on <i>capias</i> , to be paid by plaintiff	25	
For executing landlords' warrants	50	
For taking inventory of goods (each item)	2	
For levying or distraining goods and selling the same, for each dollar, not exceeding one hundred dollars	3	
And for each dollar above one hundred dollars	2	
And one-half of said commission shall be allowed where the money is paid after levy, without sale, but no commission shall, in any case, be taken on more than the real debt, and then only for the money actually received by the constable and paid over to the creditor;		
For advertising the same	1	00
For copy of vendue paper, when demanded (each item)	2	
For putting up notice of distress at mansion-house, or at any other place on the premises	25	
For serving <i>scire facias</i> personally	50	
For serving by leaving a copy	50	
For executing bail-piece	1	00
For travelling expenses, on an execution returned <i>nulla bona</i> and <i>non est inventus</i> , where the constable has been at the defendant's last residence, each mile circular	10	
For travelling expenses in all other cases, each mile circular	10	
For executing order for the removal of a pauper	75	
For travelling expenses in said removal, each mile circular	15	

	Dolls.	Cts.
For serving execution		50
For serving execution on a writ of restitution	2	00
For serving execution on a writ of possession	2	00
For serving summons in landlord and tenant proceedings	1	00
For serving notice in landlord and tenant proceedings		50
For taking inventory of goods on an execution (each item)		2
For serving search warrant	1	00
For serving <i>capias</i> execution	1	00
Constable and appraisers, personally, each one dollar on appraisement	1	00

III. The fees of aldermen, justices and constables upon commitments to a house of refuge, are fixed by the act 21 April 1855, (Purd. 468,) as follows:—

To any constable or officer for arresting the person committed	50
To the alderman or justice of the peace directing the commitment	50
To the constable or other officer delivering the person committed, pursuant to such commitment, at the proper house of refuge	1 00
With mileage at the rate of five cents circular for all distances travelled: said fees and mileage to be paid by the county in which the commitment is made: <i>Provided</i> , That no allowance for mileage shall be made, unless the distance travelled shall exceed seven circular miles.	

IV. The act 28 March 1814, provides that it shall and may be lawful for any person to refuse payment of fees to any officer who will not make out a bill of particulars, as prescribed by this act, signed by him, if required; and also a receipt or discharge, signed by him, of the fees paid. Purd. 473.

The act 18 March 1816, provides that in all cases where any sheriff or constable, upon any execution to him delivered to be executed, shall not sell either real or personal estate for, or recover and receive, the whole amount of the debt and interest mentioned in any such execution, he shall be allowed to receive, take or retain commissions or poundage on the amount of the sum by him actually recovered or received, and no more. Purd. 473.

By act 22 February 1821, all officers whose fees are regulated by that act, or by the act of 1814, are required to make fair tables of their respective fees, and to publish and keep up the same, in some conspicuous place, in their respective offices, for the inspection of all persons having business therein, under a penalty of ten dollars to any person aggrieved, with double the amount of any excess of fees paid by such person to him. Purd. 473. The same act provides that it shall be lawful for the recorder of deeds and register of wills to receive the fees for recording the same at the time the deed or deeds, will or wills, are left at his office for recording. *Ibid*.

The act 24 April 1829, authorizes justices, on the issuing of an execution, to indorse thereon for collection the fees for the return thereof, as well as for issuing the same. Purd. 602. And by act 11 April 1850, it is provided that nothing in the act of 1814 shall be deemed to impose on any sheriff, deputy-sheriff or constable, any penalty for taking the fee for service or copy of any writ of summons, or other original process, at the time of receiving such process to be served. Purd. 473.

It seems the plaintiff is liable to the officers for their fees where they cannot be procured from the defendant. 4 B. 147.

An indictment [or a civil proceeding] against a justice of the peace for refusing a copy of his proceedings, ought to state a previous tender of his fee for that service; and the want of it is fatal. 5 S. & R. 373. 5 P. L. J. 426.

A justice of the peace who has entered two judgments in the same suit, is not entitled to two trial fees, if, on the first day of entering judgment, the defendant was not present, and the plaintiff was willing to continue the case; the utmost limit to which his right could extend, would be to demand compensation for investigating the plaintiff's claim, and entering judgment by default, for which the fee-bill allows but 12½ cents. 3 P. R. 519. "I incline to the belief that a justice may, in some cases, charge two judgment fees: as in case of a judgment by default, opened for

a rehearing, and judgment again rendered on trial; a defence having been made." Per ROGERS, J. *Ibid.*

The act 21 March 1772, which requires notice in writing to be given to a justice, thirty days before suing out a writ against him, for anything done in the execution of his office, should be liberally construed for the protection of justices of the peace. 4 B. 24.

The notice to a justice of an intended suit for the penalty for taking greater fees than the law allows, need not specify the amount of fees which the justice might legally have taken. 17 S. & R. 75.

Nothing less than a tender of fifty dollars, the amount of a penalty upon a justice of the peace for taking illegal fees, is sufficient amends, and available as a defence. 7 W. 491.

The recorder of deeds, under the fee-bill of 28 March 1814, can only charge 37½ cents for a certificate and seal, and cannot add to it the charge of 12½ cents for a search to enable him to give the certificate. If he exact payment for the latter charge, he incurs the penalty of fifty dollars imposed by the 26th section of the before-mentioned act of assembly. 4 R. 162.

There is nothing in the fee-bill that allows a sheriff or constable costs for employing a watchman to take charge of property; and when objected to by the defendant on an execution, it must be disallowed. 2 P. 113.

A justice of the peace, in a criminal case, can only charge for one recognisance from the defendant and his surety, and one from the prosecutor and his witnesses. 1 Ash. 110. 17 S. & R. 75.

He is entitled to a fee for a recognisance for a further hearing. *Wood v. Elkinton*, Com. Pleas, Phila., 8 December 1847.

On binding over a defendant, he has no right to take from him any fees, beyond those for the recognisance, and the commitment and *supersedeas*; and then only, if such services be actually performed. 5 P. L. J. 457.

He is not liable to the penalty for taking illegal fees, in consequence of having charged, in his bill of particulars, for an execution, the aggregate sum allowed for an execution and return, if intended to include both services. *McHenry v. White*, Com. Pleas, Phila. 1 December 1847.

A justice is only entitled to a fee of 20 cents, for a copy of the proceeding in a case before him; and if he charge or demand a greater amount, he renders himself liable to the penalty for taking illegal fees. 9 C. 190

A constable, for serving a subpoena from the court, is entitled to the same fee as the sheriff; for in such case, he acts as a sheriff's officer. 1 Br. 274.

By act 12 March 1870, witnesses before justices of the peace are to receive fifty cents per diem in Delaware county. P. L. 412.

Female.

ACT 3 FEBRUARY 1819. Purd. 86.

SECT. 1. No female shall be arrested or imprisoned, for or by reason of any debt contracted after the passing of this act.

This provision as to the exemption of females from imprisonment for debt, was re-enacted by the 6th section of the act of 13th June 1836. P. L. 573.

Women are not relieved from arrest for debt by the act of 12th July 1842, but by that of 1819; and therefore, a warrant of arrest cannot issue against a female under the act of 1842. *Morris v. Hofheimer*, District Court, Phila., 6 June 1860. MS. Nor can an attachment be issued against a female trustee to compel payment of the trust funds in her hands. 1 Ash. 873.

Feme Sole Trader.

I. Who to be deemed feme sole trader. to be feme sole traders.
II. When married women may be decreed III. Judicial decisions.

I. ACT 22 FEBRUARY 1718. Purd. 474.

SECT. 1. Where any mariners or others are gone or hereafter shall go to sea, leaving their wives at shop keeping, or to work for their livelihood at any other trade in this province, all such wives shall be deemed, adjudged and taken, and are hereby declared to be, as *feme sole* traders; and shall have ability and by this act are enabled to sue and be sued, plead and be impleaded at law in any court or courts of this province, during their husbands' natural lives, without naming their husbands in such suits, pleas or actions; and when judgments are given against such wives, for any debts contracted, or sums of money due from them, since their husbands left them, executions shall be awarded against the goods and chattels in the possession of such wives, or in the hands or possession of others in trust for them, and not against the goods and chattels of their husbands; unless it may appear to the court, where those executions are returnable, that such wives have, out of their separate stock or profit of their trade, paid debts which were contracted by their husbands, or laid out money for the necessary support and maintenance of themselves and children, then and in such case execution shall be levied upon the estate, real and personal, of such husbands, to the value so paid or laid out, and no more.

II. ACT 4 MAY 1855. Purd. 474.

SECT. 2. Whensoever any husband, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a *feme sole* trader, under the act of the 22d of February 1718, entitled "An act concerning *feme sole* traders," and be subject as therein provided, and her property, real and personal, howsoever acquired, shall be subject to her free and absolute disposal during life, or by will, without any liability to be interfered with or obtained by such husband, and in case of her intestacy shall go to her next of kin, as if he were previously dead.

SECT. 3. Whensoever any husband or father, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his child or children, the mother of such children shall have all the rights and be entitled to claim, and be subject to all the duties reciprocally due between a father and his children, and she may place them at employment and receive their earnings, or bind them to apprenticeship without the interference of such husband, the same as the father can now do by law: *Provided always*, That she shall afford to them a good example, and properly educate and maintain them according to her ability: *And provided*, That if the mother be of unsuitable character to be intrusted as aforesaid, or dead, the proper court may

appoint a guardian of such children, who shall perform the duties aforesaid, and apply the earnings of such children for their maintenance and education.

SECT. 4. That creditors, purchasers and others may, with certainty and safety, transact business with a married woman under the circumstances aforesaid; she may present her petition to the court of common pleas of the proper county, setting forth under affidavit the facts which authorize her to act as aforesaid, and if sustained by the testimony of at least two respectable witnesses, and the court be satisfied of the justice and propriety of the application, such court may, upon such notice as they may direct, make a decree and grant her a certificate, that she shall be authorized to act, have the power and transact business as hereinbefore provided; and such certificate shall be conclusive evidence of her authority, until revoked by such court for any failure on her part to perform the duties by this act made incumbent upon her, which may be ascertained upon the petition of any next friend of her children.

III. There is no *feme sole* trading in Pennsylvania, but such as falls within the acts of assembly. 6 W. & S. 346 .

A married woman cannot claim the *status* of a *feme sole* trader, under the act of 1855, unless she has been so decreed by the proper court. 3 Phila. R. 508.

A friend of a family (the husband being insolvent) may furnish money to the wife, in trust, to be employed in business for the benefit of the family, the husband acting as agent, without exposing the property to the creditors of the husband. 1 Wr. 247. And a stranger may purchase the husband's stock in trade, at a judicial sale, and make gift of it to the wife, with like effect. 19 Leg. Int. 204.

But where a merchant failed in business and became insolvent, and after his failure and insolvency, his wife commenced business in her own name, purchasing goods, at first, on the indorsements and guarantees of her husband's father, and continued the business for some years with capital loaned to her by the same party, the husband transacting all the business in the wife's name; it was held, that the stock of goods so held in the wife's name was liable to execution at the suit of the husband's creditors. 11 C. 375.

A *feme sole* trader may be sued, without naming her husband, for debts contracted, either in the course of her trade, or for the maintenance of herself and children, whether the same be by special contract, or by specialty. 2 S. & R. 189.

And she can maintain an action in her own name, for a distributive share of her ancestor's estate. 2 Br. 193.

A deserted wife who has been decreed a *feme-sole* trader, under the act of 1855, cannot, by a conveyance of her real estate, divest her husband's estate as tenant by the curtesy. 2 Brewst. 302.

Fences.

- I. How fences to be constructed.
- II. Division fences.

- III. Penalty for maliciously destroying fences.
- IV. Authorities and decisions.

I. ACT OF 1700. Purd. 475.

SECT. 1. All cornfields and grounds kept for inclosures, within the said province and counties annexed, shall be well fenced, with fence at least five feet high, of sufficient rail or logs, and close at the bottom; and whosoever not having their ground inclosed with such sufficient fence as aforesaid, shall hurt, kill or do damage to any horse, kine, sheep, hogs or goats of any other persons, by hunting or driving them out of or from said grounds, shall be liable to make good all damages sustained thereby to the owner of the said cattle.

II. ACT 11 MARCH 1842. Purd. 475.

SECT. 3. When any two persons shall improve lands adjacent to each other, or where any person shall inclose any land adjoining to another's land already fenced in so that any part of the first person's fence becomes the partition fence between

them, in both these cases the charge of such division fence, so far as is inclosed on both sides, shall be equally borne and maintained by both parties.

SECT. 4. On notice given, the said [fence] viewers shall, within five days thereafter, view and examine any line fence as aforesaid, and shall make out a certificate in writing, setting forth whether in their opinion the fence of one has been already built, is sufficient, and if not, what proportion of the expense of building a new or repairing the old fence, should be borne by each party, and in each case they shall set forth the sum which in their judgment each party ought to pay to the other, in case he shall repair or build his proportion of the fence, a copy of which certificate shall be delivered to each of the parties; and the said viewers shall receive the sum of one dollar for every day necessarily spent by them, in the discharge of their duties, which they shall be entitled to receive from the delinquent party, or in equal sums from each, as they shall decide to be just.

SECT. 5. If the party who shall be delinquent in making or repairing of any fence, shall not, within ten days after a copy of the certificate of the viewers shall have been delivered to him, proceed to repair or build the said fence, and complete the same in a reasonable time, it shall be lawful for the parties aggrieved to repair or build the said fence; and he may bring suit before any justice of the peace or alderman against the delinquent party, and recover as in other actions for work, labor, service done and materials found, and either party may appeal from the decision of the justice or alderman, as in other cases.

SECT. 6. The said viewers shall not be called out to view any fence between the 1st day of November and the 1st day of April of the next year.

SECT. 7. If any viewer shall neglect or refuse to perform any duty herein enjoined upon him, he shall pay for each such neglect or refusal the sum of three dollars, to be recovered by the party aggrieved as debts of a like amount are recoverable.

SECT. 8. A majority of the viewers in each township shall be a quorum, and shall have power to do all the duties herein assigned. (a)

ACT 23 MARCH 1865. Purd. 1387.

SECT. 1. If any person or persons, from and after the passage of this act, shall, maliciously or wantonly, break or throw down any post and rail or other fence, erected for the inclosure of land, or shall carry away, break or destroy any post, rail or other material, of which such fence was built, inclosing any lots or fields within the commonwealth, such person or persons so offending shall be guilty of a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding fifty dollars, one half thereof to be paid to the informer, on conviction of the offender or offenders, the other half to the support of the poor of such county, township, borough or ward where the offence has been committed, with costs of prosecution, or to undergo an imprisonment not exceeding six months, or both or either, at the discretion of the court.

IV. The duties of fence viewers are to be performed by township and borough auditors. Purd. 475. It is not essential, that, in addition to their oath as auditors, they should take an official oath, as fence viewers. 8 H. 138.

One of the owners of adjacent *unimproved* lands cannot call upon the other to contribute to the charge of a division fence between them. 8 C. 65.

An occupant is not bound to join in a division fence; he may set his fence, if it please him, not on the line of division, but within it; and if his neighbor extend his fence across the line to join it, it is a trespass. 2 Barr 488.

So, a party who, on the destruction of a partition fence, by accident, recedes from the former line, and erects a fence on his own land, is not bound to maintain the former fence. 2 Barr 126. 6 H. 367.

Either owner of adjoining lands may, at pleasure, erect a partition fence, and the occupation of his neighbor's land for that purpose is not adverse; when the charge assessed by the fence viewers is answered, it becomes common property. 2 Barr 488. Where there is only a line between the lands of parties, each has a right to insist upon a common partition fence along it. 3 C. 95.

(a) See acts 11 March 1862, Purd. 1276; Purd. 1607, as to fences and fence viewers in 22 March 1865, Purd. 1394; and 6 May 1870, Philadelphia.

The act of 1842, does not entitle a land-owner to five days' notice, previous to the meeting of the fence viewers; but five days' notice must be given to the viewers. 8 H. 138.

The owner is entitled to notice of the meeting of the viewers; but want of notice cannot be alleged, if he were present at the view, without objecting to the omission to give him previous notice of it. Ibid.

The certificate of the viewers is not invalid, because it may require oral testimony to sustain it. But if it be void for uncertainty, the party's remedy is not gone; he may still recover for work and labor in erecting the defendant's portion of the fence, by proving otherwise its necessity and value. Ibid.

No appeal lies from the decision of the fence viewers. 11 H. 37.

Where there is, in fact, a partition fence, the duty of contribution to maintain it exists; and neither party can excuse himself from this duty by alleging that the line is in dispute. The jurisdiction of a justice, under the fence law, to enforce contribution, is not ousted, by raising a question of title to the land. 1 C. 78.

The removal of a fence under a claim of right, is not within the purview of the act of 14th April 1851. 2 C. 187.

The act of 1700 does not require the owner of land, inclosed by an insufficient fence, to permit trespassing cattle to remain in his fields; it only gives damages to the owner of the cattle for any injury done to them, in driving them out of the other party's grounds. If he drive them into the highway, without injury, he is not responsible for any damage they may subsequently sustain without his default. 8 C. 65.

A railroad company is not bound to fence its road against trespassing cattle. An owner of cattle suffered to go at large, and which are killed or injured on a railway, has no recourse against the company, or its servants; on the contrary, he may be liable for the damage done by them to the company or the passengers. 7 H. 298. See 6 C. 240-1.

Where one party insists upon a partition fence being made, and makes his share of it, and the other, refusing to put up his part, is injured by the cattle of the other going upon his land, in consequence of the fence not being made, the injury being the result of his own negligence, he cannot maintain an action for the damage thereby sustained. 3 C. 95.

A division fence between adjoining owners of land, of more than twenty-one years' standing, although crooked, constitutes the line between them, even though the deeds of both parties call for a straight line between acknowledged points. 4 C. 149.

Improved lands must be fenced, in order that the owner may recover for damages done by stray cattle. 5 P. F. Sm. 227.

Ferries.

I. Cutting a ferry-rope made penal, and the owners, on request, to sink their ropes, to allow vessels to pass.

II. Information and warrants against violators of this law.

III. Flats with sails to strike their masts.

I. ACT 8 FEBRUARY 1766. Purd. 476.

SECT. 1. Provides that any person who shall cut any rope stretched across any river or creek in the commonwealth, which is used in drawing the boats carrying travellers over the same, shall, on conviction, forfeit and pay ten pounds, one-half to the owner of the rope so cut, and the other half to the guardians of the poor. To prevent obstructions from such ropes, the owners, or ferrymen who shall neglect to refuse to slacken and sink them when required to permit any vessel to pass, shall, on conviction, forfeit and pay ten pounds.

II. INFORMATION AND WARRANTS.

INFORMATION FOR CUTTING THE ROPE OF A FERRY.

MONROE COUNTY, ss.

The information of B. J., of Monroe county, yeoman, taken on oath before J. R., one of the justices of the peace in and for the said county, the 10th day of April, Anno Domini 1860, who saith, that on the 8th of April inst., he was standing on the west side of Muddy Creek, in the said county, opposite to the ferry-house of T. C., and saw a certain J. H., of the same county, laborer, with an axe cut the rope stretched across the said creek at the said ferry, and used in drawing the boats carrying travellers over the same. And he saith not.

(Signed,) B. J.

Sworn and subscribed before J. R., Justice of the Peace.

WARRANT FOR CUTTING A FERRY ROPE.

MONROE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of U—— M——, in the county of Monroe, greeting.
WHEREAS, B. J., of Monroe county, yeoman, hath this day made oath before J. R., one of our justices of the peace in and for the said county, that on the 8th of April inst. he was standing on the west side of Muddy Creek, in the said county, opposite to the ferry-house of T. C., and saw a certain J. H., of the same county, laborer, with an axe cut the rope stretched across the said creek, at the said ferry, and used in drawing the boats carrying travellers over the same. You are, therefore, hereby commanded to take the said J. H., and bring him before the said J. R. forthwith, to answer the said charge, and further to be dealt with according to law. Witness the said J. R., at U—— M—— township aforesaid, the 10th day of April, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

NOTE.—The defendant being brought before the justice must be dealt with as other persons charged with penal offences. He must be discharged, give bail for his appearance, or be committed to prison, and the witnesses bound to appear and give evidence at the next session of the court of quarter sessions of the proper county.

INFORMATION AGAINST THE KEEPER OF A FERRY.

MONTGOMERY COUNTY, ss.

The information and complaint of A. B., of Montgomery county, miller, taken upon his solemn affirmation before J. R., one of our justices of the peace in and for the said county, the 10th day of April, A. D. 1860, who saith that on the 8th day of April inst. he was going down the river Schuylkill in a shallop loaded with grain, that when he came opposite to the ferry owned and occupied by T. C., he requested the said T. C. to slacken and sink the rope extended across the said river at the ferry aforesaid, in such manner as to enable him the said A. B. to pass with his shallop in safety, but that the said T. C. absolutely refused so to do. And further saith not.

(Signed,) A. B.

Affirmed and subscribed before J. R., Justice of the Peace.

WARRANT AGAINST THE KEEPER OF A FERRY.

MONTGOMERY COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of U—— M——, in the County of Montgomery, greeting:

WHEREAS, A. B., of Montgomery county, miller, hath this day upon his solemn affirmation before J. R., one of our justices of the peace in and for the said county, declared that on the 8th day of April instant he was coming down the river Schuylkill with a shallop loaded with grain, that when he came opposite to the ferry owned and occupied by T. C., he requested the said T. C. to slacken and sink the rope extended across the said river at the ferry aforesaid, in such manner as to enable him, the said A. B., to pass with his shallop in safety, but that the said T. C. absolutely refused so to do. These are, therefore, to require you to take the said T. C., and bring him before the said J. R. forthwith, to answer the said charge, and to be dealt with according to law. Witness the said J. R., at U—M— aforesaid, the 10th day of April, A. D. 1860.

J. R., Justice of the Peace. [SEAL]

NOTE.—The defendant being brought before the justice is to be dealt with in the same manner as in the case of cutting the ferry rope, respect being had to the evidence produced.

III. ACT 8 FEBRUARY 1766. Purd. 476.

SECT. 2. All flats or boats passing up and down any river or creek, if navigated by sails, shall have their masts to strike or take down when legally required, so as to facilitate the navigation of said river or creek, under a penalty of ten pounds, to be recovered and applied as directed in the 1st section.

INFORMATION AGAINST THE MASTER OF A SAIL-BOAT.

MONTGOMERY COUNTY, ss.

THE information and complaint of A. B., of Montgomery county, yeoman, taken upon oath before J. R., one of our justices of the peace in and for the said county, the tenth day of April, Anno Domini 1860, who saith that he is the owner of a certain ferry upon the river Schuylkill, in the said county, and hath a rope stretched across the same, used in drawing the boats carrying travellers; that this morning C. D., of Berks county, yeoman, passing down the said river with a boat navigated by sails, did not require him, the said A. B., to raise or sink the said rope, but passed on without taking down and striking the mast of the said boat, whereby the rope of the said A. B. was broken and destroyed, to his great damage. And further saith not. (Signed,) A. B.

Sworn and subscribed before J. R., Justice of the Peace.

WARRANT.

MONTGOMERY COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Borough of N—, in the County of Montgomery, greeting:

WHEREAS, A. B., of Montgomery county, yeoman, hath this day made complaint on oath before J. R., one of our justices of the peace in and for the said county, that he is the owner of a certain ferry upon the river Schuylkill, in the said county, and hath a rope stretched across the same, used in drawing the boats carrying travellers; that this morning C. D., of Butler county, yeoman, passing down the said river with a boat navigated by sails, did not require him, the said A. B., to raise or sink the said rope, but passed on without taking down and striking the mast of the said boat, whereby the rope of the said A. B. was broken and destroyed, to his great damage. These are, therefore, to command you to take the said C. D. and bring him before the said J. R. forthwith, to answer the said charge, and further to be dealt with according to law. Witness the said J. R., at U—M— aforesaid, the tenth day of April, A. D. 1860.

J. R., Justice of the Peace. [SEAL]

NOTE.—The proceedings on the arrest of the defendant, in this case, will be of the same character as those under the first section of this law.

Fires.

ACT 17 APRIL 1869. Purd. 1568.

SECT. 1. Whenever it shall be made to appear, by the affidavit of a credible witness, that any building or other property has been set on fire maliciously, or burned from an unknown cause, it shall be lawful for the mayor or any alderman of any city, or justice of the peace of any borough or township wherein such fire may have occurred, upon request of any citizen of such city, borough or township, as the case may be, or of any president, secretary or agent of any insurance company having a policy written and in force upon the premises burned or attempted to be burned, to proceed, with all reasonable dispatch, to investigate and ascertain, as far as practicable, the facts relating to the cause and origin of such fire; and for this purpose the said mayor, alderman or justice of the peace shall have all the powers of a coroner for summoning a jury and witnesses and conducting the investigation.

SECT. 2. The number of jurors shall not be less than three, and shall be selected from the vicinity where the fire occurred, who, after being sworn or affirmed to perform their duties faithfully, and inspecting the place where the fire occurred, and hearing such testimony as may be produced before them in regard to the premises, shall make out and deliver to the officers having cognisance of the case, a report, under their hands and seals, in which they shall find and certify, as far as ascertained, how and in what manner such fire occurred, and who was guilty of firing the same, either as principal or accessory, or if not wilfully set on fire, then to certify how the same originated, as far as can be ascertained.

SECT. 3. If the jury shall find that any person or persons wilfully set fire to the premises in question, or that reasonable cause exists for believing them to have been accessory thereto, then the mayor or other officer having cognisance of the case as aforesaid, shall bind over the witnesses to appear at the next court of quarter sessions of the proper county, to give testimony in the case; and if the person charged or implicated by the jury as aforesaid be not in custody, the mayor or other officer holding the inquest shall issue his warrant for the arrest of the accused, and being brought before such magistrate shall be committed or admitted to bail, to appear and answer, at the next court of quarter sessions of the proper county, such bill or bills of indictment as may then and there be preferred against him, her or them, in the same manner as persons are held by such magistrates to answer, upon information made before them for like offences.

SECT. 4. The officer issuing such process shall have the same power to examine the defendant as in other cases; the testimony of all witnesses examined before the jury under this act shall be reduced to writing, by the officer holding the inquest, and shall be returned by him, together with the inquisition of the jury and the recognisances and examinations taken by such officer, to the next court of quarter sessions of the proper county.

SECT. 5. The compensation of the mayor or other magistrate holding such inquest, and of the jurors and witnesses in attendance, shall be the same as is now allowed by law in cases of coroner's inquests *super visum corporis*, and shall be paid by the person or persons at whose instance the proceedings are instituted; in all cases where the inquest shall not find sufficient cause to bind over any person on a charge of causing or being accessory to such burning, but if such cause shall be certified by the said inquest, then the costs of the proceedings shall abide the issue in court in the same manner as costs before committing magistrates on similar charges instituted by information now do, and shall be paid accordingly: *Provided*, That this act shall not apply to the city of Philadelphia or to the county of Allegheny.

ACT 28 FEBRUARY 1865. Purd. 1387.

SECT. 1. If any person or persons shall wilfully give, or cause to be given, any false alarm of fire, from a fire alarm telegraph box or boxes, or shall break, or cause to be broken, any fire alarm signal box, or any pole, post or wire connected with the police and fire alarm telegraph, within the city of Philadelphia, or shall injure or in any manner interfere with or interrupt the working of the same, he, she or they shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five hundred dollars for each offence, or by imprisonment for a term not exceeding two years, or by both.

Firing of Guns, Fireworks, &c.

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| <p>I. Provides penalties for setting off, or exposing for sale, fireworks, &c.</p> <p>II. Penalty for firing guns, &c., at certain times.</p> | <p>III. Who shall be answerable for firing, &c. in houses.</p> <p>IV. The duty of a constable under this act.</p> |
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I. ACT 26 AUGUST 1721. Purd. 483.

SECT. 4. Provides, that if any person shall fire any gun or other firearms, or shall make, or cause to be made, or sell, or utter, or offer to expose to sale, any squibs, rockets or other fireworks, or shall cast, throw or fire any squibs, rockets or other fireworks, within the city of Philadelphia, without the governor's special license for the same; such person being thereof convicted before any one justice of the peace of the said city, shall, for every such offence, forfeit and pay five shillings; one half to the use of the poor of the said city, and the other half to the use of him who shall prosecute; which forfeitures shall be levied by distress and sale of the offender's goods as aforesaid; and for want of such distress, if the offender refuse to pay the said forfeiture, he shall be committed to prison for every such offence, the space of two days, without bail or mainprise: *Provided*, That such conviction be made within ten days after such offence has been committed.

[By the first section of the act of February 9th 1750-51 (Purd. 483), the provisions of the above section are extended over every town or borough in the state.]

II. ACT 24 DECEMBER, 1774. Purd. 484.

SECT. 1. Provides, that if any person or persons shall, [on any thirty-first day of December, or first or second day of January, in every year,] without reasonable occasion, discharge and fire off any hand gun, pistol, or other firearms, or shall cast, throw, or fire any squibs, rockets or other fireworks, within the inhabited parts of this province, [state,] every person so offending, and being thereof convicted, before any justice of the peace, shall, for every such offence, forfeit, for the use of the poor, the sum of ten shillings, to be levied by distress and sale of the offender's goods and chattels; and for want of such distress, such offender shall be committed to prison for the space of five days, without bail or mainprise.

III. SECT. 2. If any person or persons shall willingly permit, or suffer within the time aforesaid, any person or persons to discharge, or fire off, at his, or her, house, any hand gun, pistol or other firearms, or to cast, throw or fire any squibs, rockets or other fireworks as aforesaid, every person so offending, and being convicted, shall, for every such offence, forfeit and pay, for the use aforesaid, the sum of twenty shillings, to be recovered in manner aforesaid.

IV. [The third section of this act makes it the duty of every constable, under a penalty of twenty shillings, to present every such offence as above to a justice, or the court of quarter sessions, together with the names of the offenders. Every offence against this act must be prosecuted within four months.]

Firing of Woods.

- I. Firing the woods—how punished.
 II. Forms of informations, warrants, orders, executions, and docket-entry.

I. ACT 18 APRIL 1794. Purd. 484.

WHEREAS, it has been represented, that numbers of persons are in the custom of setting fire to the woods, for different purposes, thereby producing an extensive conflagration, injurious to the soil, destructive to the timber and the infant improvements within the state: Therefore,

SECT. 8. Where any party is injured, and shall not demand above fifty dollars for his loss or damage, it shall be lawful for such party to apply to any justice of the peace of the county where the offence is committed, who shall issue a warrant, and cause the party offending to be brought before him; and if it shall appear that the defendant is guilty, then the said justice shall issue his warrant to two or more freeholders, commanding them, in the presence of the defendant, if he will be present, to view the place or things damaged, or inquire into the loss sustained by the plaintiff, and to certify to the said justice, upon their oaths or affirmations, what damage, in their judgment, the plaintiff hath sustained by occasion of the premises; and upon the return of such certificate, the said justice is hereby empowered to grant execution for the recovery of the said damages, together with the costs of prosecution.

[The party has a right to appeal from the judgment of the justice to the next court of common pleas.]

II. FORMS OF INFORMATIONS, &c.

INFORMATION FOR HAVING SET THE WOODS ON FIRE.

MERCER COUNTY, ss.

THE information of A. B., of Mercer county, currier, taken upon oath before J. R., one of our justices of the peace in and for the said county, the tenth day of April, A. D. 1870, who saith that on the 8th day of April, inst. he was returning home through the woods, belonging to J. B., of U— M— township, in the said county, and saw T. C., of the same township, innkeeper, passing through the same woods with fire in a shovel; that upon inquiring of the said T. C. what he was going to do with fire at that time and place, he answered that he was going to kindle a fire as he expected to be out all night hunting; that the next day this informant heard that the said woods were on fire and a great part consumed, and he verily believes that they were set on fire by the said T. C. And further saith not.

(Signed.) A. B.

Sworn and subscribed before J. R., justice of the peace, April 10, 1870.

WARRANT AGAINST ONE FOR HAVING SET THE WOODS ON FIRE.

MERCER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of U— M—, in the County of Mercer, greeting:

WHEREAS, A. B., of Mercer county, currier, hath this day made information on oath before J. R., one of our justices of the peace in and for the said county, that on the 8th day of April inst., he was returning home through the woods belonging to J. B., of U— M— township, in the said county, and saw T. C., of the same township, innkeeper, passing through the same woods with fire and a shovel, and that upon inquiring of the said T. C. what he was going to do with fire at that time and place, he answered that he was going to kindle a fire, as he expected to be out all night hunting; that the next day this informant heard that the said woods were on fire, and a great part consumed, and verily believes that they were set on fire by the said T. C. You are, therefore, hereby commanded to take the said T. C. and bring him before the said J. R. forthwith, to be dealt with according to law. Witness the said J. R., at U— M— township aforesaid, the 10th day of April, A. D. 1870.

J. R., Justice of the Peace. [SEAL.]

WARRANT AGAINST ONE FOR DAMAGE DONE BY SETTING FIRE TO THE WOODS.

MERCER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of U— M— Township, in the County of Mercer, greeting:

WE command you, that you take T. C., of the township aforesaid, innkeeper, and bring him before J. R., one of our justices of the peace in and for the said county, forthwith, to answer J. B. of a plea of trespass, for his loss or damage, not exceeding fifty dollars, occasioned by the said T. C. setting on fire certain woods within the township aforesaid, contrary to the act of the general assembly in such case made and provided. Hereof fail not. Witness the said J. R., at U— M— township aforesaid, the 10th day of April, A. D. 1870.

J. R., Justice of the Peace. [SEAL.]

WARRANT TO FREEHOLDERS, TO ESTIMATE DAMAGES FROM FIRE IN THE WOODS.

MERCER COUNTY, ss.

To L. M., and N. O., and P. Q., all of U— M— Township, in the County of Mercer:

WHEREAS, T. C., of the township aforesaid, hath been brought before me, J. R., one of the justices of the peace in and for the said county, to answer J. B. of a plea of trespass

not above fifty dollars, for the loss and damage of the said J. B., occasioned by the said T. C. setting on fire certain woods within the said township, contrary to the act of the general assembly in such case made and provided; and whereas, upon examination, it hath appeared to me, by the testimony of two credible witnesses, that the said T. C. is guilty of the charge exhibited against him by the said J. B. You are, therefore, commanded, in the presence of the said T. C., if he will be present, to view the place or things damaged, and inquire into the loss sustained by the said J. B., and to certify to me upon your oaths or affirmations what damage, in your judgment, the said J. B. hath sustained by occasion of the premises. Witness my hand and seal at U—M— township aforesaid, the 13th day of April, A. D. 1870. J. R., Justice of the Peace, [SEAL.]

RETURN OF THE FREEHOLDERS.

To J. R., Esquire, one of the justices of the peace of the County of Mercer:
MERCER COUNTY, ss.

In pursuance of your warrant of the 13th instant, we do now return that we have, in the presence of J. B., the plaintiff, and T. C., the defendant, viewed the fences of the said J. B., which we find considerably injured by fire communicated from the woods in the neighborhood of the said fences, and do certify upon our oaths that the said J. B. hath sustained damage thereby to the amount of twenty-eight dollars. Witness our hands the 15th day of April, A. D. 1870.

(Signed,) L. M. [SEAL.]
N. O. [SEAL.]
P. Q. [SEAL.]

EXECUTION FOR DAMAGES FROM FIRE IN THE WOODS.

MERCER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the township of U—M—, in the County of Mercer, greeting:
WHEREAS, J. B. hath obtained judgment before J. R., one of our justices of the peace in and for the said county, against T. C., of U—M— township aforesaid, innkeeper, for twenty-eight dollars damages, which he sustained by occasion of the said T. C. setting on fire certain woods within the township aforesaid, together with two dollars and twenty-five cents, the costs of prosecution, and the said T. C. having neglected to comply with the said judgment; we command you that of the goods and chattels of the said T. C. you levy the damages and costs aforesaid, and indorse hereon the time you make your levy, and hereon, or on a schedule hereto annexed, a list of the same, and within twenty days thereafter expose the same to sale by public vendue, you having first given due notice thereof by at least three advertisements, put up at the most public places in your township, and returning the overplus, if any, to the said T. C.; and for want of sufficient distress that you take the body of the said T. C. and convey him to the jail of the said county, there to be kept until the damages and costs aforesaid be fully paid, or he be otherwise discharged by due course of law. Make return hereof to our said justice on or before the 10th day of May, A. D. 1870. Witness the said J. R., at U—M— township aforesaid, the 20th day of April, A. D. 1870. J. R., Justice of the Peace. [SEAL.]

DOCKET ENTRY.

J. B.
vs.
T. C.

COSTS.

Justice.	
Warrant	25
Docket entry	25
Order to freeholders	15
Swearing do.	30
Subpoena	30
Witnesses ex. and aff.	50
Judgment	50
Execution	25
Return, &c.	25
Constable.	
Serving warrant	50
Mileage	30
Order on freeholders	75
Mileage	45
Serving execution	50
Mileage	35
	<u>\$5.25</u>

April 10th 1870, warrant issued. D. R., Constable.
A subpoena issued for two witnesses for plaintiff, both served by constable, D. R., and by him returned "served on oath."
Demand not above \$50 for damages occasioned by firing woods, &c. April 10, A. D. 1870, defendant brought up same day. Plaintiff appears. W. S. sw.; P. D. H. aff. P. On hearing it appears that the defendant is guilty of the charge exhibited against him. Therefore, judgment and warrant issued April 13th 1870, to L. M., and N. O., and P. Q., to view, examine and certify what damage the plaintiff hath sustained, &c. April 15th 1870, the above-named freeholders report that the plaintiff hath sustained damage to the amount of twenty-eight dollars. Therefore, judgment for plaintiff for twenty-eight dollars. Execution issued April 20th, returnable May 10.

Constable's Return.—Money and costs paid into office.
D. R., Constable.
Received satisfaction. J. B.

Fish.

ACT 4 MARCH 1870. Purd. 1607.

SECT. 1. Whenever any person shall have made or erected an artificial pond upon his own land, and shall put therein any fish, or the eggs or spawn of fish, for the purpose of breeding and cultivating fish, and shall give notice thereof, either in one or more of the newspapers of the county, or by written or printed hand-bills, put up in public places near said pond, any person who shall thereafter enter upon such pond for the purpose of fishing, or shall catch or take any fish thereout, shall be guilty of a trespass, and in addition thereto shall be liable to a penalty of five dollars for the first offence, ten dollars for the second, and twenty dollars for the third and each and every subsequent offence: *Provided*, That this act shall not prevent the owner of such pond, or any one by his authority, from catching or taking fish therefrom.

SECT. 2. The penalties imposed by this act may be recovered, with costs of suit, by any person, in his own name, before any justice of the peace of the county where the offence was committed, and the person suing for the same shall be a competent witness in such suit; and the justice who shall collect such penalty shall pay over the same, one half to the overseers of the poor for the use of the poor of the township where the offence was committed, and the other half to the plaintiff in such suit; and on the non-payment of such penalty, the defendant shall be committed to the common jail of the county for a period of not less than five days, and at the rate of one day for every dollar of the judgment, where the same shall be above five dollars.

The act 16 April 1870 provides for the preservation of trout in the counties of Potter, Lycoming, Tioga, Clinton and Sullivan, and punishes offences against its provisions by a fine of not more than \$25 nor less than \$5, or by imprisonment in the county jail of not less than ten, nor more than twenty-five days for each offence. Purd. 1607.

Fixtures.

I. Nature and properties of fixtures.

II. Judicial decisions.

FIXTURES are personal chattels annexed to the freehold, either useful to the tenant in his trade, or in the occupation of his house, or ornamental to the house, and which are capable of removal without doing substantial injury to the real estate. Gib. on Fixt. 6. And, although during the period of their annexation considered as portion of the land, the party fixing them is allowed to reduce them again to a chattel state. Ibid. 5.

Baron Parke defines them as "those personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them, or his personal representatives, though the property in the freehold may have passed to other persons." 5 M. & W. 171. And see 1 Bouv. Inst. 187.

Whatever a tenant erects or fixes to the premises demised for the purposes of his trade, or any article which he may fix to the house for his domestic use, and which is capable of being removed without injury to the house, may be removed by him during the term, (Gib. on Fixt. 22, 33,) but not after its expiration, (Ibid. 38, 1 Wh. 91, 7 C. 155, 2 Wr. 846,) except where his estate ceases on an uncertain event, against which he could not provide. Gib. on Fixt. 42.

Although fixtures are part of the freehold, yet where the tenant has a right to sever them, they are so far considered as his personal property, that they may be seized and sold under a writ of execution against his goods and chattels. The execution creditor may exert the power of the tenant, and convert them into goods and chattels, towards the satisfaction of his debt. Ibid. 52. 4 W. 330. 11 P. F. Sm. 87.

But where the fixtures are the property of the landlord, and part of the thing demised, they cannot be disannexed from the house under the writ of execution. 7 T. R. 9. And so where the freeholder is in possession of a house and fixtures, the fixtures cannot be severed from the house and seized under an execution. 5 B. & Ald. 625. Where the fixtures belong to a lessee for years, he has an interest in them distinct from the land; but where they belong to the freeholder, his interest in the fixtures and his interest in the land are identical, and they are to all intents parcel of the freehold. Gib. on Fixt. 53.

Although seizable under an execution, fixtures are not distrainable; because so long as they continue annexed to the land, they are part of the thing demised, and if not severed during the term, will revert to the landlord, who cannot seize what is contingently *his* property. Ibid. 54. 4 B. & Ald. 206. And so far is this principle carried, that if the fixture be severed from the freehold for a temporary purpose, it is not distrainable in that its solitary state; as in the instance of a mill-stone severed from the mill, for the purpose of being picked. Bro. Abr. Distress, pl. 23. 17 S. & R. 413. 2 W. & S. 116. And as a consequence of this doctrine, it would seem, that where fixtures are seized and severed under an execution against the tenant, the landlord is not entitled to be paid a year's rent out of the proceeds of the sale. 3 Eng. L. & Eq. 569.

II. A steam-engine set up by a lessee, on a tract of land, for the purpose of carrying on the making of salt, is personal property; and as such, liable to be seized and sold by his execution creditors. 4 W. 380. 11 P. F. Sm. 87. 2 Pet. 137.

Where the instrument or utensil is an accessory to anything of a personal nature, as to the carrying on a trade, it is to be considered a chattel; but when it is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part of the inheritance. 2 Br. 285.

From the adjudged cases on the subject, I think we are warranted in saying that everything put into, and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold and cannot be levied on as personal property. 17 S. & R. 415, per SMITH, J. 2 W. & S. 119. Ibid. 890. 3 Stew. 314. See 2 J. 804.

A steam-engine used for propelling a saw-mill, is part of the building. 3 W. 140. So is a copper boiler or kettle fixed in a brewery. 17 S. & R. 413. And so also is a steam-engine, with its fixtures, erected by the owner of the land, for the purpose of grinding bark and breaking hides, in the course of his business as a tanner. 7 W. 106. 12 N. H. 205.

The criterion of a fixture in a mansion-house or dwelling, is actual and permanent fastening to the freehold; but this is not the criterion of a fixture in a manufactory or a mill. 2 W. & S. 116.

Gas-fixtures, such as chandeliers and side-brackets, put up and attached to the gas-pipes by the owner of the premises, are mere personal property, not fixtures in the proper sense of the term, and do not pass by a sheriff's sale of the real estate. 9 C. 522.

Trover will not lie against the owner of real estate in possession, for fixtures annexed to the freehold. 7 C. 155.

May be severed & sold in part but not otherwise

Floating Lumber.

ACT 10 APRIL 1862. Purd. 1278.

SECT. 1. It shall and may be lawful for any person or persons, party or company, who are or shall be engaged in lumbering, in any manner, upon the West Branch of the river Susquehanna, or any of its tributaries, to adopt one mark of designation, (a) which mark may be either in letters, figures, words, names or other devices, at the discretion of such person, party or company, wherewith to stamp or mark all logs, masts, spars, shingles, shingle-bolts, square timber, boom-sticks, boards or other lumber, put or intended to be put in said stream or its tributaries, to be run, driven or floated to any mills, booms or markets anywhere, at or above the Susquehanna boom at Williamsport, and to furnish to the prothonotary of the court of common pleas, at Williamsport, in the county of Lycoming, or other county, where the said kinds of lumber shall be put into said stream or tributary, a statement in writing of the mark so adopted as aforesaid, with a certificate appended, that the same has been so adopted as a mark of designation as aforesaid, signed by the person, party or some officer of the company adopting the same as aforesaid; and no person, party or company shall be entitled to adopt more than one of any of the kinds of marks aforesaid, as a mark of designation, but any such person, party or company shall not be prohibited from using any other mark or marks, in addition to the mark of designation, for distinguishing different kinds or lots of lumber, or lumber obtained from different localities, so always as that it interfere not with the mark of designation of any other person, party or company; and it shall be the duty of the prothonotary aforesaid to receive and file of record in his office any mark stated and certified as aforesaid, and to give a certificate thereof to the person filing the same, and certificates thereof from time to time to any person demanding the same, under his hand and the seal of the court; and the said prothonotary shall be entitled to demand and receive for the first certificate as aforesaid the sum of one dollar, and for every subsequent certificate the sum of twenty-five cents; and the said certificates shall be *prima facie* evidence of the right of the person, party or company filing the same, to the use of the mark mentioned therein, and that all logs, shingles, shingle-bolts, masts, spars, square timber, boom-sticks, boards or other lumber in and along said streams, or in and along the main river Susquehanna, are the property of the person, party or company whose mark of designation, duly registered as aforesaid, shall be thereon; the right to the use of any mark of designation as aforesaid, shall depend upon the priority of the registry on record as aforesaid, and no mark of designation as aforesaid shall be received or filed, or certificate given therefor by the prothonotaries aforesaid, if the same shall have been previously registered; it being the true intent and meaning of this act to prevent the use of the same mark of designation by more than one person, party or company.

SECT. 2. It shall not be lawful for any person or persons, without authority from the owner or owners, to catch, stop, take up or detain any lumber of any of the kinds mentioned in the 1st section of this act, excepting masts, spars, square timber and boards, which shall be floating in any of the streams or main river above said Susquehanna boom, mentioned in said section, having thereon any duly registered mark, under any pretence whatsoever; and the owner or owners of any of the kinds of lumber aforesaid, marked with duly registered marks, or his, her or their agent or agents, shall be entitled to take possession of and remove, at his or their pleasure, any lumber of any of the kinds before mentioned, so taken up, stopped or detained as aforesaid, contrary to the provisions of this act, without being in any manner liable for damages or expenses incurred by any person or persons so taking up, stopping or detaining the same as aforesaid, without let or hindrance, upon the production of the certificate of the prothonotary, made in conformity with the provisions of this act, either by the owner of the mark men-

tioned therein, or by any other person or persons, agent or agents, with the authority from the owner or owners, in writing, indorsed thereon or annexed thereto for the purpose, and duly acknowledged before any officer authorized to take acknowledgments of deeds or other writings: *Provided*, That this section shall not apply to any incorporated boom company, or to lumber of any of the kinds aforesaid; taken up below said Susquehanna boom. And for the purpose of encouraging persons to catch, take up and secure logs and lumber floating down the Susquehanna river, below the Susquehanna booms, it shall and may be lawful for any person or persons so taking up and securing any of the said kinds of lumber, so found floating down the said river, below said booms, to charge and receive from the owner or owners of said lumber the sum of fifty cents per thousand feet, board measure, and to have a lien upon the same until payment is made or tendered by the owner or his agent; and for all such lumber as aforesaid, taken up below the Columbia bridge, seventy-five cents per thousand feet, board measure.

SECT. 3. The owner or owners of any of the kinds of lumber aforesaid, their agent or agents, shall have the right, and by this act are authorized to enter peaceably upon the lands, mills or other premises of any person or persons above said Susquehanna booms, doing no damage, to search for any such lumber, duly marked with registered marks as aforesaid, and shall have the right, and by this act are authorized, to remove any such lumber, marked as aforesaid, without let or hindrance, first paying to the owner or owners of such mill, premises or land the actual damage done thereto, by occasion of such lumber having floated or remained thereon, or damage done in the removal of such lumber therefrom; and if the parties cannot agree as to the amount of damages done as aforesaid, the said lumber shall be delivered up to the owner or owners thereof, his, her or their agents, upon the production of a certificate, as provided in the 2d section of this act; and the owner or owners thereof, his, her or their agents as aforesaid, shall be liable to arrest, at the suit of the owner or owners of any such mill, premises or land as aforesaid, upon a *capias ad respondendum*, from which he or they shall not be discharged until he or they shall give bail absolute, before the justice or prothonotary who shall issue the same, to pay to the owner or owners of any such mill, premises or land as aforesaid, the amount of the judgment that may be finally recovered for the damages as aforesaid, with costs of suit: *Provided*, That if the person or persons commencing any such suit as aforesaid, shall fail to recover, on final hearing, a greater amount than was tendered by the owner or owners, his, her or their agents as aforesaid, at the time of claiming such lumber as aforesaid, then the party plaintiff shall pay the party defendant, his, her or their necessary costs of suit, and for his, her or their witnesses; which costs as aforesaid shall be paid before the amount of the judgment obtained shall be collected, or be made a set-off against the same; and it shall not be required, upon the trial of any such case, to bring the money offered into court.

SECT. 4. If any of the kinds of lumber aforesaid, duly marked with registered marks as aforesaid, which may float or come upon any land as aforesaid, shall not be claimed as aforesaid, within three months thereafter, the same shall be forfeited to the use of the owner or owners of any such land as aforesaid: *Provided*, That the said lumber shall have been first advertised for three successive weeks in the newspaper published nearest to said land, the cost of which to be added to the other charges and paid by the owner, before he shall be entitled to remove the said lumber.

SECT. 5. If any person or persons shall fraudulently or wilfully use the registered mark of another, or shall fraudulently make claim to be the owner of any lumber of any kind, whether marked or not, in and along said streams and main river, or shall fraudulently refuse to deliver up any lumber of the kinds aforesaid, duly stamped or marked as aforesaid, in accordance with the 2d and 3d sections of this act; or shall, without authority from the owner or owners thereof, wilfully deface or obliterate any marks, names, figures, letters or other devices of designation thereon, whether registered or not; or shall fraudulently saw, split, consume, destroy or injure, or knowingly permit to be sawed or consumed upon his, her or their mill, or other factory, or shall fraudulently sell or purchase, or convert to his, her or their use any lumber of the kinds mentioned in the 1st section of this act, whether

marked with registered marks as aforesaid or not, unless the same shall have become duly forfeited, according to the provisions of this act, or the provisions of existing laws; every such person so offending shall, for every such offence, upon conviction thereof, forfeit and pay a sum not exceeding one thousand dollars, and if the court deem proper, also undergo an imprisonment by separate and solitary confinement at labor, or simple imprisonment, not exceeding three years.

SECT. 6. No incorporated boom company upon said streams shall be held legally responsible for any logs or lumber, such as they are authorized by their respective charters to catch or stop, that may escape from any booms, unless the same shall have been duly marked as aforesaid, with registered marks, and the production to the officers of said companies of a certificate, as provided in the 2d section of this act, shall be sufficient evidence to warrant the delivery of any lumber caught in said booms, to the person, party or company certified to be the owner or owners of the marks thereon, or his, her or their agent or agents, in the absence of any express notice of any other claim to the same: *Provided*, That this section shall not be so construed as to prevent the said companies from collecting boomage upon such non-marked lumber, according to the provisions of their respective charters: *Provided further*, That such boom companies shall not be released from legal responsibility for any such logs or lumber as may escape from the control of the owner or owners, by reason of high water, or from other causes, which may be stopped by, or come into any boom as aforesaid.

SECT. 7. That the act of the general assembly of this commonwealth, approved the 20th day of March, Anno Domini 1812, entitled "An act to regulate the taking up of lumber in the rivers Susquehanna and Lehigh, and their branches," an act approved the 20th day of April, Anno Domini 1853, entitled "An act to regulate the advertisement of lumber lodging upon islands, et cetera," and an act, approved the 8th day of April, Anno Domini 1855, entitled "An act supplementary to an act to regulate the taking up of lumber, approved the 20th day of March, Anno Domini 1812," be and the same are hereby repealed, so far as relates to any of the several kinds of lumber mentioned in the 1st section of this act, having thereon a duly registered mark as aforesaid, in and along the streams and their tributaries mentioned in the 1st section of this act.

SECT. 8. Any bill of sale of any of the kinds of duly marked lumber aforesaid, executed and acknowledged as provided in the 2d section of this act, either by the owner of the mark stamped thereon, or his, her or their administrators or executors, or by any sheriff, or other public officer, that he has made sale of any such marked lumber as aforesaid, by virtue of lawful authority, shall be *prima facie* evidence that the title of the person, party or company owning the mark thereon in such lumber, has become vested in the grantee or grantees mentioned in such bill of sale as aforesaid; and the like effect shall be given to every subsequent bill of sale of any such lumber, made and acknowledged as hereinbefore provided.

III. The act 6 March 1849, provides for the taking up of floating lumber upon the waters of the Ohio, Allegheny or Monongahela rivers. Purd. 674. The act 19 April 1864 makes similar provisions for lumber found adrift in the river Delaware. Purd. 1345. The act 11 April 1866 provides for lumber found adrift in the river Schuylkill, or in the Delaware, having drifted out of the Schuylkill. Purd. 1431. And the act 11 December 1866 makes further provisions as to the taking up of saw logs in the Susquehanna and Lehigh and their branches. And see act 13 April 1868. P. L. 92.

To enable a salvor, under the act of 1812, to retain possession of lumber taken up adrift in the Susquehanna, against the owner, there must be a strict compliance with the provisions of the act. 2 C. 499.

If an insufficient and defective list of the lumber saved be filed before the justice, it cannot be amended after the owner has exercised his right of recapture. Ibid.

The act 11 December 1866 is not unconstitutional; but it does not apply to lumber lodged upon islands in the Susquehanna. 2 Leg. Gaz. 81.

Forcible Entry and Detainer.

I. What constitutes forcible entry and detainer.

III. Proceedings in case of forcible entry or detainer.

II. Provisions of the Penal Code.

IV. Judicial decisions.

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and
etc

I. **ALTHOUGH** jurisdiction of the *title* to lands or tenements cannot be exercised by magistrates, yet where the *right* to possess is attempted to be acquired or retained by *force*, then it becomes a breach of the peace, peculiar in its character, and requires a more speedy interposition than is afforded by the remedies of ordinary courts of law.

Possession should follow ownership, and he who by any means obtains possession of property belonging to another, is guilty of a gross wrong in attempting to retain it; but when the obtaining of it is by violence, the law recognises it as a substantive offence, for redress and punishment of which the law has pointed out substantive sufficient redress. To such an offence the law has given the distinctive name of "*Forcible Entry*," and to the analogous and too frequently consequent offence of similarly retaining possession, is given the name of "*Forcible Detainer*;" though generally "*Forcible Entry and Detainer*" is the joint title of the offence, as no motive could well be given for the forcible entry, unless a detainer by similar means follows the demand for restitution.

Forcible entry is the violently taking possession of lands and tenements, without right to enter, by force and arms, or with noises, threats or other demonstrations of violence. Forcible detainer is the violently *keeping* possession of lands and tenements, where the possessor has no right, by force and arms, or with noises, threats or other demonstrations of violence, which are sometimes evidenced by having and keeping a large number of persons assembled together for the purpose of taking or keeping possession by actual force or violence. The punishment of these offences is prescribed by the 21st and 22d sections of the revised Penal Code.

II. ACT 31 MARCH 1860. Purd. 221.

SECT. 21. If any person shall with violence and a strong hand, enter upon or into any lands or buildings, either by breaking open doors, windows or other parts of a house, or by any kind of violence or other circumstances of terror, or if any person, after entering peaceably, shall turn out by force or by threats, or menacing conduct, the party in possession, every person so offending shall be guilty of a forcible entry, and, on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court, and to make restitution of the lands and tenements entered as aforesaid.

SECT. 22. If any person shall by force and with a strong hand, or by menaces or threats, unlawfully hold and keep the possession of any lands or tenements, whether the possession of the same were obtained peaceably, or otherwise, such person shall be deemed guilty of forcible detainer, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court, and to make restitution of the lands and tenements unlawfully detained as aforesaid: *Provided*, That no person shall be adjudged guilty of forcible detainer, if such person, by himself, or by those under whom he claims, has been in peaceable possession for three years next immediately preceding such alleged forcible detention. (a)

(a) These two sections relate to the offences of forcible entry and detainer. The first specifies what shall constitute a forcible entry, and declares how the offence shall be punished. The second declares what conduct shall amount to a forcible detainer, and also defines the nature and extent of the punishment to be inflicted upon the offender. The only

statutory enactment of our own concerning the offences here referred to, is the act of 1700, 1 Sm. 1; but the English statutes, 15 Rich. II., ch. 11, 8 Hen. VI., ch. 9, 31 Eliz., ch. 11, and 21 James I., ch. 15, relative to forcible entry and detainer, are all reported to be in force in this state. The provisions contained in our statute of 1700, as well as those of the

III. There is no offence more easily understood and more distinctly described than this is by its title. There can be no *construction* on the facts; they must exhibit a violent or actually forcible possession, in a violent manner, or by forcible means, and can only apply to cases of excessive intrusion originally, or wanton retention, where the original entry was justifiable, or even, if unlawful, was not forcible. The offence may be committed by one or more, and all who participate are equally guilty. Thus, where forcible possession is attempted by one, with the assistance of others, either armed or displaying other indications of violence, all present are adjudged to be guilty of the forcible entry; and properly so, as without such assistance the force of one person would seldom be attempted to be set up.

This offence is the subject of indictment, to be proceeded with as in other cases. Complaint of injury is made before a magistrate, who, on proper application, issues a warrant, and after having committed or bound over the defendant or defendants for trial; and upon the conviction, or plea of guilty, the court inflict such punishment as is commensurate with the character of the offence, and restore the premises to their lawful possessor. If the forcible detainer be persisted in, the magistrate may commit for the continued breach of the peace, or order such surety for good behavior until the time of trial, as will insure speedy justice and the prompt abatement of the nuisance.

Besides the redress thus afforded, the party injured may recover damages in an action of trespass; it is a well settled principle of law that wherever injury is done by the unlawful act of another, that other is responsible in damages to the party aggrieved. And the conviction upon indictment, in no manner lessens the claim of the party aggrieved for damages. Damages are given as compensation for the injury; the other proceedings are rather in advancement of public justice than private redress.

IV. To constitute the offence of forcible entry there must be such acts of violence, or such threats, menaces, signs or gestures, as may give reason to apprehend personal injury or danger, in standing in defence of the possession. A. 14, 17, 42, 355. 6 S. & R. 252. The statute requires as an indispensable ingredient in the offence, "violence and a strong hand." 1 Y. 501. The force must amount to a breach of the peace. 1 Brewst. 509. 2 Ibid. 564.

Where no other force is used than is implied in every trespass, the case is not within the statute. 1 Sm. 3, n. 7 Sm. 723.

Unless there be possession in another at the time of the entry, it is no offence, whatever may be the degree of force used. A. 43, 315, 355.

In order to constitute a forcible entry, the prosecutor's possession must be quiet, peaceable and actual; not a mere *scrambling* possession; and the entry must be accompanied by actual force or intimidation. Therefore, a man who breaks open the door of his own dwelling, which is forcibly detained from him by one who claims the bare custody of it, cannot be guilty of this offence. 1 Ash. 140. A. 17, 43, 316, 355. 6 S. & R. 252. 10 W. 144, 455. 1 Brewst. 509.

An indictment for *forcible* entry may be sustained against a landlord for *forcibly* ejecting a sub-tenant, after the termination of the tenancy and removal of the principal tenant. 5 P. L. J. 119. 2 P. 401.

And a prosecution for forcible entry will lie by one tenant in common against his co-tenant, where the possession has been adverse and exclusive. 2 P. 420.

The *entry* and the *detainer* are distinct offences, and although both be charged in the same indictment, the defendants may be acquitted of one and convicted of

the aforementioned English statutes, are all supplied by the 21st and 22d sections of this act. Whilst the language is greatly simplified and condensed, the only material alteration in the law itself, will be found in making the proceeding by indictment the exclusive criminal remedy, thereby excluding the inquisition now authorized to be held before two justices of the peace, which is believed to be entirely unnecessary, in view of the fact that restitution is to form part of the sentence, except in cases of conviction for forcible detainer, where

three years' peaceable possession has immediately preceded the commission of the offence. This limitation has not been extended to convictions for forcible entry, because, according to the statutory limitation proposed by us for misdemeanors, no conviction can be had unless the offender is prosecuted within two years after the commission of the offence. The punishment of fine and imprisonment is the same as at common law, except the *maximum* is mentioned, as in other sections of the Report on the Penal Code 16.

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the other. 1 S. & R. 124. There may be a forcible detainer, though the entry was peaceable; and it is sufficient if it appear from the indictment that the aggrieved party was forcibly kept out of possession.

To authorize judgment of restitution, the estate of the prosecutor must be averred in the indictment, possession is not enough. 9 Barr 184. 2 P. 411.

The defendant cannot excuse his act, by showing that the prosecutor was his tenant, and was carrying on a business which increased the insurance risk. 1 Brewst. 509.

Forgery.

[See COUNTERFEITING.]

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| I. Provisions of the Penal Code. | III. Judicial decisions and authorities. |
| II. Consideration of forged instruments
may be recovered back. | IV. A warrant against one charged with
forgery. |

I. ACT 31 MARCH 1860. Purd. 245.

SECT. 169. If any person shall fraudulently make, sign, alter, utter or publish, or be concerned in the fraudulently making, signing, uttering or publishing any written instrument, other than notes, bills, checks or drafts already mentioned, to the prejudice of another's right, with intent to defraud any person or body corporate, or shall fraudulently cause or procure the same to be done, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.

SECT. 170. If any person shall falsely and fraudulently forge or counterfeit, or falsely and fraudulently be concerned in the forging and counterfeiting the great or less seal of the commonwealth, the public and common seal of any court, office, county or corporation, or any other seal authorized by law, or shall falsely and fraudulently utter and publish any instrument or writing whatever, impressed with such forged and counterfeit seal, knowing the same to be forged and counterfeit, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

SECT. 171. If any person shall forge, deface, embezzle, alter, corrupt, withdraw, falsify or unlawfully avoid any record, charter, gift, grant, conveyance or contract; or shall knowingly, fraudulently or unlawfully spare, take off, discharge or conceal any fine, forfeited recognisance or other forfeiture; or shall forge, deface or falsify any registry, acknowledgment or certificate; or shall alter, deface or falsify any minute, document, book or any proceeding whatever of or belonging to any public office within this commonwealth; or if any person shall cause or procure any of the offences aforesaid to be committed, or be in anywise concerned therein; he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding two thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years; and if a public officer, he shall be removed from said office, and the same be declared vacant by the court passing sentence upon him.

. II. ACT 5 APRIL 1849. Purd. 111.

SECT. 10. Whenever any value or amount shall be received as a consideration in the sale, assignment, transfer or negotiation, or in payment of any bill of exchange, draft, check, order, promissory note or other instrument negotiable within this commonwealth, by the holder thereof, from the indorsee or indorsees, or payer or payers of the same, and the signature or signatures of any person or persons represented to be parties thereto, whether as drawer, acceptor or indorser, shall have been forged thereon, and such value or amount, by reason thereof, erroneously given or paid, such indorsee or indorsees, as well as such payer or payers

respectively, shall be legally entitled to recover back from the person or persons previously holding or negotiating the same, the value or amount so as aforesaid given or paid by such indorsee or indorsees or payer or payers respectively to such person or persons, together with lawful interest thereon, from the time that demand shall have been made for repayment of the same.

III. Forgery, at the common law, is an offence in falsely and fraudulently making or altering any manner of record, or any other authentic matter of a public nature; as a parish register, or any deed, will or the like. 1 Hawk. P. C. 182-4.

The forgery of any writing which may be prejudicial to another is indictable at common law. A. 84. Ld. Raym. 1461. Vaux's Dec. 47.

Any alteration of a genuine instrument in a material part, whereby a new operation is given to it, is a forgery of the whole. Whart. Cr. L. § 1421.

If there be two persons of different descriptions and addresses, but of the same name, and one signs his name with the address of the other, for the purpose of fraud, it is forgery. Bayl. Bills 432.

A man may even be guilty of forgery by signing his own name: thus, where coal being consigned to P., of New York, arrived there, and was claimed by another of the same name who resided there, but was not the true assignee; and he, knowing this, obtained an advance of money, on indorsing the permit for the delivery of the coal, with his own proper name: it was held, that this was a forgery. 6 Cow. 72.

One receiving a counterfeit note from an innocent person, in payment, and keeping it by him six months, *without notice*, is guilty of gross negligence, and must sustain the loss. 18 S. & R. 318.

It is not forgery to get an illiterate man to sign a note for \$141, by falsely and fraudulently pretending that it is for \$41 only. 10 H. 390.

The making of a false entry in the journal of a mercantile firm, by a confidential clerk and book-keeper, with intent to defraud his employers, is a forgery at common law. Such forgery may consist in a false addition of the amount of cash received from bills receivable. 8 C. 529.

The act of 5th April 1849, was only declaratory of the common law. 6 C. 527. Notice of the forgery, within a reasonable time after its discovery, and an offer to return the note, are necessary to the maintenance of an action for the recovery of the consideration paid, unless waived by the defendant, or the note be shown to be of no value. 6 C. 145, 527.

In an action to recover back the money paid for a promissory note, with a forged indorsement, the supposed indorser is a competent witness to prove the forgery. 6 C. 527.

The transferer of negotiable paper warrants that it is not forged or fictitious, though he do not indorse it. 14 Wr. 441.

IV. WARRANT AGAINST ONE CHARGED WITH FORGERY.

MERCER COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of U—— M——, in the County of Mercer, greeting: You are hereby commanded to take the body of A. B., if he be found in the said county, and bring him before J. R., one of our justices in and for the said county, to answer the indictment upon a charge, founded on the oath of C. D., of having feloniously altered certain promissory note drawn by E. F. in favor of G. H., dated April 27th 1859, for \$100.67½, and further to be dealt with according to law; and for so doing this shall be your warrant. Witness the said J. R., at U—— M——, who hath hereunto set his hand and seal, the tenth day of May, A. D. 1860. J. R., Justice of the Peace. [SEAL.]

Fornication and Bastardy.

- I. Provisions of the Penal Code.
- II. Judicial decisions.
- III. Form of a warrant and commitment for

- bastardy.
- IV. Form of a warrant for concealing the death of a bastard child.

I. ACT 31 MARCH 1860. PURD. 223.

SECT. 37. If any person shall commit fornication, and be thereof convicted, he or she shall be sentenced to pay a fine not exceeding one hundred dollars, to the guardians, directors or overseers of the poor of the city, county or township where the offence was committed, for the use of the poor of such city, county or township; and any single or unmarried woman having a child born of her body, the same shall be sufficient to convict such single or unmarried woman of fornication; and the man, by such woman charged to be the father of such bastard child, shall be the reputed father, and she persisting in the said charge, in the time of her extremity of labor, or afterwards in open court, upon the trial of such person so charged, the same shall be given in evidence, in order to convict such person of fornication, and such person being thereof convicted, shall be sentenced, in addition to the fine aforesaid, to pay the expenses incurred at the birth of such child, and to give security, by one or more sureties, and in such sum as the court shall direct, to the guardians, directors or overseers of the poor of the city, county or township where such child was born, to perform such order for the maintenance of the said child, as the court before which such conviction is had shall direct and appoint.

SECT. 38. If a bastard child is begotten out of the state, and born within the state, or begotten within one of the counties of this state, and born in another, in the latter case, the prosecution of the reputed father shall be in the county where the bastard child shall be born, and the like sentence shall be passed as if the bastard child had been or shall have been begotten within the same county; and in the former case, viz., of a bastard begotten without the state and born within it, the like sentence shall be passed, except in the imposition of a fine, which part of the sentence shall be omitted.

SECT. 39. If any woman shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by law be a bastard, so that it may not come to light whether it was born dead or alive, or whether it was murdered or not, every such mother, being convicted thereof, shall suffer an imprisonment, by separate or solitary confinement at labor, not exceeding three years; and if the grand jury shall, in the same indictment, charge any woman with the murder of her bastard child, as well as with the offence aforesaid, the jury by whom such woman shall be tried, may either acquit or convict her of both offences, or find her guilty of one and acquit her of the other, as the case may be. (a)

(a) The 8th section of the act of 1718 subjected the concealment, by the mother, of the death of a bastard child, to the penalty of death, except such mother could make proof, by one witness at least, that the child, whose death was by her so concealed, was born dead; this provision was copied from the English statute of 21 James I., ch. 27; the rigorous nature of this statute suggested the passage of the 6th section of the act of 5 April 1790, which declares that "the constrained presumption that the child whose death is concealed, was therefore murdered by the mother, shall not be sufficient evidence to convict the party indicted, without probable presumptive proof is given that the child was born alive;" and that of the 18th section of the act of 1794, which declares "that the concealment of the death of any such child shall not be conclusive evidence

to convict the party indicted of the murder of her child, unless the circumstances attending it be such as shall satisfy the mind of the jury that she did wilfully and maliciously destroy, and take away the life of such child." In this state of the law, it seemed better to the commissioners to repeal all the existing statutes of the subject, and to substitute a plain provision, making the concealment of the death of an illegitimate child a substantive offence. The destruction of the life of such child by its mother is thus left subject to the same punishment, and susceptible of the same proof as ordinary cases of murder. They have, however, preserved that feature of the act of 1794 which authorizes counts for the murder of a bastard child, and for concealment of its death, to be united in the same indictment. Report on the Penal Code 25.

II. Where a man and his wife live together as married persons usually do, a third person may be convicted of fornication with the wife, but not of bastardy, unless the bodily impotence of the husband be clearly and fully established. 1 Ash. 9.

Where the husband and wife live separate and apart, it may be shown, either on facts or circumstances, that the husband had not access to the wife. Ibid.

If the husband have access to his wife, no evidence short of absolute impotence will bastardize the issue; but if they live at a distance from each other, so that access is improbable, the legitimacy of the issue may be made a question upon the evidence. 6 B. 283.

On an indictment for fornication and bastardy, a married woman is a competent witness to prove the criminal connection, but not the non-access of the husband. Id.

On an indictment for fornication and bastardy, if a witness testify that he had no connection with the prosecutrix about the time the child was begotten, her competency as a witness to prove the defendant is the father of the child, is thereby destroyed; but the credibility of the witness is for the jury. 4 P. L. J. 136.

It is impossible for a mother to decide to which of two or more connections about the same time, her conception is to be imputed: and therefore, on the trial of an indictment for fornication and bastardy, the prosecutrix may be asked "if she had connection with any other person about the time when the child was begotten." 1 P. L. J. 43.

In an indictment charging the defendant with fornication and bastardy, where the period of gestation proved was three hundred and thirteen days, the court ruled, that although this was an unusual period of gestation, it was not an impossible one, and that the defendant might have been the father of a child born under such circumstances. 6 P. L. J. 195. 1 Cr. C. C. 592.

In an indictment for fornication and bastardy, the witness testified, "*he forced me, he worked himself under me, and in that way forced me: I did not give my consent.*" Upon a demurrer to this evidence, it was held, that it was not such as would merge the offence charged in the crime of rape; but that the defendant might be legally convicted. 5 W. & S. 345.

In an indictment for fornication and bastardy, an omission to state the sex of the child is fatal. 1 R. 142.

The term "illicit intercourse," in an indictment for conspiracy to cause a female to commit fornication, is a sufficient designation of the offence. Commonwealth v. Schamps, Q. S. Phila., 3 June 1854. MS.

On an indictment for seduction, the defendant may be convicted of simple fornication. 5 H. 126.

In Pennsylvania, the court allow for lying-in charges, and direct payment of a sum for support of the child from its birth to the rendition of judgment, and the person who incurred the expenses be dead, the money may be awarded to his legal representative. 3 Y. 39.

The period and amount of maintenance of the child is, by statute, in Pennsylvania, left to the judgment of the quarter sessions, and they may alter their practice if they find proper. 4 B. 541.

The practice in Pennsylvania on a conviction is, to require the defendant to give security to perform all the sentence, except fine and costs; for these he is committed to pay them. 6 S. & R. 282.

An action of debt does not lie upon the sentence of the court of quarter sessions. 3 S. & R. 9.

The prosecutrix cannot maintain an action against the constable for an escape, after conviction; but after sentence, she may do so. 6 H. 263-4. 9 H. 215. 1 A. 63. 9 P. F. Sm. 320.

A bond, conditioned "from time to time and at all times hereafter" to indemnify the county from all expenses which shall accrue by reason "of the birth, maintenance, education and bringing up of the child," is good. 3 H. 409.

One who subsequently marries the prosecutrix, cannot release the allowance for maintenance. 6 H. 116.

Sex.

Concealment of the *birth* of a bastard child is no offence under 89th section. Vaux's Dec. 24.

An indictment under the 89th section which does not distinctly aver the *death* of the child, is bad. 8 W. 535.

But it is not necessary to set forth in what manner, or by what acts, the mother endeavored to conceal the death of the infant. 2 S. & R. 40.

If the mother die in child-birth, her declarations as to the paternity of her child, are not evidence as death-bed declarations. 21 Leg. Int. 4.

The court may, in its discretion, decree the maintenance to be paid to any person other than the mother. 7 Wr. 61.

III. A WARRANT FOR BASTARDY.

COUNTY OF HUNTINGDON, ss.

The Commonwealth of Pennsylvania,

To any Constable in the said county, greeting:

WHEREAS, A. E. B., of the said county, hath made oath before the subscriber, one of our justices of the peace in and for the said county, that she is now pregnant with a bastard child, which is likely to become chargeable to the said county; that D. F., farmer, of G—— township, in the said county, did beget her with child, and that he is the father of the same. These are, therefore, in the name of the said commonwealth, to require and command you, or some one of you, forthwith to apprehend the said D. F., and bring him before the subscriber to answer the said premises, and to be further dealt with according to law. Witness our said justice of the peace, under his hand and seal, this tenth day of May, A. D. 1860.

T. E., Justice of the Peace. [SEAL.]

NOTE.—When the defendant is brought before the justice, he must take bail from him to appear at the next session to answer the charge, or in default of sufficient surety, commit him to the county prison, and bind over the witnesses to give testimony.

The above warrant, and the practice under it, seem to have originated from the provisions of the statute of 6 Geo. II., ch. 31, which enacts that "if any single woman be delivered, or declare herself with child of a bastard, likely to be chargeable to a parish, or any extraparochial place; and on oath, in writing, before one or more justices of the county or corporation, charge any one of getting her with child, the justices, on application of any overseer, may grant a warrant against the person charged, and shall commit him to jail, or the house of correction, unless he give security to indemnify the parish, or a recognisance to abide the order of the next quarter or general sessions. *Provided*, if the woman die, marry, miscarry or be not with child, or no order be made within six months after delivery, &c., he shall be discharged," &c. Com. Dig., Bastard, G. 2.

A COMMITMENT FOR BASTARDY.

COUNTY OF HUNTINGDON, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said county, and to the Keeper of the Prison of the said County of Huntingdon, greeting:

THESE are to authorize and require you, the said constable, forthwith to convey and deliver into the custody of the keeper of the prison, the body of D. F., farmer, charged on oath before T. E., one of our justices of the peace in and for the said county, with having, within the said county, begotten A. E. B., a single woman, with child, of which bastard child she is now pregnant, and which when born is likely to become chargeable to the said county; and you, the said keeper, are hereby required to keep the said D. F. in your custody in the said prison, and him there safely to keep till the next court of quarter sessions of the said county of Huntingdon, or until he shall thence be delivered by due course of law; and for so doing this shall be your sufficient warrant. Witness the said T. E., at H——, who hath hereunto set his hand and seal the twelfth day of May, Anno Domini 1860.

T. E., Justice of the Peace. [SEAL.]

IV. A WARRANT FOR CONCEALING THE DEATH OF A BASTARD CHILD.

HUNTINGDON COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of H—— township, in the County of Huntingdon, greeting:

WHEREAS, information hath been made upon oath to J. R., one of our justices of the peace

in and for the said county, that M. B., of D—— township, in the said county, single woman, hath had a bastard child, lately born alive, of her body, which child is since dead, and that the said M. B. hath concealed the death of the said bastard child. You are, therefore, hereby commanded to take the said M. B. and bring her before our said justice to answer the said complaint, and further to be dealt with according to law. Witness the said J. R., at H—— township aforesaid, the 10th day of April, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

Fortune Telling.

ACT 8 APRIL 1861. Purd. 225.

SECT. 1. Any person who shall pretend, for gain or lucre, to predict future events, by cards, tokens, the inspection of the head or hands of any person, or by any one's age, or by consulting the movements of the heavenly bodies; or who shall, for gain or lucre, pretend to effect any purpose by spells, charms, necromancy or incantation, shall be guilty of a misdemeanor, punishable by any court of quarter sessions in this commonwealth by fine and imprisonment, or both or either, at the discretion of the court; the first offence shall be punished with not more than two years imprisonment, nor less than fifteen days, and a fine of not more than one hundred, nor less than ten dollars; the second offence with any term of imprisonment and fine, not exceeding five years or five hundred dollars, as the court may deem proper.

SECT. 2. Whosoever shall pretend, for lucre or gain, to tell fortunes or foretell future events, by other means than those aforesaid, shall be guilty of a misdemeanor, to be prosecuted as offences against public law are now prosecuted in this commonwealth, and to be punished as is provided in section first of this act.

SECT. 3. If any person or persons shall publish, by card, circular, sign, newspaper or any other means whatsoever, that he or she shall or will predict future events, the said publication may be given in evidence to sustain an indictment under the first and second sections of this act.

SECT. 4. Any person whose fortune may have been told as aforesaid, shall be a competent witness against all persons charged with any violation of the provisions of this act.

SECT. 5. Any person or persons who shall advise the taking or administering of what are commonly called love powders or potions, or who shall prepare the same, to be taken or administered, shall be guilty of a misdemeanor, and shall be punished as is provided in section one of this act.

SECT. 6. Any person or persons who shall pretend, for lucre or gain, to enable any one to get or to recover stolen property, or to tell where lost articles or animals are, or to stop bad luck, or to give good luck, or to put bad luck on any person or animals, or to stop or injure the business of any person, or to injure the health of any person, or to shorten the life of any person, or to give success in business, enterprise, speculation, lottery, lottery numbers or games of chance, or win the affections of any person whatever, for marriage or seduction, or to make one person marry another, or to induce any person to alter or make a will in favor or against any one, or to tell the place where treasure, property, money or valuables are hid, or to tell the place where to dig or to search for gold, metals, hidden treasure or any other article, or to make one person dispose of property, business or any valuable thing in favor of another, shall be guilty of a misdemeanor, punishable under the provisions of this act, in any court of quarter sessions; and the party or parties who may have consulted such persons as have pretended to do any of the acts aforesaid, shall be competent witnesses in all proceedings for a breach or breaches of this act.

Frauds.

I. Provisions of the Penal Code.

1. Fraudulent destruction of written instruments.

2. Fraudulent disposition of property.

3. Fraudulent insolvency.

4. Fraudulent collusion with insolvents.

II. Judicial decisions.

I. ACT 31 MARCH 1860. PURD. 238.

1. **SECT. 129.** If any person shall fraudulently or maliciously tear, burn or in any other way destroy any deed, lease, will, bond or any bill or note, check, draft or other security for the payment of money, or the delivery of goods, or any certificate of loan or other public security of this commonwealth, or of the United States, or any of them, or any certificate of the stock or debt of any bank, corporation or society, either of this commonwealth or the United States, or either of them, or of any foreign country, or any receipt, acquaintance, release or discharge of any debt, suit or other demand, or any transfer or assurance of money, stock, goods, chattels or other property, or any letter of attorney or other power, or any day-book or other book of accounts, or any agreement or contract whatever, with intent to defraud, prejudice or injure any person, bank, body corporate, society or association, the person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, not exceeding three years, or either, or both, at the discretion of the court.

2. **SECT. 130.** Any person who shall remove any of his property out of any county, with intent to prevent the same from being levied upon by any execution, or who shall secrete, assign, convey or otherwise dispose of any of his property, with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent, or who shall, with like intent, collude with any debtor for the concealment of any part of his estate or effects, or for giving a false color thereto, or shall conceal any grant, sale, lease, bond or other instrument or proceeding, either in writing or by parol, or shall become a grantee, purchaser, lessee, obligee or other like party in any such instrument or proceeding, with the like fraudulent intent, or shall act as broker, scrivener, agent or witness, in regard to such instrument or proceeding, with the like intent, such person or persons, on conviction thereof, shall be guilty of a misdemeanor, and be sentenced to pay a sum not exceeding the value of the property or effects so secreted, assigned, conveyed or otherwise disposed of or concealed, or in respect to which such collusion shall have taken place, and undergo an imprisonment, not exceeding one year.

3. **SECT. 131.** If it shall appear to the court upon the hearing of any petition in insolvency, either by the examination of the petitioner, or other evidence, that there is just ground to believe either—

I. That the insolvency of the petitioner arose from losses by gambling, or by the purchase of lottery tickets; or

II. That such petitioner had embezzled or applied to his own use any money, or other property with which he had been intrusted, either as bailee, agent or depository, and to the prejudice of the opposing creditors; or

III. That he has concealed any part of his estate or effects, or colluded or contrived with any person for such concealment, or conveyed the same to any person for the use of himself, or any of his family or friends, or with the expectation of receiving any future benefit to himself or them, and with intent to defraud his creditors; in every such case it shall be the duty of the court to commit such person for trial.

SECT. 132. If such debtor shall, upon trial, be convicted of any of the acts mentioned in the preceding section, he shall be adjudged guilty of a misdemeanor, and shall be sentenced as follows:

I. If found guilty of embezzlement or concealment of property, as aforesaid, he shall be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

II. If it shall appear, by the verdict of the jury on such trial, that the insolvency of the petitioner was caused by gambling or the purchase of lottery tickets, as aforesaid, he shall be sentenced to an imprisonment not exceeding three years.

SECT. 133. If no bill shall be presented to the grand jury at the next sessions, or if the bill shall not be found, or if the indictment shall not be tried at the second session after the commitment of such petitioner, unless the postponement of the trial take place at the instance of such petitioner, or if, upon trial, such debtor be acquitted, it shall be the duty of the court of common pleas to discharge him from imprisonment upon his proceeding as is provided by the insolvent laws.

4. SECT. 134. If any person, with intent to defraud the creditors of an insolvent debtor, or any of them, shall collude or contrive with such insolvent debtor for the concealment of any part of his estate or effects, or for giving a false color thereto, or shall contrive or concert any grant, sale, lease, bond or other instrument or proceeding, either in writing or by parol, or shall become a grantee, purchaser, lessee, obligee or other like party, in any such instrument or proceeding, with the like intent, or shall act as broker, scrivener, agent or witness, in regard to such instrument or proceeding, with the like intent, such person shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars, and to undergo an imprisonment not exceeding two years, and shall forfeit all claim which he may have to any part of the estate of such debtor.

II. To render the offence complete, under the 130th section of the act, the assignment or conveyance of the property must be with a fraudulent intent, to prevent the creditor from pursuing his legal means for making his debtor's effects available for the payment of his debts in a legitimate way, conceived at the time of the conveyance. If the transfer was legal, and *bona fide*, between the parties, if made to give a preference to one creditor over another, it is not criminal. The proper subject for inquiry is not, whether the bargain was a good one, or such a sale as a prudent man would make of his effects; but simply, was the transfer tainted with fraud, or consummated in iniquity, with a design to injure a creditor. 2 P. 317. 3 P. L. J. 86.

To constitute the offence, there must be an *actual* secreting or assigning; a mere refusal to surrender them is not enough. 1 Brewst. 347.

If a creditor resort to a prosecution under the 130th section of the act, for the mere purpose of compelling a settlement of his claim, he will be liable to an action for malicious prosecution. The act is intended to punish a criminal offence, not to be used as a means of collecting debts, however just, and to suffer it to be perverted to that purpose would necessarily lead to great injustice and oppression. 1 J. 84.

Where a petitioner for the benefit of the insolvent laws, was the president of a railroad company, and had issued certificates of stock and loans, in the name of the company, without the knowledge of the managers, and pledged the same as collateral security for moneys borrowed and applied to his own; it was *held*, that this was a case of embezzlement within the meaning of the act relating to fraudulent insolvency. 2 Ash. 287.

A tax collector is an agent within the meaning of the 2d clause of the 131st section of the act. Fisher's Case, 2 Wh. Dig. 27, pl. 133.

If a defendant charged with fraudulent insolvency, be acquitted, he must be discharged by the court. 2 Wh. Dig. 27, pl. 125. But if convicted, and pardoned, he may still be held in custody under the execution. 1 Ash. 84.

Fraudulent Conveyances.

I. Statute against fraudulent conveyances.

II. Judicial decisions.

I. STATUTE 13 ELIZABETH, CAP. V. Purd. 1025.

SECT. 2. Provides that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands or goods, or of any lease, rent, common or other profit, or charge out of the same, by writing or otherwise; and all and every bond, suit, judgment and execution, at any time had or made, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed [to wit, *to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, &c.*] shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, whose actions, suits, debts, &c., by such fraudulent devices and practices, as aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded) *to be clearly and utterly void* and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

SECT. 6. Provides that this act shall not extend to property conveyed *bonâ fide*, and on good consideration, to any person not having notice or knowledge of the fraud.

The statute of 13 Eliz., c. 5, relates to creditors only: the statute of 27 Eliz., c. 4, contains similar provisions for the protection of subsequent *bonâ fide* purchasers. Rob. Dig. 298.

II. To bring a case within the statute of 13 Eliz., c. 5, the conveyance must be voluntary; it must be made by the owner of the land, he being at the time indebted; and with intent to delay, hinder and defraud creditors or others of their just and lawful actions, &c.; and in general the intent will be presumed from the circumstance of the party being indebted. Where these circumstances occur the conveyance is void, as well in respect to *subsequent* as to *prior* creditors. 1 P. C. C. 460, 464. See 1 Am. Lead. Cas. 41-79.

If the motive of the grantor in a voluntary conveyance, be to withdraw property from the reach of debts he intends to contract, the deed is invalid as against debts subsequently incurred. 3 Wr. 499.

A man cannot settle his property to his own use, until a creditor assails it, and then over, so as to prevent his creditor from seizing it. 10 Wr. 411.

The fraudulent intent as to existing creditors, is a conclusion of law, where the deed is a voluntary one; but where it is otherwise, the fraudulent intent is to be established as a fact, by the party impugning the conveyance. 8 C. 123.

A conveyance of real estate by a father to his son, intended to delay and hinder creditors, is fraudulent as to them, whether the consideration amount to the value of the land or not. 4 H. 488.

The consideration of a sale may amount to the value of the land sold, and yet the sale be fraudulent as against creditors, because such sale may delay, hinder and obstruct them in the collection of their debts. 4 H. 497.

A deed made to hinder and delay creditors, though void as to them, nevertheless concludes the debtor for all other purposes. 5 C. 219. The deed is good except against the interest intended to be defrauded. 3 C. 148.

Freeholder.

FREEHOLDERS are entitled to certain privileges in this state: 1. By the act of 1725 to an exemption from arrest, on mesne process, in any civil action. (Purd. 35.) 2. By the acts of 1810 and 1836 to a stay of execution, on judgments obtained against them. Purd. 431, 601.

For purposes of exemption from arrest, the act of 1725 defines a freeholder to be an inhabitant in any part of this province who hath resided therein for the space of two years, and has *fifty* acres of land or more, in fee simple, well seated, and *twelve* acres thereof or more, well cleared or improved, or hath a dwelling-house worth *fifty pounds* current money of America, in some city or township within this province, clear estate, or hath unimproved land to the value of *fifty pounds* like money.

But in order to be entitled to a stay of execution, the defendant must have a freehold, *within the county* where the judgment is entered. 5 B. 432. Purd. 431.

Any incumbrance on a freehold estate is sufficient to deprive a defendant of a stay of execution. It is not enough that the estate may be considered equal to the judgment, after paying all incumbrances. 5 B. 253.

A judgment obtained before a justice of the peace is sufficient ground to defeat the privilege of a freeholder. 1 D. 436.

If a defendant freeholder, who seeks to avail himself of the privilege arising from his freehold, neglect to suggest it, it would justify the issuing of an execution against him; but, *on the payment of costs* accrued on the execution, the magistrate should supersede it, and give the defendant the privilege secured by law. 1 Ash. 407.

Where a plea of freehold for a stay of execution is entered by a defendant, the plaintiff may issue execution, but at his peril. 2 M. 847.

If the plaintiff issue execution, notwithstanding the plea, on defendant's motion to set it aside, if the freehold be found sufficient, the motion will be granted, and the plaintiff will be compelled to pay the costs of the execution: if the freehold be found insufficient, the execution will be good. Ibid. On a plea of freehold being entered, the plaintiff may move to dismiss it for insufficiency. 1 Phila. R. 204. 1 T. & H. Pr. 833. 2 M. 847.

If the freehold be within the county, the defendant need only show its existence and value; it then lies on the plaintiff, if he object, to show an incumbrance; but if it lie in another county, the defendant must, in addition, produce evidence of its being clear from incumbrances. 1 T. & H. Pr. 250.

If there be two persons concerned in the same transaction upon which a suit is brought, and one of them be privileged from arrest, he being a freeholder and the other not, the party freeholder is liable to be jointly arrested with the other; for a party privileged from arrest loses that advantage by his partnership with one who is not entitled to such privilege. 2 Br. 136.

Under the act of 1725, if the defendant's freehold be clear of incumbrances, it is enough that it be of the value of fifty pounds, though less than the plaintiff's demand; if incumbered, the question is, whether it would be sufficient to satisfy the plaintiff's demand, over and above the incumbrances. 1 S. & R. 363-5.

Fugitives from Justice.

I. Constitution of the United States.
II. Act of congress.

III. Judicial decisions.

I. A person charged in any state, with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. Const. U. S. Art. IV. § 2.

II. ACT OF CONGRESS, 12 FEBRUARY 1793. 1 Bright. Dig. 293.

SECT. 1. Whenever the executive authority of any state in the union, or of either of the territories north, west or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled; and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory, as aforesaid; charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive; and to cause the fugitive to be delivered to such agent, when he shall appear: but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs and expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

SECT. 2. Any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person or persons shall by force set at liberty or rescue the fugitive from such agent, while transporting as aforesaid, the person or persons so offending, shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year.

III. The right to arrest criminals who had fled from one state to another, was recognised under the colonial governments before the adoption of the constitution of the United States. It was based upon that great principle of the common law, that when a crime has been committed, any one has authority to arrest the offender, with or without a warrant. Since the adoption of the federal constitution, and the passage of the act of congress in 1793, it has always been the practice, in every state, to arrest a criminal who has fled from justice, and taken refuge in another state, and detain him till a formal requisition can be made by the proper authority for his surrender and removal; and this, upon the principle of comity between the several states; each acting under the great principle of the common law just stated. *Hyer's Case*, Com. Pleas, Phila., February 1848, before PARSONS, J.

This right to arrest under such circumstances, has been fully recognised by the supreme court, in the case of *The Commonwealth v. Deacon*. The late chief justice, in delivering the opinion of the court in that case, remarks: "I grant, that when the executive has been in the habit of delivering up fugitives, or is obliged by treaty, the magistrates may issue warrants of arrest on their own accord, (on proper evidence,) in order the more effectually to accomplish the intent of the government, by preventing the escape of the criminals. On this principle, we arrest offenders who have fled from one of the United States to another, even before a demand has been made by the executive of the state from which they fled." 10 S. & R. 135. The same point is decided in 4 Harring. 572. 9 Wend. 221. 6 P. L. J. 428. R. M. Charl. 120. Vaux's Dec. 30. 6 H. 39. 3 Zab. 311. 17 Leg. Int. 244.

It makes no difference, whether or not the offence charged be a *felony* by the laws of the state from which the party is alleged to be a fugitive. 1 Sandf. S. C. 701. In Pennsylvania, the ordinary practice with the executive is, to issue his warrant of surrender, whenever a requisition is supported by an indictment, duly accompanied by executive averment that the particular offence is a crime in the state where it was committed, and by an affidavit that the defendant has fled from such state into the one where the warrant is demanded. 6 P. L. J. 424. 13 Geo. 97. 21 Law Rep. 488.

Fugitives slaves are not embraced, and cannot be demanded under that clause of the constitution which provides for delivering up fugitives from justice; although the offence of running away from their masters be punishable by indictment, in the state from which they fled. Ibid. 425.

An affidavit to arrest an alleged fugitive from justice, must state *positively* that the alleged crime was committed in the state from which the party is alleged to be a fugitive, and that the party is actually a fugitive from that state. 1 Sandf. S. C. 701. 6 P. L. J. 417, 418. 6 Law Rep. 57. 3 McLean 121. 3 Zab. 311. 2 Carter 396. 5 Cal. 237.

The affidavit, when that form of evidence is adopted, must be at least so explicit and certain, that if it were laid before a magistrate, it would justify him in committing the accused to answer the charge. 6 P. L. J. 414, 418.

The warrant of removal must show that a demand has been made by the executive of the state from whence the fugitive fled; and also that information has been given, either by the copy of a bill of indictment, or by affidavit, charging the fugitive with having committed a crime; which should be stated as it is represented in the indictment or affidavit furnished. If the validity of the warrant be examined on *habeas corpus*, it ought to appear affirmatively that the governor had jurisdiction of the case, otherwise the warrant is utterly void. Hyer's case, 1 Am. L. J. 430.

Where the warrant is duly issued, the courts cannot go behind it; the only question they can entertain is as to the identity of the alleged fugitive. 6 P. L. J. 417.

Where a defendant is brought into a state as a fugitive from justice, after acquittal, or conviction and pardon, he cannot be surrendered to the authorities of another state as a fugitive, but must be allowed an opportunity to return to the state in which he is domiciled. Daniel's Case, 22 April, 1848, Quarter Sessions, Phila., before PARSONS, J.

Where the governor of one state demands a person of the governor of another state, as a fugitive from justice, and the governor of the latter state causes the accused to be arrested and delivered to the person appointed for that purpose by the governor making the demand, such person is not liable for a false imprisonment, by reason of any irregularity in the warrant of arrest. 2 Blackf. 311. The governor's warrant is a conclusive justification. 20 Law Rep. 651.

The governor issuing the requisition is the only proper judge of the authenticity of the affidavit. 5 Cal. 237. 21 Law Rep. 488. 16 Leg. Int. 20.

Gambling.

- I. Of gambling-houses.
- II. Of cock-fighting, gaming, &c.
- III. Of gaming, &c., at taverns.

- IV. Of money lost at play.
- V. Of billiard rooms and bowling saloons.
- VI. Judicial decisions.

I. OF GAMBLING-HOUSES.

IF any person shall set up or establish, or cause to be set up or established in any house, room, out-house, tent, booth, arbor or other place whatsoever, any game or device of address or hazard, with cards, dice, billiard balls, shuffle-boards or any other instrument, article or thing whatsoever, heretofore or which hereafter may be invented, used and employed, at which money or other valuable thing may or shall be played for or staked or betted upon; or if any person shall procure, permit, suffer and allow persons to collect and assemble in his house, room, out-house, booth, tent, arbor or other place whatsoever, under his control, for the purpose of playing at, and staking or betting upon such game or device of address or hazard, money or other valuable thing; (a) or if any person being the owner, tenant, lessee or occupant of any house, room, out-house, tent, booth, arbor or other place whatsoever, shall lease, hire or rent the same, or any part thereof, to be used and occupied, or employed, for the purpose of playing at, or staking and betting upon such game or device of address or hazard, for money or other valuable thing; the person so offending in either of the enumerated cases, shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year. (b) The owner of such house, room, out-house, tent, booth, arbor or other place whatsoever, who shall have knowledge that any such game or device of address or hazard, as aforesaid, has been set up in or upon the said premises, and shall not forthwith cause complaint to be made against the person who has set up or established the same, shall be deemed and held to have knowingly leased, hired or rented the said premises for the said unlawful purposes: *Provided*, That this act shall not be construed to apply to games of recreation and exercise, such as billiards, bagatelle, ten-pins, et cetera, where no betting is allowed. Act 31 March 1860, § 55. *Purd.* 227.

If any person shall keep or exhibit any gaming-table, establishment, device or apparatus, to win or gain money or other property of value, or aid, assist or permit others to do the same; or if any person shall engage in gambling for a livelihood, or shall be without any fixed residence, and in the habit or practice of gambling; he shall be deemed and taken to be a common gambler, and upon conviction thereof, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine not exceeding five hundred dollars. *Ibid.* § 56.

If any person shall, through solicitation, invitation or device, persuade or prevail on any other person to visit any room, building, arbor, booth, shed or tenement, or other place kept for the use of gambling, such person shall be guilty of a misdemeanor, and, upon conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars; and besides, shall be civilly responsible and liable to pay back to any person induced by him to enter such gambling-house, any sum he may have lost at play therein. *Ibid.* § 57.

No witness shall be excused, under any allegation or pretence whatsoever, in any prosecution or proceeding for unlawful gambling, from giving his testimony touching the same; but no evidence given, or facts divulged by him, shall be used or employed against him in any criminal prosecution whatever. *Ibid.* § 58.

If an affidavit be made and filed before any magistrate, before whom complaint has been made of the commission of either of the crimes provided against in the three preceding sections, setting forth that the affiant has reason to believe, and does believe, that the person charged in such complaint has upon his person, or at any other place named in said affidavit, any gaming-table, device or apparatus, (c)

(a) A person furnishing cards or other implements of gaming, may be convicted under this act. 24 Leg. Int. 396.

(b) See act 2 April 1870, declaring the

keeping of a gaming-table, &c., to be a public nuisance. Tit. "Nuisance," *postea*.

(c) See 7 Law Rep. 413.

the discovery of which might lead to establish the truth of such charge, the said magistrate shall, by his warrant, command the officer who is authorized to arrest the person so charged, to make diligent search for such table, device or apparatus, and if found, to bring the same before such magistrate; (a) and the officer so seizing, shall deliver the same to the magistrate before whom he takes the prisoner, who shall retain possession, and be responsible therefor until the discharge, commitment or letting to bail of the person so charged; after which such officer shall retain such table, device or apparatus, subject to the order of the court before which such offender may be required to appear, until his discharge or conviction; and in case of the conviction of such person, the gaming-table, device or apparatus shall, by the direction of the court, be destroyed. *Ibid.* § 59.

It shall and may be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and remove any device or machinery of any kind, character or description whatsoever, used and employed for the purposes of unlawful gaming as aforesaid, and to arrest, with or without warrant, any person setting up the same. And it shall be the duty of such sheriff, constable or other officer, to make return, in writing, to the next court of quarter sessions of the proper county, setting forth the nature and description of the device or machine so seized upon, and the time, place and circumstances under which such seizure was made; and the said court, upon hearing the parties, if they should appear, if satisfied that such device or machine was employed and used for the purpose of unlawful gaming as aforesaid, shall adjudge the same forfeited, and order it to be publicly destroyed, and at the same time order such reasonable costs and charges to the seizing officer as they shall deem adequate and just, to be paid by the owner or possessor of such device or machine, or in case of his default, or in case he cannot be found, to be paid as costs are now by law paid upon indictments; and such adjudication shall be conclusive evidence to establish the legality of such seizure, in any court of this commonwealth, in any cause in which the question of its legality shall arise; and in any case in which a decree of forfeiture shall not be pronounced, if said court shall, upon the evidence, be satisfied that there was probable cause for the seizure, they shall certify the same, which certificate shall be a bar to any action brought against the officer for or on account of such seizure, in those cases in which the said officer returns, or offers to return such device or machine; and in all cases shall prevent a recovery in damages, for any sum beyond the real value of the device or machine seized. *Ibid.* § 60.

No writ of replevin shall issue for any device or machine, seized as aforesaid, nor shall any action be instituted for or on account of such seizure, until the court shall have first adjudicated upon the premises; but such writ or action shall forthwith, on motion, be quashed and abated by the court in which it shall be sued or brought. *Ibid.* § 61.

II. OF COCK-FIGHTING, GAMING, &c.

If any person or persons, after the first day of June next, shall cause to fight any cock or cocks, for money or any other valuable thing, or shall promote or encourage any match or matches of cock-fighting, by betting thereon, every such person so offending, shall, upon conviction thereof before any mayor's court, or court of quarter sessions of the proper city or county, forfeit and pay the sum of forty dollars for every such offence, one half thereof to the use of the informer, and the other half to the use of the poor of the proper city or county in which poor-houses have been or may be erected, and when no poor-house shall be erected, to the use of the poor of the city, borough or township in which the offence shall be committed; and in default of payment of the fine aforesaid, the offender shall be committed to prison for any period not exceeding thirty days, at the discretion of the court before which the conviction shall take place: *Provided, further*, That such information shall be made within forty-eight hours after the commission of the offence. Act 12 March 1830, § 1. *Purd.* 499.

If any person or persons, after the first day of August next, [cause to fight any cock or cocks, for money or any other valuable thing, or shall promote or encourage any match or matches of cock-fighting, by betting thereon,] or shall play at any match of bullets in any place, for money or other valuable thing, or on any public

highway, with or without a bet, or shall play at cards, dice, [billiards, bowls,] shuffle-boards or any game of hazard or address, for money or other valuable thing, every such person so offending, shall, upon conviction thereof before any justice or magistrate, as aforesaid, forfeit and pay three dollars for every such offence; and if any person or persons shall enter, start or run any horse, mare or gelding, for any plate, prize, wager, bet, sum of money or other valuable thing, every such person so offending shall, upon conviction thereof as aforesaid, forfeit and pay the sum of twenty dollars. (a) Act 22 April 1794, § 5. Purd. 499.

One moiety of the forfeitures in money, accruing and becoming due for any offence against this act, shall be paid to the overseers of the poor of the city, borough or township wherein the offence shall be committed, for the use of the poor thereof, and the other moiety to the person or persons who shall prosecute and sue for the same; and the inhabitants of such city or other place, shall, notwithstanding, be admitted witnesses to testify against any person who shall be prosecuted for any offence by virtue of this act: *Provided*, That no person shall be prosecuted or convicted for any offence against this act, unless such prosecution be commenced within thirty days after the offence has been committed. Ibid. § 12.

III. OF GAMING, &C., AT TAVERNS.

If any innkeeper, tavern-keeper or other retailer of wine, spirituous or other strong drink, shall incite, promote or encourage any games of address, hazard, cock-fighting, bullet-playing or horse-racing, at which any money or other valuable thing shall be betted, staked, striven for, won or lost, or shall furnish any wine, spirituous liquors, beer, cider or other strong drink, to any of the persons assembled or attending upon any such game, fight, play or race, such person shall forfeit and pay, upon conviction of the first offence, fourteen dollars, and upon a second conviction of the offence twenty-eight dollars. Act 11 March 1834, § 18. Purd. 499.

And if any such person shall permit and allow any kind of game of address or hazard, or any playing, betting or gaming for money or other thing of value whatsoever, either at cards, dice, billiards, bowls, shuffle-boards or any game or device in any other manner to be practised, played or carried on within his or her dwelling-house, out-house, shed or other place in his or her occupancy, such person shall, for the first and second offence respectively, forfeit and pay the like sums. Ibid. § 19.

And if any innkeeper or tavern-keeper, or other licensed retailer of wine or other liquors, shall offend as aforesaid, the license of such person shall, upon his conviction thereof, become void, and such offender shall be incapable of being again licensed in like manner for one year thereafter; and upon such second conviction, such person shall, in addition to the penalty aforesaid, be for ever incapable of being a public-house keeper or retailer as aforesaid, within this commonwealth. Ibid. § 20.

Provided, (b) That where any such licensed public-house keeper or retailer, as aforesaid, who shall be convicted as aforesaid before any one justice or other magistrate, shall think himself or herself aggrieved by such conviction, it shall and may be lawful for such licensed public-house keeper or retailer to appeal to the next court of quarter sessions of the peace, to be held for the city or county wherein the offence was committed, (and not after,) which said court shall thereupon proceed, as soon as may be, to hear and determine the said appeal, and to affirm or reverse the proceedings had before the said justice or other magistrate, and the determination of the said court shall be final and conclusive. Act 22 April 1794, § 6. Purd. 500.

IV. OF MONEY LOST AT PLAY.

If any person or persons shall lose any money or other valuable thing, at or upon any match of cock-fighting, bullet-playing or horse-racing, (c) or at or upon any game

(a) For proceedings to convict under this act, see "Profaneness:" and see "Horse-Racing."

(b) The remainder of this section supplied

by act of 1834, by which, however, this proviso is not re-enacted. *Quære*, whether it is in force? Digitized by Google

(c) See "Horse-Racing."

of address, game of hazard, play or game whatsoever, the person or persons who shall lose their money or other valuable thing, shall not be compelled to pay or make good the same; and every contract, note, bill, bond, judgment, mortgage or other security or conveyance whatsoever, given, granted, drawn or entered into, for the security or satisfaction of the same or any part thereof, shall be utterly void and of none effect. (a) Ibid. § 8.

*Note.
void*

If any person or persons shall lose any money or other thing of value, at or upon any game of address, or of hazard or other play, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same, shall have a right within ten days then next or thereafter, to sue for and recover the money or goods so lost and paid, or delivered, or any part thereof, from the respective winner or winners thereof, with costs of suit, by action of debt or case, for the value of the money or thing so lost, founded on this act, to be prosecuted in any court of record, or where the value is under a sum that may be recovered before any justice of the peace, within this commonwealth, subject to an appeal as in other cases, in which action no essoin, protection or wager of law, nor more than one imparlance shall be admitted; and in which actions it shall be sufficient for the plaintiff or plaintiffs to allege that the defendant or defendants is or are indebted to him, her or them, or hath or have received to his, her or their use the money so lost and paid, or converted the goods won of him, her or them, to the use of the defendant or defendants, whereby the action of the plaintiff or plaintiffs accrued to him, her or them, according to the form of this act, without setting forth the special matter. Ibid. § 9.

V. OF BILLIARD ROOMS AND BOWLING SALOONS.

No person shall keep any billiard room, bowling saloon or ten-pin alley in this commonwealth, without first taking from the treasurer of the proper county a license, [for which he or she shall pay as follows: for every such license granted in the city and county of Philadelphia, and other cities of this commonwealth, the sum of one hundred dollars; and for every such license in the other counties of this commonwealth, the sum of thirty dollars;] and no such license shall be granted for a longer period than one year. Any person keeping such billiard room, bowling saloon or ten-pin alley, without license, shall, on conviction thereof in the court of quarter sessions of the proper county, be punished by fine not less than the amount of such license, nor more than five hundred dollars, or imprisonment in the county jail for any period not exceeding three months, and costs of prosecution: *Provided*, That this section shall not be construed to prohibit billiard tables or ten-pin alleys connected with hospitals, asylums or other institutions for the relief of the insane and diseased. Act 10 April 1849, § 19. Purd. 500.

No license shall hereafter be granted to any person who may keep a billiard room, bowling saloon or nine or ten-pin alley, under the 19th section of the said act to which this is a supplement, unless such person shall pay, [in the city and incorporated districts of the county of Philadelphia and city of Pittsburgh, for such license, at the rate of one hundred dollars for the first billiard table, bowling alley, or nine or ten-pin alley, and ten dollars for each and every additional billiard table, bowling alley, or nine or ten-pin alley, in any one establishment used for any such purposes;] and in the other counties of this commonwealth and the unincorporated townships of the county of Philadelphia, the sum of thirty dollars for the first table and alley as aforesaid, and ten dollars for each additional table or alley; and no such license shall be granted for a longer period than one year: any person keeping such billiard room, bowling saloon or nine or ten-pin alley, without license, shall be liable to the same penalties and liabilities provided by the said 19th section of the act to which this is a supplement, for persons offending against the same; but this section shall not be construed to prohibit billiard tables, or bowling or nine or ten-pin alleys connected with hospitals or asylums, or other institutions for the relief of the insane or diseased, or to private individuals who have such ten-pin alleys on their own premises, and not used for pay or public use. Act 15 May 1850, § 2. Purd. 500.

(a) Such note is void, even in the hands of he may sue the indorser on his indorsement. an innocent holder for value. 1 H. 601. But 1 H. 608.

No license shall be hereafter granted to any person who may keep a billiard room, bowling saloon, or nine or ten-pin alley, unless such person shall pay, in the city and incorporated districts of the county of Philadelphia, city of Lancaster and city of Pittsburgh, for such license, at the rate of thirty dollars for the first table, bowling alley or nine or ten-pin alley, and ten dollars for each and every additional billiard table, bowling alley, or nine or ten-pin alley, in any one establishment used for any such purpose; said license to be collected in the city and county of Philadelphia in the same manner as now provided by law in the case of tavern licenses. Act 14 April 1851, § 9. Purd. 501.

The moiety of the fines and forfeitures in money, accruing under the 19th section of the act to which this is a supplement, and under the 2d section of this act, shall hereafter be appropriated to and for the use of the person or persons who shall prosecute in such cases, and the other moiety of the same shall be for the benefit of the commonwealth; and nothing in the said act to which this is a supplement, or in the present act, shall be construed in any court or judicial tribunal to repeal any law in force at the time of passing the said act to which this is a supplement, imposing any penalty or penalties upon gambling or unlawful gaming. Act 15 May 1850, § 4. Purd. 501.

No person shall keep a bagatelle room in the county of Allegheny, without first taking from the treasurer of the said county a license, for which he or she shall pay as follows: for every such license granted by the treasurer of the county, the sum of five dollars for each bagatelle table, together with the sum of fifty cents to the treasurer as a fee for his certificate of license, and the further sum of thirty-seven and a half cents as a fee to the mercantile appraiser for his return, as hereinafter provided, and no such license shall be granted for a longer period than one year, and any person keeping such bagatelle rooms or tables, for purpose of play, without a license, shall, on conviction thereof in the court of quarter sessions of the proper county, be punished by a fine not less than ten dollars nor more than one hundred dollars: *Provided*, That this section shall not be construed to prohibit the use of such tables in hospitals, asylums or other institutions, for the insane and diseased. Act 11 May 1853, § 9. Purd. 501.

The mercantile appraiser shall make return to the county treasurer of all persons keeping such tables at the time of making his annual returns, as provided for by law, except the present year, which return of the keepers of such tables shall be made on the first Monday of June. *Ibid.* § 10.

No person licensed to keep a restaurant or eating-house, or to sell spirituous or malt liquors, shall establish upon his premises a billiard room, bowling saloon or ten-pin alley, shuffle-board or other like game, directly communicating with, or the passage to which shall lead through the public bar-room, eating-room, or other place of public resort on the premises, under the penalty of ten dollars for every day such communication shall be allowed, to be recovered as debts under one hundred dollars are recoverable, one-half to go to the informer. Act 13 April 1859, § 2. Purd. 501.

VI. Gaming, says Hawkins, is permitted in England, upon every possible subject, excepting where it is accompanied by circumstances repugnant to morality, or public policy, or where, in certain special cases, it is restrained by positive statute. 1 Cr. C. C. 511. But where the playing is, from the magnitude of the stake, *excessive*, and such as is now commonly understood by the term "gaming," it is considered by the law as an offence, being in its consequences most mischievous to society. 1 Russell 406.

From the nature of the evils requiring a remedy, and from the words of the act of 1847 re-enacted by the revised Penal Code of the 81st March 1860, its provisions embrace only those games which are attended with "winning, betting or gaining money or other property." It does not extend to games which are useful in disciplining the mind, or in exercising the body, and in which *nothing is either lost by one party or gained by the other*. Such games when conducted with propriety—when not kept in connection with public-houses—when not used to encourage the dissolute to spend their time and money in idleness and tipping:

(thus becoming a nuisance *in fact*), are neither forbidden by the common law, nor by the statute. There is one species of amusement which, as it approaches the line which divides innocence from guilt, it may be proper to consider. Billiards and bowling (the latter more commonly called ten-pins) are frequently used for the purpose of amusement and recreation, and it is customary for the losing party to pay to the proprietor a reasonable compensation for the use of the table, alley or saloon. In such a case it was held by the supreme court of New York, in *The People v. Sergeant* (8 Cow. 140), "that paying for the table by the rub is not gaming within the meaning of the law,—that illegal gaming implies *gain and loss between the parties by betting*; such as would excite a spirit of cupidity." This decision is fully in accordance with sound principles of interpretation (under which a penal statute is never extended by construction to cases not plainly within its purview), and we adopt it as a true exposition of the law. *Lewis's C. L.* 344.

This view of the law appears to have been adopted by the legislature, who by the act of 10th April 1849, have provided for the licensing of billiard rooms, and bowling saloons or ten-pin alleys.

A public gaming-house is a public nuisance, at common law. 1 Cr. C. C. 150. 4 *Ibid.* 107.

It seems, that dominoes is a game of chance as well as of skill. 16 Eng. L. & Eq. 346-7.

Game.

ACT 21 APRIL 1869. Purd. 1569.

SECT. 1. It shall not be lawful for any person or persons to kill, hunt or take by any device, means or contrivances whatever, or sell or expose for sale, or have unlawfully in his or her possession, or worry or hunt with hound or dogs, any deer or fawn between the "twentieth" day of December in any year and the first day of September in any year "following": *Provided*, That nothing in this section shall apply to tame deer or those kept in parks.(a)

SECT. 2. Any person violating the foregoing provision of this act shall be deemed guilty of a misdemeanor, and shall likewise be liable to a penalty of fifty dollars.

SECT. 3. No person shall kill, or have unlawfully in his or her possession, or expose for sale, any ruffed grouse or pheasant between the twentieth day of December and the first day of August; or any quail or Virginia partridge(b) between the twentieth day of December and the first day of October; or any wild turkey between the first day of January and the first day of October; or any fox squirrel or gray squirrel or rabbit between the first day of January and the first day of August; under a penalty of five dollars for each and every bird or squirrel so killed, or unlawfully had in possession, or exposed for sale.(a)

SECT. 4. No person shall kill, capture, take or have in his or her possession any woodcock between the fifteenth day of November and the "first" day of "September in any year," under a penalty of five dollars for each and every bird so killed or had in possession, or exposed for sale.(c)

SECT. 5. No person shall at any time kill, trap, or expose for sale, or have in his or her possession after the same is killed, any night hawk, whippoorwill, finch, thrush, lark, sparrow, wren, martin, swallow, woodpecker, dove, bobalink, robin or starling, or any other insectivorous bird, nor destroy or rob the nests of any wild birds whatever, under a penalty of five dollars for each and every bird so killed, trapped or exposed for sale, and for each nest destroyed or robbed.

(a) See act 19 February 1870, P. L. 210, and act 2 April 1870, P. L. 807, as to Washington county.

(b) See act 9 April 1870, as to Adams, York

and Franklin counties. P. L. 1068.

(c) So amended by act 5 April 1870. P. L. 50. See act 9 April 1870, as to the counties of Adams, York and Franklin. P. L. 1068.

SECT. 6. No person shall at any time, with intent so to do, catch any speckled brook trout with any device save only a hook and line, and no person shall catch any trout, or have in his or her possession, save only in the months of April, May, June and July, under a penalty of five dollars for each trout so caught or had in possession.

SECT. 7. There shall be no shooting, hunting or trapping on the first day of the week, called Sunday; and any person offending against the provisions of this act shall on conviction, forfeit and pay a sum not exceeding twenty-five nor less than five dollars, or be imprisoned in the county jail where the offence was committed not less than ten days nor more than twenty-five days for each offence.

SECT. 8. No person shall at any time feed or bait or build blinds, for the purpose of killing, or to trap or snare, any wild turkey, or ruffed grouse, or pheasant, or quail, or Virginia partridge, or woodcock, under a penalty of five dollars for each and every bird so taken, trapped or snared: *Provided*, That nothing in this act shall be construed to prevent individuals or associations for the protection, preservation and propagation of game from gathering alive by nets or traps, quails or Virginia partridges, for the sole purpose of preserving them alive over the winter, from the fifteenth day of November to the first day of January, and for no other purpose whatsoever.

SECT. 9. It shall be the duty of any constable having knowledge of the violation of any of the provisions of this act to make report thereof to any justice of the peace of the proper county; and any other person having such knowledge may make complaint before such justice; and the said justice shall issue his warrant for the arrest of the offender, and proceed to hear and determine the matter in issue, in the same manner as provided in other cases; and any officer found guilty of making a wilfully false return, or neglecting to make a report of the offence when brought to his notice, shall be considered a party to the misdemeanor, and be liable to payment of the fines herein imposed, and be declared incompetent to fulfil the duties of his office, and his office shall be deemed vacant.

SECT. 10. Any person offending against the provisions of this act, and being thereof convicted before any alderman or justice of the peace aforesaid, whose decision shall be final, either by confession of the party so offending or by the oath or affirmation of one or more witnesses, shall, for each and every offence, forfeit the sums attached to the same, one-half to the informer and one-half to the use of the county, which forfeiture shall be levied by distress and sale of the offender's goods and chattels; and for want of such distress, if the offender shall refuse to pay the said forfeiture, he shall be committed to the jail of the county for the space of ten days, without bail or mainprize: *Provided, however*, That such conviction be made within six months after the committing of the offence.

SECT. 11. When any prosecution commenced under this act, proving the possessions of the fresh skin or carcass of a deer during any portion of the year, excepting from the first day of September to the first day of January, shall, in the absence of better or other evidence, be sufficient to warrant a conviction under the provision of this act; and the informer shall in all cases be a competent witness.

SECT. 13. The counties of Monroe and Pike are hereby exempted from the operation of the first section of this act: *Provided, further*, That the provisions of this act shall not apply to the counties of Columbia, Montour, Northumberland, Sullivan, Indiana, Jefferson, Bradford, Wyoming, Susquehanna, Clarion and Schuylkill: *Provided*, That the provisions of this act shall not apply to the counties of Tioga and Warren, so far as relates to the taking or killing of deer and taking or catching of trout.(a)

ACT OF APRIL 1870. Purd. 1608.

SECT. 3. No person shall kill, capture, take or have in his or her possession, any gray snipe, or English snipe, between the fifteenth day of November and the first day of September, under a penalty of five dollars for each and every bird so killed, or had in possession, or exposed for sale.

(a) See act 12 March 1870, as to Berks county. P. L. 417.

Guaranty.

I. Definition of, and remedy upon a guaranty.

II. When a guaranty must be in writing
III. Judicial decisions.

I. A GUARANTY is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance. Fell on Guaranty 1. The distinction between a surety and a guarantor is well settled, in Pennsylvania: the latter assumes but a contingent liability; the engagement of the former is an absolute direct one. 4 Am. L. J. 102. And the law in relation to these several contracts is different; in case of a guaranty, the creditor must enforce his remedies against the principal debtor before he resorts to the guarantor, or else he must show that the affairs of the principal debtor were in such a condition, that any pursuit of him would have proved fruitless. 1 Wall. Jr. 149. 8 P. R. 18. Whilst the only mode to be pursued by a surety is a positive call upon the creditor to pursue the principal, with notice, that unless he does so, the surety will consider himself discharged. 8 S. & R. 116. 4 H. 18.

II. ACT 26 APRIL 1855. Purd. 497.

SECT. 1. No action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action was brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some other person by him authorized.

SECT. 1. This act shall not go into effect until the first day of January next, or apply to or affect any contract made or responsibility incurred prior to that time; or for any contract the consideration of which shall be a less sum than twenty dollars.

III. In an action upon a guaranty, the consideration for it must be stated and proved. Fell on Guaranty 4.

And in Pennsylvania, there must also be proof that the principal debtor has been exhausted, or of his insolvency. 1 Wall. Jr. 149. 6 C. 205.

If at the maturity of the guaranty the principal debtor be utterly insolvent, it is not necessary to bring suit against him, before proceeding on the guaranty; and the insolvency may be proved, not only by record, but by parol evidence. 3 H. 293.

The mere demand of payment and refusal to pay, is not sufficient evidence of insolvency, though the debtor be not a resident of the commonwealth. 3 P. R. 18.

What is *due diligence* is a question of fact for the jury, on the evidence submitted to them. 16 S. & R. 79. 1 C. 210. And where the promise is by parol, the jury are to determine whether they imported a direct or a contingent liability. 16 Leg. Int. 60.

Where a judgment has been recovered against the principal debtor, and an execution issued, and returned "no goods," the proceedings are *prima facie* evidence of his insolvency. 1 C. 210. 6 C. 205.

Words of doubtful import ought not to receive such a construction as to subject the person using them to pay the debt of another. 7 Cr. 69.

Where one guaranties the payment of a sum of money on a day certain, the creditor, it seems, when the period arrives, may sue on the contract of guaranty, without pursuing the principal debtor. Bright. R. 96. 1 M. 276. 1 P. L. J. 80. 1 Phila. R. 70.

In an action on a guaranty, it is a good defence, that collateral securities assigned by the principal, at the time of making the contract of guaranty, for the security of the same debt, have been lost through the plaintiff's want of diligence. 7 C.

A contract to guaranty the payment of rent reserved on a lease, is not discharged by the lessor's consent to an assignment of the term; the lease providing that no assignment shall be valid without such consent. 6 C. 205.

The act of 1855, requires that a promise to pay the debt of another should be in writing; but where the consideration moves directly from the promisee to the promisor, although the contract may be to perform work for a third person, the statute has no application. 16 Leg. Int. 60. And see 2 Wr. 302. 5 Phila. 147.

A contract required to be in writing must appear with reasonable certainty, without recourse to parol proof, from the instrument itself; and parol testimony cannot be admitted, either to contradict or to vary it. 4 Phila. 75.

An agreement made between parties prior to or contemporaneously with their executing a written obligation as sureties, by which one promises to indemnify the other from loss, does not contradict or vary the terms or legal effect of the written obligation, and may be proved by parol evidence. 12 N. Y. 462.

The consideration upon which the contract is made, need not be expressed in writing, but may be proved by parol. 9 Wr. 345.

To bring a case within the act, the promisee must be the original creditor. 20 Law Rep. 676. If the old debt remain, the contract is not an original undertaking and is therefore within the statute. 14 Wr. 52.

The agent contemplated by the statute, who is to bind the defendant, in an action on a guarantee, by his signature, must be a third person, and not one of the contracting parties. 5 Phila. 147. 5 B. & A. 333.

"It is settled that the word 'assign' implies no guarantee." 17 S. & R. 502. The covenant implied from the assignment of a bond is not a guarantee, but that the assignee should receive the money from the obligor to his own use; and if the obligee should receive it, then, that the assignor should be answerable over for it. 1 D. 449. 7 H. 133.

To partnerships.—Attempts have been made to establish the guarantee as an indemnity to the *house* of trade, rather than to the *members* composing it. But after many decisions upon the subject, the principles applicable to such instruments seem to be this, that as every partnership ceased to be the same if any alteration is made in the parties of which it is composed, so the prospective operations of a guarantee given to a partnership will cease upon any change, either by the death or withdrawing of any of the partners, or the addition of the new one unless the guarantee itself contain some provision, contemplating such change, and continuing its operations to the succeeding partnership. Gow on Part. 147.

Hawkers and Pedlars.

I. Hawkers' and pedlars' licenses.

II. Tin and clock pedlars.

I. THE courts of quarter sessions of the respective counties in this commonwealth, or two judges of said courts in vacation, are hereby authorized to issue a license (a) to any applicant [who shall bring himself within the provisions of the act passed the 30th day of March 1784, entitled "An act for regulating of hawkers and pedlars," and the supplement thereto, passed the 28th day of March 1799.] (b) and who shall give bond to the commonwealth of Pennsylvania, with sureties to be approved of by the court, in the sum of three hundred dollars, conditioned that such applicant shall be of good behavior during the continuance of such license, which shall be for one year, and the said applicant shall satisfy the court that he is a man of honesty and good moral character, and otherwise bring himself within the provisions of said acts: *Provided*, That before any such license shall issue to any such applicant, he shall pay for the use of this commonwealth, for a license to travel on foot, eight dollars; with one horse and cart or wagon, or other vehicle, sixteen dollars; with two horses and wagon or other vehicle, twenty-five dollars; and produce a receipt from the county treasurer, together with the usual fees to the clerk for similar services; and the clerks of said courts respectively, shall, within ten days after each term, transmit to the auditor-general a list of the names of persons to whom licenses have been granted at the preceding term, and the rates thereof: *Provided*, That no person licensed for the purpose aforesaid, shall be permitted to sell, vend or expose to sale, any (c) foreign or domestic goods, wares or merchandise, in any private or public house, or in any of the open streets, lanes or alleys, or in any other part or place of the city of Philadelphia, the district of Southwark, or the townships of the Northern Liberties, Moyamensing and Passyunk, under the penalty of fifty dollars, to be recovered by any person who shall sue for the same, as debts of like amount are by law recoverable: *And provided further*, That it shall be the duty of the auditor-general to publish once a year the names of all persons who shall take out a license as aforesaid, in at least three papers within this commonwealth, for three successive weeks. Act 2 April 1830, § 1. Purd. 783.

No person shall be licensed as hawker and pedlar, or petty chapman, within this state, but such only as is a citizen of the United States, and who, from loss of limb or other bodily infirmity, shall be disabled from procuring a livelihood by labor, which disability shall be proven by certificate or certificates from two physicians of respectable character, under oath, residing in the county where the application for license is made; and no license hereafter granted shall extend farther than the county in which such license may have been granted, except wholesale pedlars, whose license shall extend throughout this state, for which they shall pay for the use of the commonwealth, for a license to travel with one horse and wagon, or other vehicle, forty dollars; with two horses and a wagon, or other vehicle, fifty dollars. Act 16 April 1840, § 1. Purd. 783.

No person shall be licensed as a hawker or pedlar under the several acts of assembly now in force, unless he shall have resided at least one year in the county in which such application shall be made, and shall produce satisfactory evidence, on oath, from at least two respectable practising physicians, who shall be citizens of the United States, residents in such county, that such applicant is, in point of fact, by reason of bodily disability (the nature and character (d) of which shall be stated), unable to procure a livelihood at his trade, if he have any, or by bodily labor. Act 5 May 1841, § 7. Purd. 783.

It shall be the duty of the county treasurers respectively, on or before the second

(a) This act does not embrace tin and clock pedlars. 2 W. 300.

(b) Part within brackets supplied; *infra*.

(c) The sale of a single article subjects the offender to the penalty. 14 S. & R. 398.

(d) A certificate that the applicant was

affected with "*gastro hepatalgia*," was held insufficient; the nature and character of the disease must be stated, that the court may judge whether the applicant is entitled to a license. 7 P. L. J. 275.

Tuesday in December, in each and every year, to render an account under oath or affirmation to the auditor-general, of all moneys received by them for licenses, specifying the names of the persons and the amount received from each, and pay over to the state treasurer all moneys received by them, deducting therefrom a commission of five per cent.; and if any county treasurer shall neglect or refuse to render his account to the auditor-general for settlement, and pay over the full amount to the state treasurer, as hereinbefore directed, such treasurer shall not be allowed any compensation or commission. Act 2 April 1830, § 3. Purd. 784.

No person or persons, either with or without license, shall sell or expose to sale, any foreign or domestic goods, wares or merchandise, as a hawker or pedlar, or travelling merchant, by public auction or outcry, (a) in any part of this commonwealth, under the penalty of fifty dollars for each and every offence; and all forfeitures that may accrue under this act, or the acts to which this is a further supplement, may be sued for and recovered by action of debt, before any alderman or justice of the peace, as debts of like amount are by law recoverable, (b) by any person who may sue for the same, one-half to the informer and the other half to the use of the county in which the offence may have been committed; and so much of the acts to which this is a further supplement as is by this act altered or supplied is hereby repealed: *Provided, nevertheless*, That nothing contained in this act shall prohibit the citizens of this commonwealth, who may manufacture goods, wares or merchandise within this commonwealth, from vending or exposing the same to sale, in the same manner as if said act had not been passed into a law. Ibid. § 2.

And if any person not being licensed as aforesaid (except such whose licenses have or may not yet be expired) shall be found hawking, peddling or travelling from place to place (c) through any part of this state, to sell or expose for sale any foreign goods, wares or merchandise, every person so offending against this act shall be liable to a fine of fifty dollars; or being so qualified by the license, shall refuse on request of any citizen of this state to show his license, every person so offending shall be liable to a fine of twenty dollars, to be recovered and applied in the same manner as is provided for by an act for regulating hawkers and pedlars, and its several supplements, passed the 30th day of March 1784: (d) *Provided*, That this act shall not be construed to prevent citizens of this commonwealth from hawking and peddling goods of their own manufacture. Act 16 April 1840, § 2. Purd. 784.

If any person having a license shall lend or otherwise dispose of the same to any other person, the person so lending and the person so receiving the same shall be liable to a fine of fifty dollars, respectively, which fines shall be recovered and applied as by the act to which this is a supplement is directed and provided. Act 28 March 1799, § 2. Purd. 784.

No person or persons shall sell or expose to sale, within the county of Schuylkill, (e) as a hawker, pedlar or travelling merchant, any foreign or domestic goods, wares or merchandise, under the penalty of fifty dollars for each and every offence, to be inflicted in the manner provided for in the act of April 6th 1833, entitled "A supplement to the act regulating auctions in the city of Lancaster and other towns of this commonwealth," passed the 7th day of April 1832. (g) Act 17 April 1846, § 1. Purd. 784.

(a) To constitute a sale by auction there must be either successive bids for the property, or successive offerings of it at different prices, in a way to provoke competition. Offering goods publicly at a specified price is no violation of the act. 1 W. & S. 552-3.

(b) See 4 P. L. J. 371.

(c) Selling groceries from a canal boat is a violation of this act. 1 H. 386.

(d) The act of 1784 is supplied by act 2 April, 1830, § 2.

(e) By subsequent acts these provisions have been extended to the counties of Lebanon, Elk, Cumberland, Perry, Carbon, Berks, Luzerne, Columbia, Monroe, Mercer, Lancaster, Butler, Union, Somerset, Bedford,

York, Montgomery, Lycoming, Lehigh, Dauphin, Sullivan, Wyoming, Bucks, Susquehanna and Washington; and to Fayette county, as to the peddling of tin and copper ware. Purd. 785.

(g) The act of 1833, here referred to, provides that the mode of proceeding against any person for a violation of its provisions, shall be by indictment in the court of quarter sessions of the proper county; and that whenever complaint shall be made to any justice of the peace or alderman of the proper county or city, on oath or affirmation, against any person for violating the provisions of the same, it shall be his duty to issue a warrant for the apprehension of such person, and compel him

It shall be lawful for the manufacturers of agricultural tools and implements, stoves, hollow-ware and wooden ware, to peddle their own manufacture, or authorize agents to peddle the same for them: *Provided*, That the provisions of this act shall not extend to any portion of the state east of the Allegheny mountains or to the county of Armstrong. Act 14 April 1863, § 1. Purd. 1809.

Every honorably discharged soldier (a) who is a resident of this state, and who from wounds or on account of disease contracted while in the military or naval service of the United States, and on account of such disability, is unable to procure a livelihood by manual labor, shall have the right to hawk, peddle and vend any goods, wares or merchandise within this commonwealth, (b) by procuring a license for that purpose, to be issued without cost: *Provided*, That before any such soldier shall be entitled to the benefits of this act he shall obtain a certificate from an examining surgeon of the United States that he is unable to procure his living by manual labor, and shall also procure a certificate from the prothonotary of any county in this state, that he has filed in the office of said prothonotary his affidavit, setting forth that he is the *bonâ fide* owner, in his own right, of all the goods, wares and merchandise which he proposes to hawk, peddle and vend, and that he will not engage to sell the same for any other person or persons whatever: *And provided further*, That the aforesaid certificates, together with such person's discharge from the military service, or an exemplified copy thereof, shall be full and conclusive evidence of such person's right to the benefits of this act. (c) Act 8 April 1867, § 1. Purd. 1471.

II. *Tin and clock pedlars*.—No person shall employ himself or be concerned in the business or employment of hawking or peddling any kind of tin or japanned ware or clocks, from place to place, without having previously obtained a license so to do, under the provisions of the second section of this act; and if any person shall go from place to place, to sell or expose to sale any such articles without a license so to do being by him first obtained, such person shall forfeit and pay the sum of fifty dollars; and any justice of the peace or alderman, on view, or the information or complaint, on oath or affirmation, of any other person, shall and in either case is hereby enjoined to proceed in a summary way against any such person so offending to conviction; and in default of immediate payment of said forfeiture, to commit him to the common jail of said county, there to be detained until discharged by due course of law; and every repetition of the said offence shall be considered and punished as a new offence: and every person so employed, who upon demand shall refuse to exhibit his license, shall be deemed an offender against this act, and one-half of the penalties, which may accrue under the provisions of this act, shall go to the informer, and the other half to the county in which they may happen; and any such informer, notwithstanding his interest, shall be a competent witness. Act 6 February 1830, § 1. Purd. 785.

The clerks of the courts of quarter sessions of the respective counties of this commonwealth are hereby authorized to grant separate licenses for one year, under seal of said court, to hawkers and pedlars of tin and japanned ware, and to hawkers and pedlars of clocks, upon satisfactory evidence of the good moral character of such applicant, he having first produced a receipt from the county treasurer for thirty dollars; and it shall be the duty of the said clerks respectively, upon granting such license, immediately to transmit a certificate thereof to the auditor-general, who shall charge the county treasurer with the sum so received; and the county treasurers shall receive a like commission, and be subject to the same duties, restrictions and penalties, connected with their accountability under this act, as are provided in the 5th section of the act, entitled "An act laying a duty on retailers of foreign merchandise," (a) and the applicant shall pay to the clerk like fees as for similar services. *Ibid.* § 2.

to enter into a recognisance with sufficient securities for his appearance at the next court of quarter sessions of the proper county, to answer the said complaint; and any person being thereof duly convicted, shall pay a fine for the use of the commonwealth, of not less than fifty nor more than five hundred dollars, at the discretion of the court, together with the costs of prosecution.

(a) Extended to sailors and marines, by

act 9 April 1868. Purd. 1522.

(b) See act 17 April 1869, as to Lancaster county. P. L. 1180.

(c) The act 17 April 1869 provides that licenses granted under this act shall not be transferable, nor held to privilege any one but the person therein named to hawk, peddle and vend as therein provided. P. L. 1181.

(d) Act 2 April 1821. 7 Sm. 473.

Homicide.

I. Degrees of homicide.

III. Judicial decisions.

II. Provisions of the Penal Code.

I. HOMICIDE, or the killing of any human creature, is of three kinds : felonious, excusable and justifiable. 4 Bl. Com. 177.

Felonious homicide is the killing of a human creature of any age or sex, without justification or excuse. Ibid. 188. It is either murder or manslaughter, according to the circumstances. Lewis' C. L. 858.

Murder, as defined by the common law, is when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and in the peace of the commonwealth, with malice prepense or aforethought, either express or implied. 1 Ash. 289. 4 P. L. J. 155. 3 Am. L. J. 299

Express malice, is where the killing is the product of a sedate, deliberate mind, and formed design. Ibid.

Malice implied, or in a legal sense, means that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, a heart regardless of social duty, and fatally bent on mischief. Ibid. 8 P. F. Sm. 9.

By act of 22d April 1794, re-enacted in 1860, murder, in Pennsylvania, is divided into two degrees. "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree." Purd. 230.

All other kinds of murder shall be deemed murder of the second degree. Ibid.

In order to constitute murder in the first degree, it is not only necessary that the act of killing should be wilful, premeditated, malicious, legally unjustifiable and inexcusable, but the act of violence must be specifically directed against life. 2 Ash. 41.

Murder in the second degree includes all cases of deliberate homicide, where the intention is not to take life; of which, homicide by a workman throwing timber from a house into the street of a populous city, without warning; or of a person shooting at a fowl, *animo furandi* [with intent to steal], and killing a man, are instances frequently given. Whart. C. L. § 1107. 3 Am. L. J. 299.

Manslaughter is the unlawful and felonious killing of another, without any malice, either express or implied. It is of two kinds : 1st. *Voluntary manslaughter*, which is the unlawful killing of another without malice, either upon sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, not amounting to felony; 2d. *Involuntary manslaughter*, where a man doing an unlawful act, not amounting to felony, by accident kills another. Whart. C. L. § 932-3.

Excusable homicide is of two kinds : 1st. Where a man doing a lawful act without any intention of hurt, by accident kills another; as, for instance, where a man is hunting in a park, and unintentionally kills a person concealed. This is called homicide *per infortunium*, or by misadventure. 2d. Where a man kills another upon immediate attack, merely in his own defence, or in defence of his wife, child, parent or servant, and not from any feeling of revenge or malice; which is termed homicide *se defendendo* [in self-defence]. Ibid. § 934.

Justifiable homicide is of three kinds : 1st. Where the proper officer executes a criminal, in strict conformity with his sentence. 2d. Where an officer of justice, in the legal exercise of a particular duty, kills a person who resists or prevents him from exercising it. 3d. Where the homicide is committed in the prevention of a forcible and atrocious crime; as, for instance, when the deceased was in the act of robbing or murdering another. Ibid. § 936-8.

II. ACT 31 MARCH 1860. Purd. 230.

SECT. 74. All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

SECT. 75. Every person convicted of the crime of murder of the first degree, his aiders, abettors and counsellors, shall be sentenced to suffer death, by hanging by the neck; and it shall be the duty of the clerk of the court wherein such conviction takes place, and he is hereby required, within ten days after such sentence, to transmit a full and complete record of the trial, and conviction to the governor of this commonwealth.

SECT. 76. Every person duly convicted of the crime of murder of the second degree, shall, for the first offence, be sentenced to undergo an imprisonment, by separate or solitary confinement, not exceeding twelve years, and for the second offence, for the period of his natural life.

SECT. 77. Every person liable at any former period to be prosecuted for petit treason, shall in future be indicted, proceeded against and punished as is directed in other kinds of murder.

SECT. 78. Every person convicted of any voluntary manslaughter, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or simple imprisonment, not exceeding twelve years, and in the discretion of the court, to give security for good behavior during life, or for any less time, according to the nature and enormity of the offence.

SECT. 79. If any person shall be charged with involuntary manslaughter, happening in consequence of an unlawful act, it shall and may be lawful for the district attorney, with the leave of the court, to waive the felony and to proceed against and charge such person with a misdemeanor, and to give in evidence any act or acts of manslaughter; and such person, on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars, and to suffer an imprisonment not exceeding two years; or the district attorney may charge both wilful and involuntary manslaughter in the same indictment, in which case the jury may acquit the party of one, and find him or her guilty of the other charge.

SECT. 81. If any person shall administer, or cause to be administered or taken by another, any poison or other destructive thing, or shall stab, cut or wound any person, or shall, by any means whatsoever, cause any person bodily injury, dangerous to life, with intention, in any of the cases aforesaid, to commit murder, such person shall be guilty of felony, and shall, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.

SECT. 82. If any person shall attempt to administer any poison, or other destructive thing, or shall attempt to cut or stab or wound, or shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate or strangle any person, with intent, in any of the cases aforesaid, to commit the crime of murder, he shall, although no bodily injury be effected, be guilty of felony, and be sentenced to pay a fine of one thousand dollars, and undergo an imprisonment, by separate or solitary confinement, not exceeding seven years.

III. Murder in the first degree is where a felonious and malicious homicide is committed with a specific intent to take life. 12 H. 386. 4 P. L. J. 156-7. A. 283. 8 P. F. Sm. 9. 2 Brewst. 546.

But the intent of the defendant is to be collected from his words and actions. 4 D. 146. A. 163, 257. 1 Ash. 289. 2 Ash. 41.

In the absence of evidence to the contrary, the law presumes an intent to kill from the use of a deadly weapon. 7 C. 198. 8 P. F. Sm. 10.

If the killing is by one in the attempt to commit a rape, burglary, robbery or arson, the intention is of no consequence; it is murder in the first degree. 7 W. & S. 418. 1 Br. Appx. 18.

But to constitute murder in the first degree, under this clause of the statute, there must be an *attempt* to perpetrate one of the enumerated offences; an *intent* merely is not enough. 1 Gr. 484.

Under the act of assembly, an unlawful killing, though it may be presumed murder, will not be presumed murder in the first degree. A. 282-3. The burden of proving it so lies on the commonwealth. 1 Wh. Dig. 478, pl. 109.

Murder in the second degree is, where a felonious and malicious homicide is committed, but without a specific intent to take life. 4 P. L. J. 157. A. 283. Bright. R. 186. 2 Ash. 227.

If death result from desire to do great bodily harm, and the act is not excused by heat of sudden quarrel, or on the doctrine of self-defence, it is murder in the second degree. 1 Brewst. 352. 2 Ibid. 546, 553.

A felonious homicide committed by one in a state of intoxication, is murder in the second degree; when the mind, from intoxication, or any other cause, is deprived of its power to form a design with deliberation and premeditation, the offence is stripped of the malignant feature required by the statute to place it in the list of capital crimes. 1 Am. L. J. 149. Lewis' Cr. L. 405. 1 Gr. 484. 18 N. Y. 9.

But the degree of intoxication that will have such effect, must be that degree of drunkenness which deprives one of the power of judging of his acts, and their legitimate consequences. Commonwealth v. Capie, Oyer & Terminer, Phila., 29 April 1853. MS. And see 4 Cr. C. C. 605. 3 Greenl. Ev. § 148. 2 Brewst. 546.

The true criterion as to the capability of the prisoner to commit murder in the first degree is, not whether he was drunk or sober, but whether he had the power, at the time, deliberately to form and plan in his mind, the design and intention of killing his victim. If, from intoxication, or other cause, the mind is deprived of the power to plan, deliberate upon and purpose the death of another, if such act is the result of impulse, not of deliberation, then the perpetrator is not guilty of murder in the first degree. 3 Phila. 235. 1 Wr. 45. And see 8 Wr. 55.

Involuntary manslaughter is, where it plainly appears that neither death nor any great bodily harm was intended; but death is accidentally caused by some unlawful act, not amounting to felony; or an act not strictly unlawful in itself, but done in an unlawful manner, and without due caution. 7 S. & R. 428. 2 P. 447.

What is carelessness, and what is due care, are matters of fact to be determined by a jury, in each particular case as it arises. Commonwealth v. Kuhn, 1 Pitts. Leg. J., 30 April 1853.

One indicted for murder cannot be convicted of involuntary manslaughter; it must be prosecuted and punished as a misdemeanor. 7 S. & R. 423. 2 P. 447. 8 Wr. 135.

Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force; and even his servant, attendant on him, or any other person present, may interpose for preventing mischief; and if death ensue, the party so interposing will be justified. 4 P. L. J. 158.

When engaged in the suppression of dangerous riots, the sheriff and his assistants are authorized to resort to every necessary means to restore the public peace, and prevent the commission of criminal outrages against person or property. They may arrest the rioters, detain and imprison them. If they resist the sheriff and his assistants in their endeavors to apprehend them, and continue their riotous actions, under such circumstances, the killing then becomes justifiable. 4 P. L. J. 38.

The killing of one who appears to be an assailant, is excusable, if there be reasonable apprehension of loss of life, or of great bodily harm, and it appear so imminent at the moment of assault, as to present no alternative of escaping its consequences, but by resistance, even if it turn out afterwards that there was no actual danger. 2 Wr. 265. 2 N. Y. 197.

Horse-Racing.

I. Act for the suppression of horse-racing. II. Judicial authorities.

I. ACT 17 FEBRUARY 1820. Purd. 523.

SECT. 1. All racing, running, pacing or trotting of horses, mares or geldings, for money, goods or chattels, or other valuable things, shall be, and hereby are declared to be common nuisances and offences against this state; and the authors, parties, contrivers and abettors thereof, shall be prosecuted and proceeded against by indictment.

SECT. 2. Each horse, mare or gelding used or employed by the owner thereof, or with his consent, in any race on which any bet or wager shall have been laid, or any purse or stakes shall have been made, shall be liable to be forfeited for the proper county within which such horse, mare or gelding so forfeited shall have been employed contrary to the foregoing provisions; and the said horse, mare or gelding so forfeited, shall, at any time within two months thereafter be seized by any overseer of the poor or supervisor of the highways of the township in which such race shall have been run, or by the sheriff or any of his deputies of the county within which such township shall be situated; and in case of seizure as aforesaid, the officer so seizing shall make information thereof to the next court of common pleas for the county, and such court shall proceed to hear and decide upon such seizure; and in case such horse, mare or gelding shall have been adjudged to be forfeited, such court shall order a sale thereof at public auction, and shall direct the proceeds, after the costs of condemnation shall have been deducted, to be paid to the treasurer of the proper county.

SECT. 3. All wagers and bets which shall have been laid, betted or made on the racing, running, pacing or trotting of horses, mares or geldings, and all promises, agreements, notes, bills, bonds, contracts, judgments, mortgages or other securities or conveyances, which shall have been made, given, granted, drawn, entered into or executed by any person or persons where the whole or any part of the consideration thereof shall be, for any money, goods, chattels or other thing won, laid or betted on the running, racing, trotting or pacing of any horses, mares or geldings, shall be utterly void and of no effect.

SECT. 4. It shall and may be lawful for any person who shall lose money, goods or chattels, or any other valuable thing on the racing, running, pacing or trotting of horses, mares or geldings, and shall pay or deliver the same, or any part thereof, to the winner or other person for his use or in his behalf, to recover the same or the value thereof from such winner, with costs, by action of debt, or on the case, in any court of record having cognisance thereof: *Provided always*, That such suit shall have been instituted within two calendar months after such losing and payment and delivery as aforesaid.

SECT. 5. If any person shall contribute to or collect, or shall ask or desire any other person to contribute to or collect any money, goods or chattels to make up a purse, plate or other thing to be run, paced or trotted for as aforesaid, at any place within this commonwealth, such person so offending shall forfeit and pay the sum of thirty dollars for each offence.

SECT. 6. If any person or persons within this state shall print or cause to be printed, set up or cause to be set up, any advertisement mentioning the time and place for the running, pacing or trotting of any horses, mares or geldings, or shall knowingly suffer any advertisement as aforesaid to be set up, in or upon his, her or their dwelling-house, or out-houses, or shall knowingly suffer the same to remain up as aforesaid, every person so offending shall forfeit and pay the sum of twenty dollars.

SECT. 8. Each and all of the penalties specified in the 5th and 6th sections of this act, shall be sued for and recovered by the overseer or overseers of the poor of the township wherein the offence shall have been committed, in the name of such township, within two calendar months thereafter, by action of debt, with costs of suit, in any

court having cognisance thereof, and the proceeds thereof shall be applied to the use of the poor of the said township; and in case there shall not be in any county or counties, overseers of the poor, then and in that case it shall be the duty of the supervisor or supervisors of the highways of the proper township, and they are hereby required to execute the duties hereinbefore directed to be performed, and in that case the proceeds thereof shall be applied to the improvement of the roads of said township: And it is hereby declared to be the special duty of every such overseer of the poor or supervisors of the highways, on his own knowledge of the fact, or on information thereof by any person or persons, without delay, to institute and prosecute to effect each and every such suit or suits, under the penalty of ten dollars for each default, to be recovered by any person or persons who shall sue for the same, by action of debt, with costs of suit; and in case any suit or suits so to be brought by the said overseer or overseers of the poor, and supervisor or supervisors of the highways shall fail, the costs that may be payable by him or them, shall be paid or reimbursed out of any moneys appropriated for the use of the poor or for the improvement of the public highways.

SECT. 8. The said overseer or overseers, and supervisor or supervisors, shall be entitled to retain in his or their hands twenty-five per centum on all sums which he or they may receive by virtue of this act, as a compensation for his or their trouble.

II. The following charge of Judge PARSONS, in the case of *The Commonwealth v. Francis D. Way*, tried in the court of quarter sessions of Philadelphia county, on the 30th October 1849, recommends itself to the magistracy, as containing a clear and lucid exposition of the law on the subject of fast driving on the public highways.

"This is an indictment for an assault and battery. The facts adduced to sustain the offence present a case which is not of ordinary occurrence. While the principles of law involved are familiar to the court, and have often been laid down to juries by us, in cases which have arisen for rapid and immoderate driving in the city and incorporated districts in the county, this is the first case which has been presented to the court, charging an individual with a violation of law, by driving his horse in an immoderate and improper manner on any of the great roads and highways not in the immediate vicinity of the densely populated parts of our city and county.

"Indictments have been repeatedly preferred against the drivers of omnibuses, hacks and other vehicles, for driving through the streets of our city at a rapid gait, and thereby inflicting personal violence upon those who are passing along our streets; and this court has invariably instructed the jury, if they believed an individual was driving his horses past in a manner so rapid as to endanger the persons of those who were quietly passing along the public streets, and thereby caused personal injury to another, the individual thus driving was guilty of an assault and battery. Nay, we have gone further, and held that if one drove his vehicle in a reckless, careless and incautious manner, he was responsible for all the consequences which followed the act.

"But the general impression seems to have prevailed in the community, that these principles do not apply in relation to the conduct of individuals on a great avenue like Broad Street. This is a mistake. The law relative to roads and highways is this: All persons have an *equal right* to pass and re-pass upon them with their horses, carts and carriages, or on foot, at their pleasure; and one has no greater privilege than another relative to their use. And while persons are thus upon the highway, they are bound to drive in such a manner as not to injure others who are passing thereon; for we must remember that its free use is the same to each. No persons, when travelling upon a great thoroughfare, have a right to race their horses so as to endanger the lives or persons of others passing at the same time. If they do, the law holds them responsible for the injuries which other travellers sustain by such unauthorized acts. Gentlemen who wish to try the speed of their horses should select the race-course, and not encroach upon the liberty which other travellers enjoy, who are at the same time passing upon a public road; nor is there anything unreasonable in this. For why should one citizen yield his rights, to gratify the sportive tastes of another?

"If one drives his horse at a rapid and immoderate gait along a public road, faster than people usually drive, no matter what motive induces the act, and while thus

accelerating the speed of his horse, he injures the person of another, he is guilty of an assault and battery—and if, in so doing, he should cause the death of the individual injured, he would be guilty of manslaughter. While all are at liberty to travel on the road, and drive as may suit their tastes or convenience, they are responsible for their conduct, if any injury ensues, by departing from the ordinary method in which travellers commonly use the roads. These views are founded upon the great and fundamental principle of the law, that all have equal rights, and each must use his own in such a way as not to injure his neighbor.

"It was contended by the defendant's counsel, that the prosecutor had no right to be riding upon Broad Street with his wife. I regretted to hear this remark. We instruct you that *he had an unquestioned right* to travel there with his wife. All citizens are at liberty to ride there with their wives and families, and this great and beautiful avenue is *not* appropriated to any privileged class. You, gentlemen of the jury, may desire to bring your families from the country to the city, along this fine street; it is the great leading road to a number of cemeteries in the vicinity of the city; funeral processions are almost daily passing along this street; our citizens are frequently visiting the hallowed resting-places of departed friends; and to say that this public street is to be exclusively appropriated to sporting gentlemen, is what will never be sanctioned by this court, nor by the community. The street is open to all who may desire to use it; and every one may enjoy this privilege as he pleases, for the benefit of the air, exercise or pleasure, and can take with him any members of his family; nor are these rights to be abridged in any respect, to gratify the tastes of any other class of persons who may choose to invade the rights of the public by unlawful acts, or an improper use of a highway common to all the citizens of the state. No such principles can be for one moment tolerated in a court of justice, or in a civilized land.

"If the jury should believe that the defendant, while travelling upon the highway at the time alleged, drove his horse at an improper and immoderate speed, and ran his carriage against the vehicle of the prosecutor, who was quietly driving along the same road, he is guilty of an assault and battery. This point has not been controverted by the defendant's counsel; but it is contended that the injury was the result of inevitable accident.

"The facts of the case seem to be these: Mr. Kennedy, the prosecutor, was passing along Broad Street, in June last, with his carriage and some members of his family in it with him, and driving at the usual travelling gait. When near Girard Avenue, he was about to turn down the same; while attempting it, he saw the defendant approaching in a carriage, with his horse on a fast run; the prosecutor instantly endeavored to turn his horse in an opposite direction, but before he was entirely removed from the place of apparent danger, the defendant's carriage came in contact with that of the prosecutor, upset the carriage, threw him and his wife upon the ground, causing considerable injury to him, and much greater to his wife.

"It is clearly proved that the defendant had been, for a great distance, trotting his horse at the top of his speed; and when within about two hundred yards of the place where the event occurred, his horse broke into a run, when the defendant struck him a violent blow with his whip; some of the witnesses say he struck the horse a number of times; and one of the witnesses said that he tried to hold him up, and the horse continued his speed until after the injury was effected. After this had been done, the defendant drove on his course without returning to see the effect produced by the conflict, or who had been injured thereby, or whether he had caused the death of a fellow-being or not.

"If the jury believe that the defendant was driving his horse at a rapid, immoderate gait, faster than people usually travel, and violently drove against the carriage of the prosecutor, and thereby inflicting upon him a personal injury, he is guilty of the offence charged in the indictment. Nor will it vary the case, if, when the horse had been urged to the top of his speed for some distance, he broke into a run; for the defendant is responsible for urging his horse to that immoderate gait, and must answer for the consequences."

The jury rendered a verdict of guilty, and the defendant was sentenced to pay a fine of one hundred dollars and the costs of prosecution. See *Bright, R.* 186. 3 Am. L. J. 313.

Horse-Stealing.

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|---------------------------------------------|---------------------------------------------------------------|
| I. Punishment for horse-stealing. | III. Public sale of stolen horses not to change the property. |
| II. Reward for apprehension and conviction. | IV. Forms of process, &c. |

I. ACT 31 MARCH 1860. Purd. 235.

SECT. 105. If any person shall be guilty of horse-stealing, or as accessory thereto before the fact, or of having received or bought any horse, knowing the same to have been stolen, the person so offending shall be guilty of felony, and shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.

II. ACT 15 MARCH 1821. Purd. 525.

SECT. 1. Whosoever after the passing of this act, shall pursue and apprehend any person who shall have stolen any mare, horse or gelding within any county of this commonwealth, on the conviction of the person so apprehended, shall be entitled to the reward of twenty dollars for apprehending the person who shall have been convicted of stealing any mare, horse or gelding as aforesaid, and six cents for every mile necessarily travelled in pursuit of the offender: *Provided*, That the reward offered by this act shall in no wise exclude the person or persons entitled to such reward from being competent witnesses.

SECT. 2. It shall be the duty of the court within any county aforesaid, before which any person or persons are convicted of the crime of horse-stealing, to inquire whether any, and if any, who is the person or persons entitled to receive the above rewards, and if more than one person, then in what proportion the said sum or sums ought to be paid to them, and to direct the clerk of said court to certify the same with the name or names of the claimants to the commissioners of the county in which the owner of the horse, mare or gelding resides, who are hereby directed and enjoined to draw their warrant on the treasurer of said county in favor of the said claimant or claimants for the amount so certified, all which shall be done free of all costs and charges to the said claimant or claimants, under the provisions of this act.

III. The 7th section of the act 23 September 1780, provides that no sale of any stolen horse, mare or gelding, by an auctioneer, at public vendue, shall be deemed a public sale in market overt, so as to change the property thereof. Purd. 525. Sm. 511.

IV. INFORMATION FOR HORSE-STEALING.

MIFFLIN COUNTY, ss.

THE information of G. H., of N—— township, in the county of M——, yeoman, taken on oath before J. R., one of the justices of the peace in and for the said county, the 10th day of April, A. D. 1860, who saith that about two months ago a certain black gelding rising five years old, and about fifteen hands high, was stolen out of his pasture in N—— township aforesaid, and that he hath good cause to suspect, and doth suspect, that a certain A. B. of the same township, laborer, did steal, take and carry away, the said gelding. Further saith not.

Taken and subscribed before J. R., Justice of the Peace.

WARRANT AGAINST A HORSE-THIEF.

MIFFLIN COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of N——, in the County of Mifflin, greeting:

WHEREAS, G. H., of N—— township, in the county of Mifflin, yeoman, hath this day made oath before J. R., one of our justices of the peace in and for the said county, that about two months ago a certain black gelding rising five years old, and about fifteen hands high, was stolen out of his pasture in N—— township aforesaid, and that he hath good cause to suspect, and doth suspect, a certain A. B. of the same township, laborer, did steal, take and carry away, the said gelding. You are, therefore, hereby commanded

take the said A. B., and bring him before the said J. R., forthwith, to answer the said charge, and further to be dealt with according to law. Witness the said J. R., at N—— township aforesaid, the tenth day of April, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

COMMITMENT OF A HORSE-THIEF.

MIFFLIN COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of N——, in the County of Mifflin, and to the Keeper of the Common Jail of the said county, greeting:

WHEREAS, A. B., of N—— township, in the county of Mifflin, laborer, hath been brought before J. R., Esquire, one of our justices of the peace in and for the said county, by virtue of his warrant, charged on oath of G. H. in the same township, yeoman, with having stolen and carried away from the pasture of the said G. H., in N—— township aforesaid, a certain black gelding rising five years old, and about fifteen hands high. These are, therefore, to command you, the said constable, to convey the said A. B. to the common jail of the said county forthwith, and deliver him to the keeper thereof, who is hereby enjoined to receive the said A. B. and keep him in safe custody until he be delivered by due course of law. Witness the said J. R., at N—— township aforesaid, the 10th day of April, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

House of Refuge.

I. Commitments to the house of refuge of Philadelphia.

II. Commitments to the house of refuge of Western Pennsylvania.

III. Judicial decisions.

IV. Form of a commitment to the house of refuge.

ACT 10 APRIL 1835. Purd. 529.

SECT. 1. It shall be lawful for the managers of the house of refuge, at their discretion, to receive into their care and guardianship infants, males under the age of twenty-one years, and females under the age of eighteen years, committed to their custody in either of the following modes, viz.: First, Infants committed by an alderman or justice of the peace, on the complaint and due proof made to him by the parent, guardian or next friend of such infant, that, by reason of incorrigible or vicious conduct, such infant has rendered his or her control beyond the power of such parent, guardian or next friend, and made it manifestly requisite that, from regard for the morals and future welfare of such infant, he or she should be placed under the guardianship of the managers of the house of refuge: Second, Infants committed by the authority aforesaid, where complaint and due proof have been made that such infant is a proper subject for the guardianship of the managers of the house of refuge, in consequence of vagrancy or of incorrigible or vicious conduct, and that from the moral depravity or otherwise of the parent or next friend, whose custody such infant may be, such parent or next friend is incapable or unwilling to exercise the proper care and discipline over such incorrigible or vicious infants: Third, Infants committed by the courts of this commonwealth, in the mode provided in the act to which this is a supplement.

SECT. 2. It shall be the duty of any alderman or justice aforesaid, committing a vagrant or incorrigible or vicious infant as aforesaid, in addition to the adjudication required by the 1st section of this act, to annex to his commitment the names and residence of the different witnesses examined before him, and the substance of the testimony given by them respectively, on which the said adjudication was founded.

SECT. 3. It shall be the duty of the president and legal associates of the common pleas of Philadelphia county, the judges of the district court of the city and county of Philadelphia, and the recorder of the city of Philadelphia, alternately, in such manner as may be arranged between them at a joint meeting for that purpose, from time to time held, to visit the house of refuge at least once in two weeks,

or oftener, if to the said judges it shall seem requisite; and it shall be the duty of the judge or recorder so visiting the house of refuge, carefully to examine into all the commitments to the said house of refuge made by the aldermen, justices or guardians of the poor aforesaid, that have not previously been adjudged upon by one of the said judges or the recorder, in the manner hereinafter directed, which commitments it shall be the duty of the managers of the house of refuge, truthfully and correctly to lay before such judge or recorder, and on such examination, such judge or recorder shall have produced before him, by the managers aforesaid, the superintendent or agent, the infant or infants described in such commitment, and the testimony upon which he or she shall have been adjudged a fit subject for the guardianship of said managers, or on which he or she shall be claimed to be held as such, and if, after examining the infant and such testimony, the said judge or recorder shall be of opinion that, according to the laws of this commonwealth, regulating the control of infants, a case has been established which in his opinion would, according to law, authorize the transfer of the parental authority over such infant to the managers of the house of refuge, then and in that case, it shall be the duty of the said judge or recorder to indorse an order on the commitment of the justice or alderman, or guardians of the poor, directing the infant to be continued under the guardianship of the managers of the house of refuge, after which it shall be lawful for said managers to exercise over all such infants the powers and authorities given them by the act to which this is a supplement. But if the said judge or recorder shall be of opinion that such case has not been made out, he shall order such infant to be forthwith discharged, which order shall be obeyed by the managers, under the pains and penalties provided by law against wrongful imprisonment: *Provided*, That it shall be the duty of said judge or recorder, at the request of such infant or any person in his behalf, to transfer such hearing to the court-house of the court of which he is a member, in order that the infant may have the benefit of counsel, and of compulsory process to obtain witnesses required in his or her behalf, which such judge or recorder is hereby authorized to award as fully and amply as any judge or court could do on the hearing of a writ of *habeas corpus*: *And provided also*, That nothing in this act contained shall be construed to interfere with the provisions of an act entitled "An act for the better securing of personal liberty and preventing unlawful imprisonment," passed on the 18th day of February 1785, commonly called the *habeas corpus* act.

The act of 23d March 1826 provides that the managers shall, at their discretion, receive into the said house of refuge such children who shall be duly convicted of criminal offences, as may be, in the judgment of the court of oyer and terminer or of the court of quarter sessions of the county of Philadelphia, deemed proper objects. *Purd.* 529.

By the act 10th January 1867 they shall also receive such children who may be convicted, in any court of quarter sessions out of the city of Philadelphia, of any misdemeanor or criminal offence, as may be, in the judgment of the said court, deemed proper objects for the house of refuge. *Purd.* 1463.

The power of the managers over such children extends to their arrival at the age of twenty-one years; except in the case of females who, at the time of their commitment, are under the age of sixteen, in which case, their charge over them ceases at the age of eighteen years. *Purd.* 529.

The managers are invested with power to place the children committed to their care, at such employments, and to cause them to be instructed in such branches of useful knowledge, as may be suitable to their years and capacities; and with the consent may bind them out as apprentices, to learn such proper trades and employments as in their judgment will be most conducive to their reformation and amendment, and will tend to the future benefit and advantage of such children. *Purd.* 529.

II. ACT 22 APRIL 1850. *Purd.* 531.

SECT. 15. It shall be lawful for the board of managers of said house of refuge [of Western Pennsylvania.] at their discretion, to receive into their care and guardianship infants, males under the age of twenty-one years, and females under the

age of twenty-one years, committed to their custody, in either of the following modes, to wit:

1. Infants committed by an alderman or justice of the peace on the complaint, and due proof made thereof, by the parent, guardian or next friend of such infant, and by reason of incorrigible or vicious conduct, such infant has rendered his or her control beyond the power of such parent, guardian or next friend, and made it manifestly requisite that from regard to the morals and future welfare of such infant, he or she should be placed under the guardianship of the managers of the said house of refuge.

2. Infants committed by the authority aforesaid, where complaint and due proof have been made that such infant is a proper subject for the guardianship of the managers of the said house of refuge, in consequence of vagrancy, or of incorrigible or vicious conduct, and that from the moral depravity or otherwise of the parent or guardian, or next friend, in whose custody such infant may be, such parent, guardian or next friend is incapable or unwilling to exercise the proper care and discipline over such incorrigible or vicious infant.

3. Infants who shall be taken or committed as vagrants or upon any criminal charge, or duly convicted of criminal offences, as may, in the judgment of the court of oyer and terminer, or of the court of quarter sessions of the peace of any county within the western district: (a) and the said managers shall have power to place the said children committed to their care, during their minority, at such employment, and cause them to be instructed in such branches of useful knowledge as may be suitable to their years and capacities; and they shall have power at their discretion to bind out the said children, with their consent, as apprentices during their minority, to such persons and at such places, to learn such proper trades and employments as in their judgment will be most conducive to the reformation and amendment, and will tend to the future benefit and advantage of such children.

SECT. 16. It shall be the duty of any alderman or justice aforesaid, committing a vagrant, or incorrigible or vicious infant as aforesaid, in addition to the adjudication required by the 6th section of this act, to annex to his commitment the names and residences of the different witnesses examined before him, and the substance of the testimony given by them respectively, on which the said adjudication was made.

SECT. 17. It shall be the duty of the president judge of the court of common pleas and the judges of the district court of Allegheny county, or the judges of the court of common pleas of Westmoreland county, alternately, (b) in such manner as may be arranged between them at a joint meeting for that purpose, from time to time held, to visit the said house of refuge at least once in two weeks, or oftener if the said judges it shall seem requisite; and it shall be the duty of the judge so visiting the house of refuge, carefully to examine into all the commitments to the said house of refuge, made by the aldermen or justices aforesaid, that have not previously been adjudged upon by one of the said judges in the manner hereinafter directed, which commitments it shall be the duty of the managers truly and correctly to lay before such judge; and on such examination such judge shall have produced before him by the managers aforesaid, their superintendent or agent, the parent or infants described in such commitment and the testimony upon which he or she shall have been adjudged a fit subject for the guardianship of the said managers, or on which he or she shall be claimed to be held as such; and if after examining the infant and such testimony the said judge shall be of opinion that, according to the laws of this commonwealth regulating the control of infants, a case has been established which, in his opinion, would, according to law, authorize the transfer of the parental authority over such infant, to the managers of the said house of refuge, then and in that case it shall be the duty of the said judge to issue an order on the commitment of the alderman or justice, or direct the infant to be continued under the guardianship of the said managers, after which it shall be lawful for the said managers to exercise over all such infants the powers and authorities given them by this act; but if the said judge shall be of opinion that

(a) By act 11 April 1862, they may also for the western district. *Purd.* 1276.

(b) See act 14 April 1868. *P. L.* 1099.

such case has not been made out, he shall order such infant to be forthwith discharged, which order shall be obeyed by the managers, under the pains and penalties provided by law against wrongful imprisonment: *Provided*, That it shall be the duty of said judge, at the request of such infant, or any person on his or her behalf, to transfer such hearing to the court-house of the court of which he is a member, in order that the infant may have the benefit of counsel and compulsory process, to obtain witnesses in his or her behalf, which such judge is authorized to award as fully and amply as any judge or court could do on the hearing of a writ of *habeas corpus*: *And provided also*, That nothing in this act shall be construed to interfere with the provisions of an act for the better securing the personal liberty, and preventing unlawful imprisonment, passed on the 18th day of February 1785.

III. The house of refuge is not a prison, but a school, its object is reformation by training its inmates to industry, by imbuing their minds with principles of morality and religion, by furnishing them with means to earn a living, and, above all, by separating them from the corrupting influence of improper associates. 4 Wh. 11.

A commitment to the house of refuge of a minor found guilty of larceny, in a court of quarter sessions, is not a conviction, and does not disqualify the party as a witness. *Commonwealth v. Robinson*, 3 Pittsburgh Leg. J. 211.

The master of an apprentice is not a next friend, on whose complaint the minor may be committed to the house of refuge. *Vaux's Dec.* 146.

A father cannot transfer the custody of the person of his child to the managers of the house of refuge, unless such child be adjudged a proper subject for the house of refuge by due course of law. 1 Ash. 248.

Where a child under fourteen years of age is adjudged a vagrant, the circumstances of the case ought to be urgent, unequivocal and decisive. *Ibid.*

An infant committed to the house of refuge by a justice, on a charge of felony, is entitled to be discharged on giving bail to answer for his appearance, and demanding a jury trial. *Kelly's Case*, Q. S., Phila., 22 June 1853. MS.

But unless the record shows that the commitment was for the commission of a felony, the court will refuse to discharge; the parents appearing to be unable to restrain the infant from the commission of criminal offences. *Rebhun's Case*, Q. S., Phila., 6 August 1853. MS.

The adjudication of the justice is in no respect conclusive, and the whole subject is open on the hearing of a writ of *habeas corpus*. 1 Ash. 248.

IV. COMMITMENT TO THE HOUSE OF REFUGE.

CITY OF PHILADELPHIA, ss.

WHEREAS complaint and due proof have this day been made before me, the subscriber, an alderman of the said city, by A. B., the father of E. B., an infant under the age of [sixteen] years, that the said infant, by reason of vicious conduct, has rendered his control beyond the power of the said complainant, and made it manifestly requisite that, from regard to the morals and future welfare of the said infant, he should be placed under the guardianship of the managers of the house of refuge, I do therefore, in pursuance of the act of assembly in such case made and provided, commit the said infant to the custody of the said managers, and certify to the said managers, that the said infant is, in my opinion, a proper subject for the said house of refuge.

Witness my hand and seal, this 5th day of June, A. D. 1860.

J. B., Alderman. [SEAL.]

The following are the names and residence of the different witnesses examined, and the substance of the testimony given by them respectively on which the said adjudication was founded, to wit:

G. S., of the city of Philadelphia, laborer, being duly sworn, stated in substance —
P. H., of the said city, cordwainer, being duly affirmed, stated in substance —

J. B., Alderman.

Incest.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 224.

SECT. 39. If any person shall commit incestuous fornication or adultery, or intermarry within the degrees of consanguinity or affinity, according to the following table (established by law), he or she shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years; and all such marriages are hereby declared void. (a)

The table of degrees of consanguinity and affinity is as follows:

Degrees of Consanguinity.

A man may not marry his mother.

Do. . . . do. . . . father's sister.

Do. . . . do. . . . mother's sister.

Do. . . . do. . . . sister.

Do. . . . do. . . . daughter.

Do. . . . do. . . . the daughter of his son or daughter.

A woman may not marry her father.

Do. . . . do. . . . father's brother.

Do. . . . do. . . . mother's brother.

Do. . . . do. . . . brother.

Do. . . . do. . . . son.

Do. . . . do. . . . the son of her son or daughter.

Degrees of Affinity.

A man may not marry his father's wife.

Do. . . . do. . . . son's wife.

Do. . . . do. . . . son's daughter.

Do. . . . do. . . . wife's daughter.

Do. . . . do. . . . the daughter of his wife's son or daughter.

A woman may not marry her mother's husband.

Do. . . . do. . . . daughter's husband.

Do. . . . do. . . . husband's son.

Do. . . . do. . . . the son of her husband's son or daughter.

II. Illicit intercourse with one recognised as a daughter, and with whose mother the defendant lived in reputed wedlock, is sufficient to convict. 6 P. L. J. 236.

Illicit intercourse with a natural daughter, is incest within the statute. 80 Mich. 521.

To constitute the crime of incest, the intercourse must be by mutual consent; if accomplished by force, it is rape. 1 Parker C. R. 344.

Under an indictment for incest, evidence of previous familiarities is admissible and relevant, as they constitute a necessary part of the principal transaction. Mich. 305. See 4 Texas 128.

An indictment for incest with a daughter must aver that the defendant had intercourse with his daughter "knowing her to be such." 2 Carter 489.

An averment that the defendant had intercourse with P. B., the said P. B. then and there being the daughter of the defendant, is a sufficient allegation of the relationship of the parties. 17 Ill. 426.

On an indictment for incest, an admission of the relationship made by the defendant, is competent evidence. 5 Mich. 305.

(a) See 8 Wr. 309.

Indictment.

WHATEVER amounts to a *public* wrong, may be made the subject of indictment; as the poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, breaking windows with stones, though there be not a sufficient number of persons to constitute a riot, the embezzlement of public moneys, killing a horse, &c. 1 D. 338. Or offering to bribe, though the bribe is not accepted. 2 D. 384.

Whatever is productive of a disturbance of the public peace, or of malicious injury to the property of another; or of nuisance or scandal to the community; or partakes of the character of personal lewdness; or tends or incites to the commission of any specific crimes; is indictable as a misdemeanor at common law. Whart. C. L. § 3.

Disobedience to an act of assembly is an indictable offence at common law. 1 Barr 224. 13 S. & R. 429.

A confederacy to assist a female infant to escape from her father's control, with a view to marry her against his will, is indictable as a conspiracy at the common law. 5 W. & S. 461.

It is sufficient in indictments, [warrants, commitments or docket entries,] that the charge be stated with so much certainty that the defendant may know what he is called to answer, and that the court may know how to render the proper judgment thereon. Over-nice exceptions are not to be encouraged, especially in cases which do not touch the life of the defendant. 1 Chit. Cr. L. 170, 221.

Infant.

INFANT, a person under *twenty-one* years of age. Co. Litt. 171. A person is of full age, the day before the twenty-first anniversary of his birthday. 1 Bl. Com. 462. Thus, if a man be born at any hour on the 1st day of January 1840, he is of age to do any legal act on the morning of the 31st of December 1861, though he may not have lived twenty-one years by nearly forty-eight hours, because the law does not regard the fraction of a day. 1 Bouv. Inst. 138-9. 3 Harring. 557. 4 Dana 597.

Within the age of *seven* years, an infant cannot be the subject of a criminal prosecution. At *fourteen* years of age an infant is *doli capax*, able to discriminate between good and evil, and subject to punishment for crime: under fourteen, an infant is considered, *primâ facie*, unacquainted with guilt, and incapable of crime. But if an infant, between the ages of seven and fourteen years, exhibits unequivocal malice, and an obvious knowledge of the impropriety of the act committed, he may be convicted even capitally. 1 Ash. 248. Whart. C. L. § 58. Lewis' C. L. 599.

Infants being supposed destitute of sufficient understanding to contract, the law protects their weakness, so far as to allow them to avoid every *injurious contract*; but they are bound by all *reasonable contracts*, for maintenance and education, and by acts which they are legally bound to perform. 5 Mass. 78.

An infant is liable for necessary victuals, apparel, physic and surgical attendance, schooling and instruction, for a fine assessed on him, on his admission to a copyhold estate. So he is liable for necessities supplied to his wife or child. But he is *not* liable, as for necessities in respect of goods bought to sell again, although he keeps an open public shop, for he has not discretion to carry on business; or for money supplied to buy necessities with, unless it be *actually so expended*. 2 Stark. 726.

Infants are only capable of making contracts for *necessaries*; or of doing those things voluntarily which, by law, they might or could be compelled to perform. 2 P. R. 338.

An infant may in some cases bind himself for necessities, but he cannot do so when he has got a guardian or parent to supply his wants. 4 W. 80.

An infant is bound by a contract for necessities and for carrying on the business in which he is employed by the consent of his guardians. 7 W. 237.

An infant may bind himself for necessities purchased with the consent of his guardian, expressed or implied, but not against his consent. 7 W. 344.

It is incumbent on a tradesman, before he trusts an infant with what may appear to be necessities, to inquire whether he is provided by his friends. Peake N. P. 229. 6 W. & S. 80.

Whether articles furnished by a tradesman to an infant are necessities or not, is a question of fact for the jury, regard being had to his condition in life, &c. 39 Eng. C. L. 902. 48 Ibid. 606. 6 W. & S. 80. 1 P. F. Sm. 80.

The tradesman is not *bound to inquire* whether, or to what extent, the infant is supplied with the like articles from other sources. Ibid.

An infant entering into partnership with other persons, is not responsible for the debts contracted *during his infancy*. 7 S. & R. 54.

An infant may, by law, be a *partner*, and he will be entitled to all the benefits resulting from the partnership, although he *will not be liable* for the losses, *if he choose to avail himself of his minority*. Gow on Part. 235.

Where a banking trade was carried on in the name of father and son, in whose joint names the accounts with the customers were headed in the banking books, the father could not sue *alone* for the balance of an account overdrawn by a customer, without giving *distinct proof* that the son [though proved to be a minor] had no property in the banking fund, or share in the business, as a *partner*. 14 East 210.

A bare acknowledgment or part payment, after age, [after the infant shall have attained the age of twenty one,] will not be sufficient; there must be an *express* promise (2 Esp. 268); and such promise must be *voluntary*. 5 Esp. 102.

A note given by an infant, becomes good by a promise to pay it, made *after* the maker of the note came of age. 2 Root 477. So in case of a bond.

A promise, after attaining majority, to pay a debt contracted during infancy, "as fast as he got able," will not support an action, without proof of ability to pay. 8 C. 509.

A promise, in affirmance of an infant's contract, must be made to the party in interest, or his agent. Declarations to strangers are unavailing. Ibid.

I apprehend that *trover* will not lie against an infant for goods sold to him either with or without a knowledge of his infancy; certainly not when the fact of infancy is known to the vendor. 3 R. 354.

Where an infant hired from the plaintiff a horse and gig, to go to G—, but instead of going to that place, went to C—, in an opposite direction, and by severe usage the horse was killed; it was *held*, that his infancy was a bar to an action for damages. 3 R. 351.

If the contract of hiring came within the exception of necessities, as might be, where a horse was hired to visit a sick parent, &c., then the infant would be liable for the consequences. Ibid. 353.

He can give his infancy in evidence under the general issue. 4 D. 130.

An infant may *enforce* his own contracts although they *cannot* be enforced against him. Lord TENTERDEN.

If the infancy of the plaintiff be pleaded in abatement, the court [or the justice] may allow him to amend by inserting on the writ [summons or docket] that he sues by A. his next friend. Coxe 416.

Informers.

INFORMER. The person who informs against, or prosecutes in any of the courts of justice, those who offend against any law or penal statute. Whart. Law Dict. 376.

A common informer may bring an action in his own name, whether the penalty be given to him in whole or in part; and that without any positive direction in the act imposing the penalty. 8 W. & S. 346.

Wherever a thing is prohibited by a statute under a penalty, and that penalty, or any part thereof, is given to him who will sue for the same, any person may bring an action for the penalty and recover the same. Esp. on Penal Actions 18.

But an infant cannot be a common informer; nor a corporation, unless specially authorized. Ibid. 19-20.

A common informer may maintain an action of *debt*, though the statute giving the penalty, does not, in express terms, provide for the form of action. Ibid. 56.

Informers, under the summary proceedings authorized by the "Act for the prevention of vice and immorality," and other similar acts, are *not* liable for costs, if they fail in establishing their accusations. 1 Ash. 413.

Inns and Taverns.

I. Statutes regulating innkeepers.

1. To keep good entertainment.
2. Not to encourage gambling.
3. Nor to allow gambling in their houses.
4. Penalty on conviction.
5. Penalty for harbouring apprentices, &c.
6. Tavern reckonings not recoverable.
7. Such suits to abate.
8. Penalty for selling without license.
9. By what measure liquors to be sold.
10. Penalty for furnishing liquors to intemperate persons.
11. How notice may be given.
12. Civil liability for damages.
13. Compensation of prosecutors.

14. Pleadings in actions for liquors sold.

15. Licenses to be recoverable.
16. Licenses to be framed.
17. Penalty for permitting drunkenness in their houses.
18. Distribution of penalties.
19. Penalty for employing intemperate persons.
20. Punishment for selling liquors in violation of the license laws.
21. Informer to be a witness.
22. Lien on horses at livery.
23. Limitation of liability.
24. How notice thereof to be given.
25. Lien on goods of boarders.

II. Authorities in relation to inns and innkeepers.

I. ACT 11 MARCH 1834. Purd. 535.

1. SECT. 17. Every innkeeper shall keep good entertainment for man and horse, under penalty of five dollars for every case of neglect.

2. SECT. 18. If any innkeeper, tavern-keeper or other retailer of wine, spirituous or other strong drink, shall incite, promote or encourage any games of address, hazard, cock-fighting, bullet-playing or horse-racing, at which any money or other valuable thing shall be betted, staked, striven for, won or lost, or shall furnish any wine, spirituous liquors, beer, cider or other strong drink, to any of the persons assembled or attending upon any such game, fight, play or race, such person shall forfeit and pay, upon conviction of the first offence, fourteen dollars, and upon a second conviction of the offence, twenty-eight dollars.

3. SECT. 19. And if any such person shall permit and allow any kind of game of address or hazard, or any playing, betting or gaming for money, or other thing of value whatsoever, either at cards, dice, billiards, bowls, shuffle-boards or any game or

device, in any other manner to be practised, played or carried on within his or her dwelling-house, out-house, shed or other place, in his or her occupancy, such person shall, for the first and second offence respectively, forfeit and pay the like sums.

4. SECT. 20. And if any innkeeper or tavern-keeper, or other licensed retailer of wine or other liquors, shall offend as aforesaid, the license of such person shall, upon his conviction thereof, become void, and such offender shall be incapable of being again licensed in like manner for one year thereafter; and upon such second conviction, such person shall, in addition to the penalty aforesaid, be for ever incapable of being a public-house keeper or retailer, as aforesaid, within this commonwealth.

5. SECT. 21. No innkeeper or tavern-keeper shall receive, harbor, entertain or trust any person under the age of twenty-one years, or any apprentice or servant, knowing him to be such, or after being warned to the contrary by the parent, guardian, master or mistress of such minor, apprentice or servant, under penalty, for the first or second offence, of three dollars over and above the forfeiture of any debt contracted by such minor, apprentice or servant, for liquors or entertainment; and for the third offence, under penalty of fifteen dollars, and the forfeiture of his license, and of being for ever incapable of receiving a license to keep a public inn within this commonwealth.

6. SECT. 22. No innkeeper or tavern-keeper shall trust or give credit to any person whatsoever for liquors, under penalty of losing and forfeiting such debt.

7. SECT. 23. Every suit brought by an innkeeper or tavern-keeper, for tavern reckonings as aforesaid, or for a debt contracted by a minor, apprentice or servant, after a warning to the contrary, as aforesaid, shall abate, or the defendant may plead such fact in bar thereof, and the plaintiff therein shall pay double costs.

ACT OF 1705. Purd. 535.

8. SECT. 1. All persons which now are or which at any time or times hereafter shall be licensed to keep any tavern, inn, ale-house or victualling-house, within this province, shall sell beer and ale by wine-measure to all persons as drink it in their houses, and by beer-measure to all such persons as carry it out of their houses, under the penalty of ten shillings, to the use of the poor for every county where the offence is committed.

ACT 8 MAY 1854. Purd. 666.

9. SECT. 1. Wilfully furnishing intoxicating drinks by sale, gift or otherwise, to any person of known intemperate habits, to a minor, or to an insane person, for use as a beverage, shall be held and deemed a misdemeanor, and upon conviction thereof the offender shall be fined not less than ten nor more than fifty dollars, and undergo an imprisonment of not less than ten nor more than sixty days; and the wilful furnishing of intoxicating drinks as a beverage to any person when drunk or intoxicated shall be deemed a misdemeanor, punishable as aforesaid.

10. SECT. 2. It shall be lawful for any member of the family, or blood relation of an intemperate person, or any overseer of the poor, or any magistrate of the district in which such intemperate person resides, or has legal settlement, or the committee of an habitual drunkard, to give a distinct notice, verbal or written, to any innkeeper, merchant, grocer, distiller, brewer or other person manufacturing, selling or having intoxicating liquors, forbidding him or them from furnishing such intemperate person or habitual drunkard with intoxicating drinks or liquors, and if, within three months after such notice, any one to whom the same is given shall furnish or cause to be furnished intoxicating liquors to such intemperate person or habitual drunkard, to be used as a beverage, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in the first section of this act.

11. SECT. 3. Any person furnishing intoxicating drinks to any other person in violation of any existing law, or of the provisions of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and any one aggrieved may recover full damages against such person so furnishing, by action on the case, instituted in any court having jurisdiction of such form of action in this commonwealth.

12. SECT. 6. Any person prosecuting for an offence indictable under this act shall, upon conviction of the offender, receive such reasonable sum for expenses, services and time expended as may be directed by the court, not exceeding twenty dollars, to be taxed and paid as a part of the costs in the cause, such allowance to be exclusive of compensation to such prosecutor as a witness under existing laws: *Provided*, That such allowance shall not be made in more than one case at the same term to one person.

13. SECT. 7. No action shall be maintained or recovery had in any case for the value of liquors sold in violation of this or any other act, and defence may be taken in any case against such recovery without special plea or notice.

14. SECT. 8. It shall be lawful for the courts of quarter sessions to revoke any licenses they may have granted, or that may have been granted under the general law regulating licenses in the city and county of Philadelphia for the sale of liquors, whenever the party holding a license shall be proved to have violated any law of this commonwealth relating to the sale of liquors, or whenever the premises of such party shall become the resort of idle and disorderly persons so as to disturb the general peace of the neighborhood, upon notice given to the person so licensed.

ACT 31 MARCH 1856. Purd. 667-8.

15. SECT. 22. Every person licensed to sell spirituous, vinous, malt or brewed liquors under this act, shall frame his license under a glass, and place the same so that it may at all times be conspicuous in his chief place of making sales, and no such license shall authorize sales by any person who shall neglect this requirement.

16. SECT. 30. Any person who shall sell spirituous or other intoxicating liquors as aforesaid, to any person who shall drink the same on the premises where sold, and become thereby intoxicated, shall, besides his liability in damages under any existing law, be fined five dollars for every such offence, to be recovered in debt before any alderman or justice of the peace, by any wife, husband, parent, child, relative or guardian of the person so injured, and levied upon the goods and chattels of the defendant without exemption: *Provided*, That suits shall not be instituted after twenty days from the commission of the offences in this and the preceding section.

17. SECT. 31. It shall be the duty of the court, mayor, alderman or justice of the peace, before whom any fine or penalty shall be recovered, to award to the informer or prosecutor, or both, a reasonable share thereof for time and trouble, but not in any case exceeding one-third; and the residue as well as the proceeds of all forfeited bonds as aforesaid, shall be paid to the directors of the public schools of the proper district, except in the city of Philadelphia, where they shall be paid to the city treasurer, to be applied for school purposes; and nothing herein contained shall prevent any such informer or prosecutor from becoming a witness in any such case.

18. SECT. 34. If any person engaged in the sale or manufacture of intoxicating liquors, as aforesaid, shall employ or permit any intemperate person in any way to assist in such manufacture or sale, it shall be deemed a misdemeanor, and any person so offending, shall be liable to conviction and punishment, as provided in the 28th section of this act.

The 28th section of this act, which was repealed by the act of 20th April 1858, § 11, provided that the party offending should be sentenced to pay a fine of not less than \$10 nor more than \$100, with the costs of prosecution, and to stand committed until the sentence of the court is complied with, not exceeding thirty days; and upon a second or subsequent conviction, in addition, to undergo an imprisonment in the county jail of not less than one month nor more than three months, and if licensed, to forfeit such license, and be incapacitated from receiving another for five years therefrom.

ACT 20 APRIL 1858. Purd. 666.

19. SECT. 11. Any unlawful sale of vinous, spirituous, malt or brewed liquors, or of any admixtures thereof, shall be deemed a misdemeanor, and, upon conviction thereof, the offender shall pay a fine of not less than ten nor more than one hundred dollars, with the costs of prosecution, and upon a second or any subsequent conviction, shall pay a fine of not less than twenty-five nor more than one hundred dollars, with the costs of prosecution; and in case of a second or subsequent conviction, the court may, in its discretion, sentence the offender to imprisonment, not exceed-

ing three calendar months; and in case any such offender, convicted of a second or subsequent offence, is licensed to sell any such liquor, such license shall be deemed forfeited and void; and no person convicted of a second or subsequent offence shall be again licensed for two years thereafter.

20. SECT. 12. No prosecutor or informer in any prosecution for the illegal sale of intoxicating liquors, shall receive any portion of the fine imposed on the defendant in any case where such prosecutor or informer is a witness for the commonwealth; and in every case of the conviction of a person returned by a constable, such constable shall receive two dollars, to be taxed in the costs.

ACT 22 MARCH 1867. Purd. 1466.

21. SECT. 4. If any person, after the passage of this act, shall sell spirituous and vinous liquors, domestic wines, malt or brewed liquors, without having obtained a license authorizing him so to do, such person shall, on conviction in the court of quarter sessions, be fined, for the first offence, in any sum not less than fifty, nor more than two hundred dollars, and for the second or any subsequent offence, such person shall be fined not less than one hundred dollars, and in the discretion of the said court, be imprisoned in the county jail not less than thirty days, nor more than ninety days: *Provided*, That nothing in this act shall be construed to repeal the provisions of the act of assembly, passed March 31st 1856, relating to sales by druggists and apothecaries.

ACT 7 APRIL 1807. Purd. 536.

22. SECT. 1. All livery-stable keepers and innkeepers within this commonwealth shall have a lien upon any and every horse delivered to them to be kept in their stables, for the expense of the keeping; and in case the owner of the said horse or horses, or the person who delivered them for keeping to the keeper of the livery stable, or innkeepers, shall not pay and discharge the said expense, provided it amounts to thirty dollars, within fifteen days after demand made of him personally, or in case of his removal from the place where such livery-stable or inn is kept, within ten days after notice of the amount due, and demand of payment in writing left at his last place of abode, the livery-stable keeper, or innkeeper, may cause the horse or horses aforesaid to be sold at public sale according to law, and after deducting from the amount of sales the costs of sale and the expense of keeping, shall deliver the residue upon demand to the person or the agent of the person who delivered the horse or horses to him for keeping: *Provided always*, that nothing in this act contained, shall be construed to impair any right of action, which the said livery-stable keepers or innkeepers may have against any person or persons, for the keeping his or their horse or horses.

ACT 7 MAY 1855. Purd. 586.

23. SECT. 1. Whenever the proprietor or proprietors of any hotel, inn or boarding-house, shall provide a good, sufficient and secure safe in the office of such hotel or other convenient place for the safe keeping of any money, goods, jewelry and valuables belonging to the guests and boarders of such hotel, inn or boarding-house, and shall notify the guests and boarders thereof, by placing in every lodging room, parlor and public hall and other conspicuous places, printed cards or notices, stating the fact that such safe is provided, in which such goods, jewelry and valuables may be deposited, and that the proprietor or proprietors thereof will not be responsible for said money, goods, jewelry and valuables unless deposited in said safe; and if any such guest or boarder shall neglect to deposit such money, goods, jewelry or valuables in such safe, the proprietor or proprietors aforesaid shall not be liable for any loss of such money, goods, jewelry or valuables, sustained by such guest by theft or otherwise: *Provided*, That nothing herein contained shall apply to such an amount of money, and such articles of goods, jewelry and valuables, as is usual, common and prudent for any such guest or boarder to retain in his room, or about his person.

24. SECT. 2. Whenever the proprietor or proprietors of any hotel, inn or boarding-house shall post in a conspicuous manner as aforesaid, notices requiring said guest or boarder to bolt the door of the room or rooms occupied by said guest or boarder,

or in leaving the said room or rooms, to lock the door and to deposit the key or keys with the proprietor or the clerk at the office; and if such guest or boarder shall neglect so to do, the proprietor or proprietors as aforesaid shall not be liable for any baggage of such guest or boarder, which may be stolen from said room or rooms: *Provided*, That said proprietor or proprietors shall clearly establish the fact of said room or rooms having been left unbolted or unlocked by said guest or boarder, at the time of the loss of said baggage as aforesaid.

25. SECT. 4. All proprietor or proprietors of hotels, inns and boarding-houses within this commonwealth, shall have a lien upon the goods and baggage belonging to any sojourner, boarder or boarders, for any amount of indebtedness contracted for boarding and lodging, for any period or time not exceeding two weeks, and shall have the right to detain said goods and baggage until the amount of said indebtedness is paid; and at the expiration of three months the said proprietor or proprietors may make application to any alderman or justice of the peace of the proper city, borough or county, who is hereby authorized to issue his warrant to any constable within said city, borough or county, and cause him to expose the said goods and baggage to public sale, after giving at least ten days' notice by public written or printed notices, put up in three or more public places in the ward of said city or borough, or in the township where said inn, hotel or boarding-house is located; and after he shall have sold the same he shall make return thereof to the said justice or alderman, who shall, after payment of all costs and the said amount of indebtedness, pay over the balance, if any there be, to the owner or owners of said goods and baggage: *Provided*, That the owner or owners of said goods and baggage shall have the right to redeem said goods and baggage at any time within the said three months, upon paying the amount of said indebtedness, and at any time previous to the sale as aforesaid, upon paying also the additional cost established by law for like services.

II. A person who makes it his business to entertain travellers and passengers, and provide lodging and necessities for them and their horses and attendants, is a common innkeeper; and it is no way material whether he have any sign before his door or not. Palmer 374. 1 Bouv. Inst. 408.

Every one at common law is entitled to keep a public inn, (but not an ale-house or tavern), and may be indicted and fined as guilty of a public nuisance, if he usually harbor thieves or suffer frequent disorders in his house; or take exorbitant prices, or refuse to receive a traveller as a guest into his house, or to find him victuals upon the tender of a reasonable price. 1 Hawk. P. C. 714. It is said also that setting up a new inn, where there is already a sufficient number of ancient and well governed inns, is a nuisance. Ibid. 1 Russell 298.

It was resolved by all the judges that any person might erect an inn to lodge travellers without any license or allowance for such erection. Dalt. c. 56.

It is the duty of an innkeeper to receive into his house all *strangers* and travellers who may call on him for entertainment, provided he has room, and they tender him a reasonable sum for the accommodations which they demand. But he may refuse to permit one to enter, being responsible for any injury the stranger or traveller might thereby sustain, if his house was not full. 2 P. 431. 1 Bouv. Inst. 408. And it is said he may also be indicted, at the suit of the commonwealth, for refusing to receive a guest under such circumstances. 1 Hawk. P. C. 714. Whart. Pr. § 911, n.

An innkeeper has the same control over his dwelling that any other person has, being responsible for the consequences of his conduct. He may refuse to admit or expel an obnoxious person from his house, and in so doing, may use as much force as is necessary, without being guilty of an assault and battery. And it makes no difference that the person expelled, called to see a guest at the inn; although by an improper exercise of his right, he may render himself liable for any injury thereby sustained either by the guest or visitor. 2 P. 431.

The innkeeper is entitled to a just compensation for his care and trouble, in attending to his guest and his property, and finding him what he may require. To enable him to recover this, the law has given him various remedies; he has a lien upon all the property of his guest, in the inn and its stables, for his claim as innkeeper. The lien does not, however, extend to the person of his guest, though formerly a different rule prevailed. 1 Bouv. Inst. 410. 3 Hill 488.

Inns were allowed for the benefit of travellers, who have certain privileges whilst they are on their journeys, and are in a more peculiar manner protected by the law; it is for this reason that the innkeeper shall answer for those things which are stolen within the inn, though not delivered to him to keep, and though he was not acquainted that the guest brought the goods to the inn, for it shall be intended to be through his negligence or occasioned by the fault of him or his servants. 8 Co. 32 b. Calye's Case.

There is in law an implied contract with a common innkeeper to secure his guest's goods at his inn. 3 Bl. Com. 164. And this duty and burden enjoined on innkeepers by law, they cannot discharge themselves of, under pretence of sickness, want of understanding, absence from their houses or the like. Bac. Abr. 182.

So if he puts a horse to pasture, without the direction of his guest, and the horse is stolen, he must make satisfaction. (But otherwise if with his direction.) Ibid.

Although a common carrier is liable for all losses occasioned by an armed mob, (not being public enemies,) an innkeeper would not be liable for such a loss. Nor would he be liable (it should seem) for a loss by robbery and burglary by persons from without the inn. But this doctrine should be now stated with some hesitation; for in a later case, (8 B. & C. 9,) BAYLEY, J., said: "It appears to me, that the innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies; although he may be exonerated where the guest chooses to have his goods under his own care." Story on Bailments 309. 9 Am. L. R. 435.

✓ In like manner, if an innkeeper bids his guest take the key of his chamber and lock the door, and tells him that he will not take the charge of the goods; yet if they are stolen he shall be answerable, because he is charged by law for all things which come to his inn, and he cannot discharge himself by such or the like words. Dalt. c. 56. Blackerley 169.

HOLT, C. J., doubted whether a man is a guest by setting up his horse at an inn, though he never went into the inn himself; but the other three justices held, that such person is a guest by leaving his horse, as much as if he had stayed himself, because the horse must be fed, by which the innkeeper has gain; otherwise if he had left a trunk or a dead thing. 1 Salk. 388.

So if a man comes to an inn with a hamper in which he hath certain goods, (to wit, hats, as the case was,) and departs, leaving it with the host, and two days after comes again; whereas in the time of his absence this was stolen, he shall not have any action against the host, because he was not a guest at the time of the stealing, and the host had no benefit by the keeping thereof, and therefore shall not be charged for the loss thereof in his absence. 1 Rolle's Abr. 2.

An innkeeper is liable for whatever is deposited in his house; but if the trust of the depositor be reposed in another person living in the house, the case is taken out of the general rule. 1 Y. 34.

In order to give this protective security to the goods, the owner of them must be a *guest* at the inn; that is, he must be a person who stays there under an express or implied agreement to be supplied with his personal wants, for a just compensation, for unless he be invested with that character, his goods will not be protected to the extent of those of a guest; one who stays at an inn as his home, under a special contract, is not a guest but a boarder. 1 Bouv. Inst. 409.

A notice by an innkeeper that all valuable articles must be deposited in the safe of the hotel, and if not so deposited, that he would not be responsible for them, if lost, does not apply to articles of personal comfort or convenience, as a watch or clothing. 8 Am. L. R. 561.

But the innkeeper will not be liable for the theft of such articles, if the guest has acted with negligence, and has not availed himself of ordinary precautions for their protection. Ibid. And see 21 N. Y. 111.

Where the guest, having packed his luggage for departure, looks his room, gives notice thereof to a clerk, and leaves the key of the room with such clerk, at the office, the innkeeper will be responsible for money stolen from a trunk, although a notice may have been brought to the knowledge of the guest, requiring money and valuables to be placed in a safe at the office, during his sojourn at the inn. 7 Am. L. R. 264.

A tavern or inn keeper may recover from a guest the amount of his bill for *boarding*, not being prohibited as a tavern reckoning by act of March 11th 1834. 2 M. 323.

The keeper of a public-house or inn cannot recover in an action upon a book account for liquors, or any other tavern reckoning, which exceeds in amount twenty shillings. 6 W. 65.

An account for liquor sold on credit by a tavern-keeper is null within the act of 1834; hence, an allowance for such liquors so furnished, on a settlement of accounts, will not avail the innkeeper. 2 Barr 77.

The innkeeper's license does not authorize the sale of liquors on Sunday, but such offence is not indictable as the keeping of a tippling or disorderly house; it is only punishable under the act of 1794. 10 C. 86.

The lien of innkeepers and livery-stable keepers, under the act of 1807, upon horses delivered to them to be kept in their stables, "for the expense of the keeping," is a charge against the owner, secured by a lien upon all the horses; it is joint and several, and one horse may be detained for the keeping of all belonging to the same owner. 11 H. 193.

Insolvent Laws, (*Proceedings, Forms, &c.*)

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| <p>I. Jurisdiction of the courts to discharge insolvents.</p> <p>II. Proceedings to obtain a discharge from confinement.</p> <p>III. The petition and proceedings thereon.</p> <p>IV. Effect of the discharge.</p> <p>V. After-acquired property of an insolvent.</p> <p>VI. When relief may be given to persons sentenced by a criminal court.</p> | <p>VII. Allowance to poor and insolvent debtors.</p> <p>VIII. Petition for leave to give bond.</p> <p>IX. Insolvent bond.</p> <p>X. Petition for discharge as an insolvent debtor.</p> <p>XI. Form of notice.</p> <p>XII. Form of an insolvent's discharge.</p> |
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SINCE the passage of the act to abolish imprisonment for debt, and of the bankrupt law, a knowledge of the provisions of the insolvent laws has ceased to be of that practical importance that it was under the former system; they have not, therefore, been inserted so much at large as in former editions of this work, but only such portions of them as were deemed of the most general interest to magistrates.

I. JURISDICTION OF THE COURTS TO DISCHARGE INSOLVENTS.

The several courts of common pleas (a) of this commonwealth shall have power to grant relief to insolvent debtors, residing or being within this commonwealth, on application made in the manner hereafter provided. Act 16 June 1836, § 1. *Purd.* 539.

The jurisdiction of the said courts may be exercised as follows, and not otherwise, viz.:

1. In the case of a person arrested or detained by virtue of any process issued in any civil suit or proceeding, for the recovery of money or damages, or for the non-performance of any decree or sentence for the payment of money, (b) without collusion with the plaintiff, the court of common pleas of the county (c) in which such debtor shall be arrested or detained, shall have power to grant relief as aforesaid.

(a) The district courts have no jurisdiction. 6 Barr 445. 2 Br. appx. 61.

(b) A person in execution for damages in tort, is entitled to relief. 1 Br. 57. So is one in custody, under an attachment for non-payment of costs. *Terry v. Peterson*, Ing. 16. Or, an attachment against an administrator, to compel payment of a debt due to a creditor of the decedent. 1 Ash. 97. Or, a commitment by the quarter sessions, for non-compli-

ance with an order directing him to pay a weekly sum for the support of his wife and child. 1 Ash. 175. Or, of an order in a bastardy case. 1 Wh. 63. But the act does not apply to process issued out of the federal courts. 5 W. 141.

(c) One arrested on a *testatum ca. sa.* can only be discharged by the court of the county to which the writ is issued. 3 W. & S. 494.

2. In the case of a person held on a bail-piece, issued in any such suit or proceeding, the court of common pleas of the county in which the suit was instituted, shall have power to grant relief, as aforesaid.

3. In the case of a debtor not arrested, detained or held as aforesaid, such power may be exercised by the court of common pleas of the county in which such debtor shall reside. Ibid. § 2.

But no debtor shall be entitled to relief under this act, unless he shall have resided within this commonwealth (a) for six months immediately preceding his application to the court, or shall have been confined in jail for three months immediately preceding such application. Ibid. § 3.

II. PROCEEDINGS TO OBTAIN A DISCHARGE FROM CONFINEMENT.

It shall be lawful for any judge of the court of common pleas aforesaid, or for the prothonotary of such court, to make an order for (the) discharge of any debtor arrested, detained or held by virtue of any process or bail-piece, as aforesaid, (b) on his giving a bond (c) to the plaintiff in such suit (d) or proceeding in such amount and with such security as shall be approved by such judge or prothonotary. Ibid. § 4.

The order of the judge or prothonotary, as aforesaid, shall direct the officer or other person having such debtor in custody or confinement, forthwith to discharge (e) such debtor, on his paying the jail fees, if any be due. Ibid. § 5.

The condition of the bond to be given as aforesaid, shall be, that the said debtor shall appear at the next term (g) of the court of common pleas of the said county, (h) and then and there present his petition for the benefit of the insolvent laws of this commonwealth, and comply with all the requisitions of the said law, and abide all the orders of the said court in that behalf, (i) or in default thereof, (k) and if he fail in obtaining his discharge as an insolvent debtor, that he shall surrender himself to the jail of the said county. (l) Ibid. § 6.

The officer or other person having such debtor in confinement or custody, shall be exonerated, on making a return of the order aforesaid, on the process by which such debtor was held, and such order being filed with any officer or magistrate, by whom any bail-piece was issued, shall entitle the bail to be exonerated as effectually as if the debtor had been surrendered and confined in prison on such bail-piece. Ibid. § 7.

Provided, That nothing herein contained shall prevent a debtor arrested on a

(a) His residence need not have been in the county. 1 Ash. 94. But if he has been absent from the state prior to the filing of his petition, it lies upon him to show, that he left with the clear intention of returning. 2 Ash. 118.

(b) This only applies to final process. 2 Ash. 289.

(c) The obligors wrote their names and affixed their seals to a piece of paper, and left it with the judge, with instructions to fill it up as a bond, conditioned to take the benefit of the insolvent act, which was accordingly done: *held*, that the bond was valid and binding on the parties. 17 S. & R. 438. The insolvent himself need not sign the bond. 8 P. R. 64. If one illegally arrested give bond, instead of suing out a *habeas corpus*, the surety will be bound. 8 W. & S. 69.

(d) If taken for the use of other creditors, it is void. 13 S. & R. 190.

(e) Such discharge is binding on the sheriff, whether the bond be legal, or otherwise. 4 W. & S. 30.

(g) A discharge at the current term of the court is a compliance with a condition of the bond. 4 W. & S. 280, 465. 2 Ash. 433. So is a discharge by the court of another county. 5 W. & S. 155. Or a discharge under the bankrupt law. 6 W. & S. 120. A discharge at any time

during the term is sufficient. 10 W. 228. And whether founded upon a petition filed in consequence of the arrest, or independently of it. 12 S. & R. 105. The application is to be to the next term at which it can possibly be done. 8 S. & R. 367. And the bond may be sued out as soon as the regular term of the court has expired. 2 Wr. 270.

(h) An insolvent whose application to be discharged is pending in one county, need not make a second application in another county where he has been arrested and given bond. 5 W. & S. 155.

(i) See 16 S. & R. 48, 2 R. 183, as to the form of the bond.

(k) Imprisonment for debt, or for crime, would not excuse performance. 6 W. 508-9. But the death of the debtor, during the term, will discharge the surety. 10 W. 228. 2 Ash. 433. And if the bond be forfeited, the court cannot relieve him by allowing the petition to be filed and heard at a later day. 1 Ash. 102.

(l) If the *ca. sa.* be set aside, the defendant need not surrender. 9 W. 287. The surrender must be on the day the petition is dismissed. 4 W. & S. 30. And see 14 S. & R. 380. 5 W. 346. 2 R. 163, 278. 4 W. 69. 1 W. & S. 882. 5 W. & S. 179. 2 Barr 178. 1 P. R. 270. 2 Gr. 389. 1 Wr. 275. 14 Wr. 194.

bail-piece from giving new bail according to law, and obtaining his release thereby. *Ibid.* § 8.

III. THE PETITION AND PROCEEDINGS THEREON.

Every petition for relief, as aforesaid, shall be accompanied with the following schedules:

1. A statement of all the estate, effects and property of the petitioner, wheresoever situate, and of whatsoever kind. (a)

2. A statement of the debts due by him, containing the names of his creditors, the amount due to each, and the nature or character of the debt, so far as he can ascertain the same. (b)

3. A statement of the causes of his insolvency, and of the extent of his losses, if any.

And the facts set forth in such petition and statements, shall be verified by the oath or affirmation of the petitioner. (c) *Ibid.* § 9.

It shall be the duty of the court to which any such petition may be presented, to fix a time for the hearing of the same, either by a general rule, or by an order to be made in the particular cause, if the circumstances of the case shall require it. *Ibid.* § 10.

Notice of the time and place fixed for the hearing as aforesaid, shall be given by the petitioner to his creditors, at least fifteen days before such hearing, either personally or by advertisement published in one or more newspapers, as the court may direct. *Ibid.* § 11.

At the time and place fixed for the hearing, the petitioner shall exhibit to the court a just and true account of his debts, credits and estate, whatsoever and wheresoever situate, and, if so required, shall produce all books and papers in his possession or under his control, relating to his business and estate, and shall answer all questions that may be put to him by the court, or (under their control) on the part of his creditors, touching the same, and shall satisfy the court that he has not concealed or conveyed to any person whomsoever, for the use of himself, or any of his family or friends, or whereby to expect any future benefit to him or them, any part of his estate, effects or credits. *Ibid.* § 12.

If upon examination of the petitioner as aforesaid there shall not arise a strong presumption of fraud, (d) and if the petitioner shall in other respects appear to be entitled to relief, the court shall direct an oath or affirmation in the following form, to be administered to such petitioner.

"I, A. B., do (swear or affirm) that I will deliver up and transfer to my trustees, for the use of my creditors, all my property that I have, or claim any title to, or interest in, at this time, and all debts, rights and claims which I now have, or that I am in any respect entitled to, in possession, reversion or remainder, and that I have not, directly or indirectly, at any time, given, sold, conveyed, leased, disposed of or intrusted any part of my property, rights or claims, to any person, whereby to defraud my creditors, or any of them, or to secure, receive or expect any profit, benefit or advantage thereby." *Ibid.* § 13.

The petitioner shall thereupon execute an assignment of all his estate, property and effects whatsoever, (e) to such trustees as may be nominated by two-thirds in number and value of the creditors then attending, either in person or by attorney, or in default of such nomination, as shall be appointed by the court. *Ibid.* § 14.

When such an assignment shall have (been) executed, (g) the court shall make an order (h) that the petitioner shall not at any time thereafter be liable to imprison-

(a) A person having no property may be discharged. 1 B. 462. If he has made an assignment, there must be a schedule of the property assigned. 1 Ash. 107. 118. An omission, without fraudulent motive, may be amended. 1 Ash. 167.

(b) The names of all the creditors, however small, should be included. 1 Ash. 167. See 4 S. & R. 2.

(c) See 5 W. & S. 179.

(d) This is confined to his not delivering up his estate to his creditors. 2 Y. 81. See 1 Ash. 117-18.

(e) All his estate passes, whether mentioned

or not. 6 B. 189. And a right of action founded on the taking of his goods. 9 S. & R. 249. But not damages for a mere personal tort. 9 S. & R. 249. 4 S. & R. 28. 1 Y. 245. 2 D. 213. Or for an excessive distress. 13 S. & R. 54. Nor the wife's choses in action. 6 W. & S. 290. 10 Barr 482. Nor her right of dower in his lands. 1 H. 526. And see 6 H. 249.

(g) The execution of a formal assignment is not necessary to vest the estate in the trustees. 8 H. 385. 5 H. 114. 5 W. 77.

(h) The record of the discharge is conclusive, and cannot be impeached collaterally. 14 S. & R. 178. 10 H. 335.

ment, by reason of any judgment or decree obtained for the payment of money only, or for any debt, damages, costs or sum of money, contracted, accrued or occasioned and due before the time of such order. (a) *Ibid.* § 15.

The order of the court as aforesaid, shall be a sufficient warrant for the discharge of the petitioner from imprisonment, if he shall be in confinement at the time of such order, or shall be at any time afterwards arrested, by virtue of process in any action or proceeding for the recovery of any debt or demand, as aforesaid, on his giving a warrant of attorney, if arrested on mesne process, to appear to the action and plead thereto. *Ibid.* § 16.

Provided, That if the petitioner shall be in custody or confinement at the time of such order, by virtue of process issued upon any judgment obtained against him in an action founded upon actual force, (b) or upon actual fraud or deceit, (c) or in an action for a libel or slander, malicious prosecution or conspiracy, or in an action for seduction or criminal conversation, where the damages found by the jury (d) shall exceed the sum of one hundred dollars; or if such petitioner shall be afterwards arrested by virtue of process issued upon any such judgment obtained against him previously to such order, he shall not be entitled to be discharged from such imprisonment or arrest, until he shall have been in actual confinement during a term of at least sixty days. (e) *Ibid.* § 17.

It shall also be lawful for the said court, upon the application of the trustees of any insolvent, to make an order for the appearance of such insolvent, at such time and place as may be fixed by the court, to answer upon any interrogatory, or otherwise, to such questions as may be propounded on the part of the said trustees, touching the estate and property of such insolvent at the time of his assignment to the said trustees, and to enforce their orders in the premises, by attachment. *Ibid.* § 18.

It shall be lawful for the court, either before or after the discharge of any petitioner as aforesaid, to make an order upon such petitioner to produce and deposit, either with the prothonotary of the court, or with the trustees, all books, documents, papers and muniments of title, in his possession or under his control, relating to the estate and property of such petitioner, and to enforce such order by attachment. *Ibid.* § 19.

IV. EFFECT OF THE DISCHARGE.

Whenever the court shall have directed personal notice to be given to creditors, of the time and place fixed for hearing the petition of any debtor as aforesaid, the discharge of such debtor shall not affect the rights and proceedings of those to whom personal notice shall (not) have been given, according to the order of the court. *Ibid.* § 31.

The discharge of any petitioner who may have been arrested or imprisoned in any other county than that of his residence, shall not protect him from arrest or imprisonment for any debt, except such as may be owing (owing) to the party at whose suit such debtor was arrested or imprisoned. *Ibid.* § 32.

The discharge of a debtor by virtue of this act, shall not acquit or release any other person from any debt, contract or engagement, or other liability, to which he was subject, but all other persons shall be answerable for the same in like manner as if such discharge had not taken place. *Ibid.* § 33.

Every such debtor shall be entitled, notwithstanding his assignment, in conformity to this act, to retain for the use of himself and his family, all such articles as are or may be by law exempted from levy or sale on any execution, or from distress for rent, and the property in such articles shall not pass to his trustees. *Ibid.* § 38.

If any such debtor shall satisfy the claims of his creditors, (g) the court shall

(a) As to the effect of the discharge, see 4 S. & R. 506. 1 S. & R. 311. 5 S. & R. 156. 1 M 14. 5 Wh. 82. 1 Ash. 67. 8 W. & S. 183. 3 S. & R. 559. Bald. 296. Crabbe 307. 2 Am. L. J. 204. The discharge may be reversed by the supreme court on certiorari. 1 Wr. 275.

(b) An action of trover and conversion is not within these exceptions. 2 Phila. R. 393.

(c) An action for breach of promise of marriage, is not within this proviso, unless actual fraud be proved. 2 Phila. R. 391.

(d) An award of arbitrators is within this proviso. O'Neill's Case, Com. Pleas, Phila. Sept. 1856. MS.

(e) Such persons may be discharged from custody on giving bond; but not on the final hearing until he has undergone sixty days actual imprisonment. 3 P. L. J. 803.

(g) After the lapse of fourteen years, the court will presume payment. 14 S. & R. 369. 1 H. 22. 4 Wh. 266. 2 W. 218.

order his estate and effects not sold, to be restored to him, or his legal representatives, and he shall, by virtue of such order, be seised or possessed thereof as of his former estate and title thereto; and if upon the final settlement of accounts by the trustees, there shall be a surplus, after payment of all the claims presented and allowed, the same shall be paid to such debtor, or his legal representatives. *Ibid.* § 39.

V. AFTER-ACQUIRED PROPERTY OF AN INSOLVENT.

The real and personal estate acquired by any debtor, after his discharge, as aforesaid, or in which he shall thereafter become entitled to any interest, legal or equitable (except such as may be by law exempted from execution) shall be subject to his debts, (a) engagements and other liabilities, in like manner, in all respects, as if such discharge had not taken place, and it shall be lawful for any of his creditors to issue and execute any new or other process against such real or personal estate, for the satisfaction of their respective claims, in the same manner as they might have done if such debtor had never been taken in execution. *Ibid.* § 40.

Whenever a majority in number and value of the creditors of any insolvent, as aforesaid, residing within the United States, or having a known attorney therein, shall consent in writing thereto, it shall be lawful for the court by whom such insolvent shall have been discharged, upon the application of such debtor, and notice given thereof, in the manner hereinbefore provided for giving notice of his original petition, to make an order that the estate and effects which such insolvent may afterwards acquire, shall be exempted for the term of seven years thereafter from execution, for any debt contracted, or cause of action existing previously to such discharge; (b) and if, after such order and consent, any execution shall be issued for such debt or cause of action, it shall be the duty of any judge of the court from which such execution issued to set aside the same with costs. *Ibid.* § 41.

VI. WHEN RELIEF MAY BE GIVEN TO PERSONS SENTENCED BY A CRIMINAL COURT.

The court of common pleas of any county in which any person may be confined by sentence or order of any court of this commonwealth, until he restore any stolen goods or chattels, or pay the value thereof, or in which any person may be confined for non-payment of any fine, or of the costs of prosecution, or upon conviction of fornication or bastardy, and for no other cause, shall have power to discharge such person from such confinement, on his making application and conforming to the provisions hereinbefore directed in the case of insolvent debtors: (c) *Provided*, That where such persons shall have been sentenced to the payment of a fine, or after a conviction of fornication and bastardy, he shall not be entitled to make such application until after he shall have been in actual confinement, in pursuance of such sentence, for a period not less than three months. (d) *Ibid.* § 47.

Any applicant for the benefit of the insolvent laws, who is or may hereafter be in confinement under sentence of any criminal court, and who shall be entitled to be released from such confinement, on a compliance with the provisions of existing acts of assembly, shall be released on giving bond, (e) as in civil cases. (g) Act 24 January 1849, § 6. *Purd.* 544.

(a) Unless barred by the statute of limitations. 5 R. 186.

(b) Such order suspends the running of the statute of limitations. 3 Wh. 15. 5 R. 186. See *Ing.* 276-7. 4 *Phila.* 309.

(c) The county commissioners have no power to discharge from prison a person convicted of a misdemeanor, and sentenced to pay a fine to the commonwealth, on taking security for the fine, although when collected it would vest in the county. 10 H. 18. The court cannot discharge on *habeas corpus* a person imprisoned under the sentence of a court of competent jurisdiction. 2 C. 279.

(d) A person who is in prison for non-payment of costs, exceeding \$15, cannot be discharged under this section until he has been in actual confinement for three months.

Wood's Case, Pittsburgh Legal Journal, 30 April 1853. *Ex parte Fox, Ing.* 47. *Bright.* Costs 888-9.

(e) After having been in actual confinement for three months. *Bright. R.* 462. *Wood's Case*, Pittsburgh Legal Journal, 30 April 1853. Where a person imprisoned under a sentence for a criminal offence, gives bond to take the benefit of the insolvent laws, and the application is refused, and he surrenders himself to jail in discharge of the bond, he is in prison again under the sentence of the court of criminal jurisdiction. 2 C. 279.

(g) This section is an exact transcript of the act 11 April 1848. P. L. 526. It is repealed, as to Schuylkill county, by act 22 March 1850. P. L. 281. It was passed to meet the case in 3 W. 384.

Every person who shall be confined in any jail of this commonwealth, in execution or otherwise, for any debt, sum of money, fine or forfeiture, not exceeding in amount the sum of fifteen dollars, (a) exclusive of costs, and who shall have remained so confined for the space of thirty days, shall be discharged from such confinement, if there be no other cause of confinement, and shall not be liable to imprisonment again for the same cause: *Provided*, That the estate and effects of such person shall, notwithstanding such discharge, be liable for such debt or other cause of imprisonment, in like manner as before. Act 16 June 1836, § 48. Purd. 544.

The respective boards of inspectors of the state penitentiaries for the eastern and western districts, (b) shall be authorized to discharge from prison, without the delay and expense of any proceeding under the insolvent laws of this commonwealth, every convict who may have served out the term of imprisonment at labor, to which such prisoner now has been or hereafter may be sentenced, notwithstanding such prisoner may not have paid the costs of prosecution, or any fine to the commonwealth, or restored the property stolen, or paid the value thereof, if in the judgment of the said board of inspectors such prisoner is unable to pay or restore the same: *Provided always*, That such discharge shall in no way interfere with the right of the commonwealth, or the public officers, or any person or persons interested in the payment or restitution aforesaid, to proceed under the judgment or judgments of conviction to recover the amount from the property of such prisoner; and that for this purpose the attorney-general or his proper deputy shall, if he deem it for the interest of the commonwealth, or at the request of any person interested, issue writs of *feri facias* and *venditioni exponas*, and other writs of execution, as the case may require, against such property and all property, real or personal, of such prisoner, taken in execution by virtue of such writs, shall be sold as in other cases real or personal property is sold by virtue of similar writs; and such sales shall be as available and effectual in law as sales in other cases by virtue of similar writs: *And provided also*, That no such discharge shall be allowed or granted by the said board of inspectors until such prisoner shall have exhibited to them, on oath or affirmation, duplicate schedules of all his property, real, personal and mixed, to which he is in any manner entitled, as far as he can ascertain the same, one of which schedules or lists of property it shall be the duty of the said inspectors to file and preserve, with the papers of the prison, and the other immediately to transmit to the clerk of oyer and terminer, or the quarter sessions, or mayor's court, as the case may be, in which the said prisoner was tried, to be filed there also, with other papers relating to the case. Act 17 April 1831, § 1. Purd. 791.

VII. ALLOWANCE TO POOR AND INSOLVENT DEBTORS.

It shall be the duty of the several courts of common pleas to fix and order a daily allowance, not exceeding twenty cents, (c) for all such poor and insolvent debtors (d) as shall or may be confined in the prison of their respective counties, and have not property sufficient to support themselves; and it shall be the duty of the plaintiff or plaintiffs, at whose suit any such debtor may be imprisoned, his or their agent or attorney, upon notice given by the keeper of the prison, to pay the said daily allowance at the prison on every Monday morning, while the debtor continues in prison; on failure whereof for the space of three days, the debtor may apply to the court of

(a) One confined for costs on several bills, which in the aggregate exceed \$15, may be discharged under this section, provided the amount due on each bill do not exceed that amount. *Com. v. Blair*, Ing. 47. *Bright. Costs*, 339. And after remaining in confinement thirty days for the fine, he is entitled to be discharged, both as to the fine and costs. 5 B. 489. See *Ex parte Fox*, Ing. 47. *Bright. Costs* 338-9.

(b) This power is extended to the board of inspectors of the Philadelphia county prison, by the act of 11 April 1867. Purd. 608.

(c) By act 11 April 1856, the several sheriffs, except those of Allegheny and Philadelphia,

are to receive for boarding prisoners, such allowance as may be fixed by the courts of quarter sessions, not exceeding twenty-five cents per diem. P. L. 814. By act 5 March 1858, this act is repealed as to Crawford and Erie counties; but the sheriffs of these counties are not to be allowed more than \$2.50 per week for each prisoner. P. L. 70. By act 24 March 1858, the sheriff of Lycoming is to receive thirty-five cents per diem for each prisoner. P. L. 143. And by act 26 March 1860, the sheriff of Warren county may charge \$2.25 per week. P. L. 262.

(d) One imprisoned for damages in tort, is not within the act. 8 Barr 445.

common pleas, (a) if it be in session, or if not, then to a judge of the same, who upon inquiry, and finding the said debtor to be destitute of property for his support in prison, and failure of payment to have been made as aforesaid, shall forthwith discharge (b) the said debtor from imprisonment, and such debtor shall not be again imprisoned for the same debt or debts. Act 26 March 1814, § 19. Purd. 538.

The prothonotaries of the several courts of common pleas of this commonwealth shall be authorized and required * * * to discharge debtors destitute of property for their support, as fully and amply as any judge may now do, under the provisions of the 19th section of the act of the 29th March 1814, entitled "An act for the relief of insolvent debtors." Act 30 March 1833, § 1. Purd. 539.

In all cases of imprisonment for debt, the plaintiff or plaintiffs shall be liable for the boarding and jailer's fees, from the time of the commitment, if the defendant shall make affidavit that he is unable to support himself; and the sheriff or jailer may recover the same as debts of similar amount are by law recoverable. Act 1 July 1842, § 11. Purd. 539.

VIII. PETITION FOR LEAVE TO GIVE BOND.

To the Prothonotary of the Court of Common Pleas of Philadelphia County:

THE petition of A. B. respectfully sheweth, that your petitioner is now in custody under an execution (or bail-piece,) issued by Alderman (or Justice) L. M., at the suit of E. F. That your petitioner has resided in the county of Philadelphia for six months immediately preceding this his application, and prays that he may be permitted, in order to procure his discharge, to give bond to the plaintiff in said suit, in such amount and with such security as you may approve, agreeably to the provisions of the act of assembly authorizing the prothonotaries of the several courts of common pleas of the commonwealth of Pennsylvania, to take security and discharge insolvent debtors from arrest.

(Signed,) A. B.

C. D., the surety proposed in the above case, being duly sworn or affirmed, says that he is worth (one hundred and eighty) dollars, after payment of all his debts and responsibilities whatsoever.

(Signed,) C. D.

Sworn (or affirmed) and subscribed before me, this 1st day of October, 1860.

N. O., Prothonotary.

IX. INSOLVENT BOND.

Know all men by these presents, that we, A. B. and C. D., No. 118, Arch street, curriers, are held and firmly bound unto E. F., in the sum of one hundred and eighty dollars lawful money of the United States of America, to be paid to the said E. F., his executors, administrators or assigns; for which payment, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the first day of October, in the year of our Lord one thousand eight hundred and sixty.

Whereas the above bounden A. B. hath been arrested on an execution (or bail-piece,) at the suit of the said E. F., for the sum of ninety dollars and six cents, besides costs; and the said A. B. hath made application to the prothonotary of the court of common pleas of the county of Philadelphia, to give bond, with sufficient security, to comply with the provisions of the act of the general assembly of the commonwealth of Pennsylvania, passed the sixteenth day of June, one thousand eight hundred and thirty-six, entitled "An act relating to insolvent debtors;" and the said prothonotary hath approved of the above named C. D. as security for the said A. B.:

Now, the condition of the above obligation is such, that if the said A. B. shall appear at the next term of the court of common pleas of the said county, and then and there present his petition for the benefit of the insolvent laws of this commonwealth, and comply with all the requisitions of the said law, and abide all the orders of the said court in that behalf, or in default thereof, and if he fail in obtaining his discharge as an insolvent debtor that he shall surrender himself to the jail of the said county; then this obligation to be void, otherwise to be and remain in full force and virtue.

Sealed and delivered in the presence of G. H. and J. J. K.

A. B.

C. D.

[SEAL.]
[SEAL.]

(a) The district courts have no such jurisdiction. 6 Barr 445.

(b) Such discharge cannot be impeached collaterally. 8 S. & R. 351-53.

To the honorable the Judges of the Court of Common Pleas of Philadelphia County:

A. B., the above-named petitioner, being duly sworn (or affirmed) according to law, saith, that the facts set forth in the above petition and in the accompanying statements are true to the best of his knowledge and belief. (Signed) A. B.

Sworn (or affirmed) and subscribed before me, this first day of November, A. D. 1860.
(Signed,) P. Q., Justice (or Alderman).

*Statement of all the Estate, Effects and Property of the within-named Petitioner,
wheresoever situate and of whatsoever kind.*

REAL ESTATE.—One three-story brick house, situate at No. 816, South Third street, county of Philadelphia, 16 feet front by 50 feet deep, upon which there is a mortgage of \$1500.

PERSONAL ESTATE.—Six shares of stock in the United States Bank; \$180 in money deposited in the Schuylkill Bank; four beds, bedstead and bedding, one sideboard, six chairs, three tables, one looking-glass, one stove, one carpet; also the necessary kitchen and cooking utensils, valued at about \$10; also the necessary tools of his trade, (carpenter,) valued at \$50. (a)

Debts due petitioner.

L. P.	.	.	.	.	.	.	.	.	.	.	.	.	\$80 00
H. R.	.	.	.	.	.	.	.	.	.	.	.	.	615 00
P. Q.	.	.	.	.	.	.	.	.	.	.	.	.	318 00
N. H.	.	.	.	.	.	.	.	.	.	.	.	.	3 50
									(Signed.)				A. B.

(Signed,) A. B.

For a valuable consideration I hereby assign, transfer and set over, unto P. R. & Co., and T. W., their heirs and assigns, all my estate, effects and property whatsoever, and wheresoever, to which I am in any manner entitled, for the use of all my creditors. Witness my hand and seal, this 18th day of December, A. D. 1860.

(Signed,) A. B. [SEAL.]

Witnesses present.

W. S. P.

J. A. Q.

Statement of the Debts due by the within-named Petitioner, containing the names of his Creditors, the amount due to each, and the nature or character of the debts, so far as he can ascertain the same.

E. F.	Judgment and bond filed,	\$90 00
P. R. & Co.	Do.	618 00
S. L.	Note,	114 00
T. S.	Book account,	39 00
L. D. T.	Rent,	68 00
Dr. S. S. P.	Medical attendance,	5 00
J. R., Esq.	Professional services,	10 00
L. G. T.	Claim disputed,	about 318 00
J. Well,	Indorsement of note,	150 00
T. W.	Money borrowed,	527 00

(a) If an assignment or bill of sale be made, it is necessary to state the fact and file a copy of the instrument in the petition, together with an inventory or schedule of the property assigned.

Statement of the causes of the within-named Petitioner's Insolvency, and of the extent of his losses.

YOUR petitioner commenced business in January, 1856, upon a borrowed capital of \$527; from that time until the present period he has met with a succession of disasters, which, together with a want of sufficient business, has compelled him to apply to your honorable court for relief. He computes his loss to be as follows: loss by fire in March last about \$300; loss upon contracting to build houses at certain prices, which he could not perform without expending a greater sum, about \$200; and loss by non-payment of debts, good and bad, about \$1016.50. Your petitioner, also, has a family to support, which has been afflicted with considerable sickness. (Signed,) A. B.

XI. FORM OF NOTICE.

Philadelphia, November 2, 1860.

TAKE NOTICE, that I have applied to the honorable Judges of the court of common pleas for the city and county of Philadelphia, for the benefit of the Insolvent Laws of the commonwealth of Pennsylvania, and they have appointed [Wednesday] the 18th day of November inst., at 10 o'clock, A. M., to hear me and my creditors, at the county court-house, corner Sixth and Chestnut streets, in the said city of Philadelphia—when and where you may attend, if you think proper. Yours, &c. A. B.

To E. F.

NOTE.—By a regulation of the court of common pleas in Philadelphia, this notice must be published in two daily papers seven times, and the newspapers filed in the office of the prothonotary two days before the day of hearing; and if the notice be personal, it is requisite it be served on the creditor personally, or left at his dwelling-house. An affidavit must be made by the person who served the notices, giving a copy of the notice, and a statement of the time and manner in which each notice was served, and the proof must be filed in the prothonotary's office two days before the hearing. The notices cannot be served by the petitioner himself.

XII. FORM OF AN INSOLVENT'S DISCHARGE.

PHILADELPHIA COUNTY, ss.

BE IT REMEMBERED, that at a court of common pleas held at Philadelphia, for the city and county of Philadelphia, in the commonwealth of Pennsylvania, [SEAL.] in the term of September, in the year of our Lord one thousand eight hundred and sixty, upon the petition of A. B. to the judges of the same court for relief as an insolvent debtor, agreeably to the acts of assembly of this commonwealth; it was ordered by the said court that he give notice to his respective creditors to appear at the court-house in the said city, on the eighteenth day of November then next, to show cause, if any they had, why he should not receive the benefit of the provisions of the said acts of assembly; and he having appeared before the said court on the eighteenth day of November, pursuant to the order of the said court, and it appearing that he had given public notice in the North American and Philadelphia Inquirer, (or personal notice,) to the several creditors of the said petitioner mentioned and marked in the list exhibited with the said petition, [if the notice is personal, it is imperative that a list of the creditors be here subjoined; if public, it is not necessary,] notifying the said creditors of the time and place appointed by the said court for proceeding upon the said petition; and the court having examined into the matter of the said petition, and no cause being shown why the prayer of the petitioner should not be granted, he took the oath prescribed by law for the relief of insolvent debtors; and he having made an assignment of all his estate, real and personal, in trust for the use and benefit of all his creditors, to P. R. & Co. and T. W., he the said A. B. was discharged; and it was thereupon ordered by the said court that the said petitioner shall not at any time thereafter be liable to imprisonment by reason of any judgment or decree obtained for payment of money only, or for any debt, damage, costs, sum or sums of money, contracted, accrued, occasioned, owing or becoming due before the time of such assignment. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Philadelphia, the 18th day of November, in the year of our Lord one thousand eight hundred and sixty. N. O., Prothonotary.

Instalments.

On a covenant or promise to pay a sum of money by instalments, an action of covenant, on *assumpsit*, will lie, *immediately*, on the non-payment of the *first instalment*. 1 Inst. 292. So, if money be awarded to be paid at different days, *assumpsit* will lie, on the award, for *each sum, as it becomes due*, and the plaintiff shall recover damages accordingly; and when another sum of the money awarded shall become due, the plaintiff may commence a new action for that also; and so on *toties quoties*, [until all the debt is recovered.] 2 Saund. 337.

A promissory note, payable by instalments, is negotiable; and the indorser is entitled to a presentment upon the last day of grace after each day of payment, and to notice, if such particular instalment be not paid when due. 11 M. & W. 374.

But, it seems, that laches as to one instalment, in ordinary cases, only discharges an indorser as to that one. And that a note payable by instalments cannot be indorsed over for less than the entire sum due upon it. Byles on Bills 5.

A note payable by instalments is negotiable, within the statute, although it contain a provision that on failure of payment of one instalment, the whole debt is to become payable. 12 M. & W. 139.

On a promissory note payable by instalments, an action of *debt* will not lie till the last day of payment be past. 1 H. Bl. 547. But if a note be payable by instalments, on the face of it, an action of *assumpsit* lies for each instalment. If, however, the note be payable by instalments, *but not on the face of it*, only one action of *assumpsit* lies; and though in such case a confession of judgment be taken for the amount of the first instalment, the note is discharged. 1 C. & M. 487. 1 M. & Rob. 263.

Interest.

I. What is interest?

IV. Interest on verdicts and judgments.

II. The rate of interest in all the states, &c.

V. Authorities and judicial decisions.

III. Interest in Pennsylvania.

I. INTEREST of money, the legal profits or recompense allowed on loans of money to be taken from the *borrower* by the *lender*. Jacob.

II. The following are the rates of interest in the several states of the Union.

In Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Indiana, Iowa and the District of Columbia, six per cent.

In Ohio, Illinois, Missouri and Arkansas, six per cent., and by agreement as high as ten.

In New York and South Carolina, seven per cent. In Michigan and Wisconsin, seven per cent., and by agreement as high as ten. In Minnesota, seven per cent., and by agreement any amount.

In Georgia, Alabama and Florida, eight per cent. In Mississippi, eight per cent. for a loan of money; six per cent. on other contracts. In Texas, eight per cent., and by agreement as high as twelve.

In California and Oregon, ten per cent, and by agreement any amount.

In Louisiana, five per cent, and by agreement as high as ten.

In Kansas, ten per cent, and by agreement as high as twenty.

III. The lawful rate of interest for the loan or use of money in all cases where no express contract shall have been made for a less rate, shall be six per cent. per annum, and the 1st and 2d sections of the act passed 2d March 1723, entitled "An

act to reduce the interest of money from eight to six per cent. per annum," be and the same is hereby repealed. Act 28 May 1858, § 1. Purd. 561.

When a rate of interest for the loan or use of money exceeding that established by law shall have been reserved or contracted for, the borrower or debtor shall not be required to pay the creditor the excess over the legal rate, and it shall be lawful for such borrower or debtor at his option, to retain and deduct such excess from the amount of any such debt; and in all cases where any borrower or debtor shall heretofore or hereafter have voluntarily paid the whole debt or sum loaned, together with interest exceeding the lawful rate, no action to recover back any such excess shall be sustained in any court of this commonwealth, unless the same shall have been commenced within six months from and after the time of such payment: *Provided always*, That nothing in this act shall affect the holders of negotiable paper taken *bonâ fide* in the usual course of business. Ibid. § 2.

Commission merchants and agents of parties not residing in this commonwealth, be and they are hereby authorized to enter into an agreement to retain the balances of money in their hands, and pay on the same a rate of interest not exceeding seven per centum per annum, and receive a rate of interest not exceeding that amount, for any advance of money made by them on goods or merchandise consigned to them for sale or disposal: *Provided*, That this act shall only apply to moneys received from or held on account of, and advances made upon goods consigned from importers, manufacturers and others living and transacting business in places beyond the limits of the state. Act of 21 May 1857, § 1. Purd. 561.

It shall be lawful for any borrower, whether by mortgage, security or otherwise, to contract before, or at any time, during the continuance of the loan, for the payment, in addition to interest, of any and all sums assessed, or to be assessed, for taxes, upon the loan, or its interest, when the same shall be payable by the lender; and no contract shall be deemed usurious by reason of such agreement. Act 27 March 1865, § 1. Purd. 1396.

IV. Lawful interest shall be allowed to the creditor for the sum or value he obtained judgment for, from the time the said judgment was obtained till the time of sale, or till satisfaction be made. Act 1700, § 2. Purd. 561.

It shall be lawful for any party or parties, in whose favor any verdict may be rendered for a specific sum of money, to collect and receive interest upon such sum from the date of the verdict; and every general judgment entered upon such verdict, whether by a court of original jurisdiction or by the supreme court, shall be deemed and held to be a judgment for the sum found by the verdict, with interest thereon from the date of such finding: *Provided*, That nothing in this act contained shall prevent any court from directing special verdicts, or entering special judgments whenever the same shall be deemed just and proper. Act 6 April 1859, § 1. Purd. 561.

V. Interest is an incident of every judgment in Pennsylvania. 4 D. 251. To a decree of the orphans' court. 4 H. 151. And to an award, from the date of its entry. 4 C. 211.

The rule of law is, that interest is allowed on goods sold and delivered, and on all open accounts, where by the usual course of dealing, or by express agreement, a certain time is fixed for payment; on money lent and advanced for work and labor done; on arrears of rent, unless it would be inferred by the landlord's conduct that he did not mean to insist upon it, or he demand more than is due, or there be other special circumstances, which might make the charge of interest improper; and, generally, whenever one person detains the money of another without any right, and against his consent. 6 B. 162. 1 S. & R. 176. 1 D. 315, 349. 2 D. 193. 4 D. 289.

By the custom of Pennsylvania, a book account for goods sold, bears interest from the end of six months after the sale and delivery. 6 C. 346.

Where there is no usage, nor precise time of payment, no account rendered, nor demand made, it is for the jury [or the justice] to give interest, by way of damages, for the delay, at their discretion, under all the circumstances of the case. 12 S. & R. 393.

No interest is allowed on an unsettled account, unless the party claiming interest bring himself within one of the recognised exceptions to the rule. 5 C. 360.

A bill payable on *demand* carries interest only from the time of *demand*. 16 S. & R. 264. A. 137.

Where money is received, as well as paid in a mistake, and neither fraud nor surprise, nor *suppressio veri*, [suppression of the truth,] nor *suggestio falsi*, [false suggestion,] can be imputed to either party, interest shall not be allowed, in an action to recover the money back. 1 D. 52.

In the case of promissory notes, where a day *certain* is fixed for payment, interest is allowed from the day of payment; and where *no day* is fixed, it is payable from the time of *demand*. *Ibid*.

The debtor is not exempted from the payment of interest by the continued absence of the creditor, at a distance from the state, and his not being heard of for many years. 9 S. & R. 263.

A factor or agent, who does not with due diligence remit the money of his principal, is chargeable with interest. 1 D. 343.

The plaintiff, in an action of covenant on a ground-rent deed, is in general entitled to interest on the arrears of ground-rent from the several days on which the ground-rent was payable. 4 Wh. 516. This, however, is a question depending on the equity of the particular case. It is recoverable, whenever payment has been unjustly withheld. 9 C. 435.

An assignee of the lessee ought not to be charged with interest on arrears which accrued prior to the conveyance to him. *Ibid*.

Where sums have been received by administrators, after the expiration of a year, interest is not chargeable from the day they were received, but the court will allow six months from those times, respectively, before the charge of interest is to commence. 1 Ash. 305. See 11 Leg. Int. 31. 2 Am. L. R. 448.

A *tender* of the sum due does not amount to an *actual payment* and discharge; but it *suspends* the *interest* until a subsequent demand and refusal. 1 D. 407.

In cases where interest is not of course, but depends on the conduct of the parties, if the defendant before suit offer to pay as much as is due, and the plaintiff refuse to receive it, the defendant is not liable to pay interest. But if the plaintiff insist on too much, and the defendant offer too little, there is a necessity for the suit, and the defendant must pay interest. 3 B. 295.

It has been held that where the condition of a bond was for the payment of *interest* annually, and the principal at a distant day, the interest might be recovered *before* the principal was due, by an action of debt on the bond. 1 B. 152.

If a party accept the *principal* of his debt, he cannot afterwards sue for the interest. 3 Johns. 229.

Where a balance of an account is paid without any charge of interest, interest cannot afterwards be demanded. 3 Johns. Ch. 587.

Money paid on account of a bond should first be applied to the discharge of the interest due, and the residue credited towards the satisfaction of the principal. 1 D. 378.

Bond dated in 1830, conditioned for the payment of money on the 1st of April 1832, with three per cent. interest from the date; the plaintiff is entitled to recover interest at three per cent. till the time of payment, and after that legal interest at the rate of six per cent. 5 W. & S. 51.

Interest must be paid according to the law of the country where the debt *was contracted*, and not according to that *where the debt is sued for*. 4 Johns. 183. 2 W. & S. 327. 2 W. C. C. 253. 3 Johns. Ch. 587.

A practice, by a storekeeper, to balance his books at the end of each year, and charge interest on the balance of a running account upon which there has been no settlement, is illegal. 16 S. & R. 257.

Where a note is made payable, in a certain number of years, with interest *annually*, only simple interest can be recovered on the principal sum. 8 Mass. 453.

Although interest upon interest is, in general, unlawful, yet there are cases in which interest is considered as changed into principal, and permitted to carry interest; as where a settlement of accounts takes place *after* interest has become due, or an agreement is made *after* it becomes due, that it shall carry interest.

Any agreement for interest upon interest, to be lawful, must be made *after* the interest has become due, and must be *prospective*, that the interest then due shall carry interest. An original agreement, that if the interest is not paid at the time it shall be due, it shall carry interest, though it would not amount to usury, so as to render the contract connected with it illegal and void, yet the party cannot recover such interest, either at law or in equity. 4 Y. 220. 7 S. & R. 15. 11 Vesey Jr. 93.

Compound interest may be recovered on an express promise, or one implied by law as part of the contract. 1 Bald. 536. An account made up of principal and interest becomes one principal debt when settled, the aggregate balance bearing interest. Ibid. An account current received and not objected to within a reasonable time, becomes a settled account, bearing interest from the time it is stated. Ibid.

Compound interest is not recoverable, unless there has been a settlement between the parties, or a judgment, whereby the aggregate amount of principal and interest due is turned into a new principal; or where there is a special agreement to do so, in such form as to be valid. Interest is never a legal incident to the non-payment of interest. 10 C. 210.



Jail.

It is thought that the following authorities, without the acts on the subject, will be sufficient for the magistracy. The acts in relation to jails, in Pennsylvania, are so numerous and so voluminous, that their insertion (with the exception of the following sections of the revised Penal Code and of the Code of Criminal Procedure) would exclude other matter more essential to accomplish the ends contemplated by this publication. So humane, judicious and well conducted have been our penitentiaries, that our system and regulations on the subject have commanded not only the attention and approbation of the civilized world, but they have been adopted, even to the plan of our prisons and their regulations, by the governments of Great Britain, France, Russia, Prussia and the greater part of Germany.

It is somewhat foreign to the object of this publication, yet the following is a circumstance of so extraordinary a nature, that we think its publication here will be excused:—

In the summer of 1842, a well-dressed young Englishman—the name is of no moment—applied to the chief magistrate of Philadelphia to be committed, for some months, to the county prison in Moyamensing. This request was not granted, there being no complaint against the person making the application. The applicant, however, was not thus to be put aside. He threatened to commit a breach of the peace, and refusing to give bail, was committed to the county prison. At his own request he was put into a cell or room, and a loom was given him, in which he worked for about twenty months, submitting in all things, as to food, raiment, exercise and labor, to the discipline of the prison. He then gave bail, and was discharged. He was permitted to have a memoranda book and pencil, with which he made such notes as he pleased, and took the book with him, when he finally left the prison. Various were the conjectures as to the motives of this individual, but of them nothing certain was ever ascertained. His conduct was exemplary. We made frequent inquiries, but never heard of his murmuring or complaining. He became an excellent weaver. It was understood that on his liberation he returned to Great Britain.

ACT 31 MARCH 1860. Purd. 247.

SECT. 181. Where any person hath been, or shall be convicted of any felony, not punishable with death, or any misdemeanor punishable with imprisonment at labor, and hath endured, or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon by the governor, as to the felony or misde-

meanor whereof such person was so convicted: *Provided*, That nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony or misdemeanor; and that the provisions of this section shall not extend to the case of a party convicted of wilful and corrupt perjury.

SECT. 182. If any person who has been convicted of any offence, other than murder of the second degree, for which the punishment prescribed by this code is imprisonment by separate or solitary confinement at labor, shall, after such conviction, be guilty of a similar offence, or of any offence for which such punishment is directed, he shall in either case, upon conviction, be sentenced to undergo an imprisonment, and be kept at labor not exceeding double the whole period of time which may, by the penal laws of this commonwealth, be prescribed for the crime of which he is convicted.

ACT 31 MARCH 1860. Purd. 264.

SECT. 74. Whenever any person shall be sentenced to imprisonment at labor by separate or solitary confinement, for any period not less than one year, the imprisonment and labor shall be had and performed in the state penitentiary for the proper district: *Provided*, That nothing in this section contained shall prevent such person from being sentenced to imprisonment and labor, by separate or solitary confinement, in the county prisons now or hereafter authorized by law to receive convicts of a like description: *And provided also*, That no convict shall be sentenced by any court of this commonwealth, to either of the penitentiaries thereof, for any term which shall expire between the fifteenth of November and the fifteenth of February of any year.

SECT. 75. No person shall be sentenced to imprisonment at labor, by separate or solitary confinement, for a period of time less than one year, except in the counties where, in the opinion of the court pronouncing the sentence, suitable prisons have been erected for such confinement and labor; and all persons sentenced to simple imprisonment for any period of time, shall be confined in the county jail where the conviction shall take place: *Provided*, That in the counties where suitable prisons for separate or solitary confinement at labor do not exist, and the sentence shall be for less than one year, simple imprisonment shall be substituted in all cases for the separate and solitary confinement at labor required by the "Act to consolidate, revise and amend the penal laws of this commonwealth."

A jailer is punishable for barbarously misusing his prisoners. Hawk. P. C. 93. So overseers of the poor, for misusing paupers, as by lodging them in unwholesome apartments (Wetherill's Case, Cald. 432), or by exacting labor from such as are unfit to work. Ibid. 76.

A person arrested upon a warrant issued by a justice of the peace of another county, and indorsed in the county where he is found, if the offence be bailable, may, at his option, give bail in the county where he is arrested for his appearance at the court where the offence is triable; but if he fail to do so, he cannot be committed to the jail of the county where he is found, he must be committed to the jail of the county where the offence is triable. 1 Gr. 220.

The 74th and 75th sections of the Code of Criminal Procedure, taken together, require: 1. That all persons sentenced to simple imprisonment, shall be confined in the county where the offender is convicted. 2. That no person shall be sentenced to imprisonment at labor by separate or solitary confinement for a less period than one year, except in the counties where, in the opinion of the court passing the sentence, prisons are provided suitable for such confinement and labor. 3. That all imprisonment at labor by separate or solitary confinement, where the sentences exceed one year, shall be in the state penitentiary for the proper district, except in the counties in whose prisons convicts of a like description are authorized to be imprisoned, and in those counties, such convicts may be sent to the county prisons as heretofore. Report on the Penal Code 54.

In New York, it has been held, that a similar provision to that contained in the last proviso to the 74th section, was directory merely, and that a failure to comply with its requirements did not avoid the sentence. 1 Park. C. R. 374.

Judgment.

A JUDGMENT is the sentence of the law, pronounced by the court upon the matter contained in the record. 3 Bl. Com. 395.

Judgments are of *four* sorts: 1. Where the facts are confessed by the parties, and the law determined by the court, as in case of judgment by demurrer. 2. Where the law is admitted by the parties, and the facts disputed, as in case of judgment upon a verdict. 3. Where both the fact and the law arising thereon are admitted by the defendant, which is the case of judgment by confession or default: or 4. Where the plaintiff is convinced that fact, or law, or both are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments upon a nonsuit or *retrazit*. Ibid. 396.

Interlocutory judgments, at law, are such as are given in the middle of a cause, upon some plea, proceeding or default, which is only intermediate, and does not finally determine or complete the suit. 3 Ibid. 395.

Final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 Ibid. 398.

A judgment in civil cases, before an alderman or justice of the peace, is the decision of the magistrate on the law and the evidence which has been laid before him in some dispute or suit; which decision, when entered on the docket of the justice, is called a judgment.

The judgment of the magistrate is given under some one of the following circumstances:—

1. When, on the return day of the summons, the defendant appears and the plaintiff does not, then, at the request of defendant, judgment of nonsuit may be entered in his favor, with fifty cents for his trouble and loss of time, to be paid by the plaintiff.

2. When the plaintiff appears and makes out his claim in the absence of the defendant, who, notwithstanding he has been duly notified to appear, has neglected or refused to attend. In such a case judgment is given for the plaintiff and against the defendant or defendants, for the amount proved to be due by him or them.

3. When the parties appear, after hearing their proofs and allegations, then the judgment should be given for whichever party, plaintiff or defendant, shall have made proof of the indebtedness of the other party to the satisfaction of the justice.

4. When the parties appear and the defendant acknowledges his indebtedness to the plaintiff for the amount he claims, then judgment is given for the amount by confession.

5. Upon the award of referees, the justice having first duly notified the parties to appear at his office.

6. When the parties voluntarily appear before the justice, and enter an amicable action. In this case the judgment is usually, but not always, by confession.

A compulsory nonsuit of a justice, *after the parties have appeared before him*, is conclusive of the suit, unless appealed from; for, having no power to enter such a judgment, it is equivalent to a judgment that the plaintiff has no cause of action. 2 Barr 89. 3 H. 101. 5 H. 75.

The judgment of a justice, in a cause of which he has jurisdiction, is conclusive upon the parties, however erroneous, unless reversed on *certiorari* or appeal. 9 S. & R. 12. 11 H. 189. 4 N. Y. 71.

A judgment erroneously entered is valid until reversed. 2 S. & R. 142.

The validity of a judgment of a justice of the peace cannot be controverted in a collateral proceeding by a stranger to it. 10 W. 101.

It seems, that if two defendants are sued and only one is served with process, and

appears and makes defence, a judgment entered generally is a judgment against such defendant only. 2 W. & S. 553.

When the writ is served upon one of two defendants, and there is a general appearance by attorney and trial of the cause upon its merits, the verdict and judgment will be sustained although the issue be by one only. 2 W. & S. 121.

A judgment on an award against two, is erroneous, if one of the defendants only had notice of the rule of reference. 12 S. & R. 412.

If defendant make default on return of the summons, the justice cannot give judgment for the plaintiff without proof of his demand; but it must be proved in the same manner as if defendant appeared and denied it. 10 Johns. 106.

If there be judgment against two, and one of them die, the plaintiff may have execution against the survivor. 1 Esp. 310.

It is essential to the validity of a judgment of a justice of the peace for a sum exceeding \$100, that it should appear upon the face of his record that the parties appeared in person before him, and confessed the judgment. Without this the judgment is absolutely void, and therefore not the subject of ratification. 10 W. 118.

The sale of a defendant's personal property to the plaintiff upon a void judgment vests no property in him. *Ibid*.

A justice has no power to open his judgment except under the circumstances, and in the manner, provided by act of assembly, to wit: 1. At the instance of the appellant, with the consent of the adverse party under § 4 of the act of 1810. 2. Where the defendant is entitled to a rehearing, after judgment, under § 7 of the same act. 3. In a proceeding under the act of 12 July 1842, where the process has not been served personally on the defendant. 1 Phila. R. 520.

It seems, that the power of a court of common pleas to open its judgments, obtained adversely, ceases with the expiration of the term at which they were obtained. 9 C. 485.

The record of a judgment rendered in one state, is not merely evidence in every other state that such a judgment was rendered, but *conclusive* of the right which it has decided. 1 Peters' C. C. 74, 155.

To make a record from another state *conclusive* evidence, and to give it full faith and credit in the courts of this state, it must be authenticated according to the act of congress of May 26th 1790, but a copy of a record not certified according to the act, may still be received as *prima facie* evidence. 2 Y. 532.

A judgment fairly obtained in another state is *conclusive* evidence of a debt; *assumpsit* therefore will not lie on such a judgment. 7 W. 315.

A judgment in a sister state is deemed to have the effect of a domestic judgment, in relation to the cause of action; and where the defendant had notice, it is *conclusive* of the subject-matter, and the original cause of action is merged in it. 4 H. 241.

The judgment of a justice of the peace of another state, is not a record, and cannot be certified under the act of congress, so as to make the exemplification thereof competent evidence. 10 Barr 157. It should be proved by a sworn or examined copy of the justice's docket, (4 Y. 501. 14 S. & R. 440. 4 W. & S. 192,) except in cases within the provisions of the act of 27th February 1845. *Purd.* 594. Or certified under the act of 29th March 1860. *Purd.* 426.

Judgment, Lien of.

I. Acts relating to judgment liens.

II. Judicial authorities and decisions.

I. ACT 4 APRIL 1798. Purd. 572.

SECT. 2. No judgment hereafter entered in any court of record within this commonwealth shall continue a lien on the real estate of the person against whom such judgment may be entered, during a longer term than five years, [from the first return day of the term, of which such judgment may be so entered,] unless the person who may obtain such judgment, or his legal representatives, or other persons interested, shall, within the said term of five years, sue out a writ of *scire facias* to revive the same.

ACT 26 MARCH 1827. Purd. 572.

SECT. 1. All judgments entered in any court of record of this commonwealth, or revived in manner prescribed by this act, or the act to which this is a supplement, shall continue a lien on the real estate of the defendant for the term of five years, from the day of entry or revival thereof; and no judgment shall continue a lien on such real estate for a longer period than five years, from the day in which such judgment may be entered or revived, unless revived within that period by agreement of the parties, and terre-tenants, filed in writing, and entered in the proper docket, or a writ of *scire facias* to revive the same, be sued out within said period, according to the provisions of the act to which this is a supplement, notwithstanding an execution may be issued within a year and a day from the rendering of such judgment, or a stay of execution may be entered on such judgment; or a time subsequent to the rendering of such judgment may be appointed by the agreement of the parties, for the payment of the money for which such judgment may be rendered, or any part thereof, or notwithstanding any other condition or contingency may be attached to such judgment; nor shall the revival of such judgment by agreement as aforesaid, or the issuing of a *scire facias*, either with or without entry of judgment thereon, have the effect of continuing such lien for a longer period than five years, from the day on which it may be revived, as aforesaid, or such *scire facias* may have issued.

ACT 24 FEBRUARY 1834. Purd. 285.

SECT. 25. All judgments, which at the time of the death of a decedent shall be a lien on his real estate, shall continue to bind such estate during the term of five years from his death, although such judgments be not revived by *scire facias*, or otherwise, after his death; and such judgments shall, during such time, rank according to their priority at the time of such death, and after the expiration of such term, such judgments shall not continue a lien on the real estate of such decedent as against a *bonâ fide* purchaser, mortgagee, or other judgment creditor of such decedent, unless revived by *scire facias* or otherwise, according to the laws regulating the revival of judgments.

II. A judgment obtained before a magistrate is a lien upon the real estate of the defendant only from the time a transcript of such judgment is entered on the docket of the prothonotary of the proper county. See act of 1810, § 10.

Judgments obtained before justices of the peace, when filed in court, are on the same footing, and entitled to the same priority with judgments in court. 1 B. 221.

A transcript entered on the docket of the common pleas is, as regards real estate, virtually a judgment of that court. 1 P. R. 20. A judgment is not a lien on lands purchased by defendant *after* the judgment, and aliened *bonâ fide*, before execution. 2 Y. 28. 6 B. 135.

But the revival of a judgment by *scire facias* creates a lien on the property acquired since the original judgment. 1 P. R. 64.

A transcript of a judgment of a justice of the peace, when filed in the common pleas, according to the 10th section of the act of 1810, becomes a record of that court, and a *sci. fa. qu. executio non*, may issue upon it therefrom. 8 W. 381.

A transcript of the judgment of a justice of the peace, filed in the common pleas, creates no lien upon the defendant's real estate, if an appeal be entered before the justice within the time limited by law. 7 W. 540.

A *scire facias* to revive a judgment of a justice, of which a transcript has been filed in the common pleas, agreeably to the act of 1810, must be issued from the common pleas, and not by the justice. 8 S. & R. 479.

The period from which the lien of a judgment runs, is not from the return of the *scire facias*, but from the date of the judgment of revival. 5 W. 163.

The supplementary act of the 26 March 1827, was enacted for the purpose of restraining the practices which had crept in under the act of the 4 April 1798, of constructive revivals of judgments by the issuing of execution, or by stay of execution, or of dispensing with revivals because the money was payable *in futuro*, or on a condition or contingency attached to a confession of the judgment, in all which cases it had been held by the court, or contended by counsel, that the lien would continue without issuing a *scire facias* within the five years. This act also altered the date from which the revival was to be reckoned, doing away the relation to the return day prescribed by the act of 1798, as the time from which the five years were to commence. Another and most material object of the act of 1827 was, to regulate revivals by the agreement of the parties, concerning which nothing had been said in the act of 1798, but which had become a common usage. It therefore prescribes precise and positive provisions as to them, pointing out the mode in which they shall be authenticated, the parties competent to enter into them, and the time for which the lien shall in that case endure. SERGEANT, J. 5 W. & S. 354.

On a *scire facias* to revive a judgment, the defendant can make no other defence than either to deny the original judgment altogether, or to show that it has been satisfied since it was rendered. In *no case*, nor under any circumstances, can the *merits* of the original judgment be inquired into. 5 S. & R. 68, 69.

A subsequent purchaser, or judgment creditor, is not bound to look beyond the judgment docket; if the Christian names of defendants in a judgment be not entered in the judgment docket, the judgment, though valid as between the parties, cannot affect subsequent purchasers or judgment creditors. It is the duty of the judgment creditor to see that his judgment is rightly entered on the judgment docket. 3 H. 177. 12 C. 458.

A judgment obtained on a *scire facias* on a void judgment, is void also. 3 Wh. 314. 1 P. F. Sm. 116.

If a *scire facias* be not prosecuted to judgment until after the lapse of five years from the time of issuing it, the lien of the original judgment is lost. 1 P. F. Sm. 204.

Jurisdiction of Justices of the Peace.

I. Definition of jurisdiction.

I. JURISDICTION is the authority or power, vested in a man or men, a court or courts, to do justice in causes of complaint brought before them. The supreme court and the judges thereof, have jurisdiction all over Pennsylvania, and are not restrained to any county, district or place; but all other courts, judges and justices, are confined to their particular districts or jurisdictions which if they exceed, whatever they do is erroneous.

The term jurisdiction has different meanings when applied to different objects: thus, there is what is termed jurisdiction over the subject-matter, and as the civil jurisdiction of justices of the peace is wholly derived from the statute law, if they have not this jurisdiction expressly conferred upon them by act of assembly, it cannot be given by consent of parties; no waiver can confer jurisdiction over the subject-matter where the law has not given it. But there is also a jurisdiction of the person of the defendant, which is acquired by due service of legal process; if legal process be not issued, or if no legal service of it be made, the justice acquires no jurisdiction over the person of the defendant, and all his proceedings are void, so much so, that if he should proceed to judgment, an execution issued on it would be no justification to the officer serving it, and he himself would thereby become a trespasser; but this kind of defect of jurisdiction may be waived by the act of the defendant, as by an appearance, or other proceeding which presupposes that jurisdiction has been acquired in the mode prescribed by law. 26 N. Y. 418.

"Jurisdiction is often confounded with judicial power, or its equivalent, judicial competence; yet, there is a clear distinction between the terms. The *judicial power* of a court extends to all those classes of cases which that court may hear and determine. The *jurisdiction* of a court is confined to cases actually brought before it, and admits of various degrees; for jurisdiction of a case, as a cause in court, vests the court with authority to call in the parties, and to bring it to a hearing in some form, so as to determine the *cause in court*, though the determination of the case may be beyond its competence. The jurisdiction by which a case may be determined is measured by the judicial power of the court, and not by the form in which the case is brought before it." LOWRIE, C. J. 8 C. 357. And see 12 C. 29.

II. Justices of the peace cannot issue any process in civil cases, except *subpoenas*, to extend beyond the bounds of their county. All persons and property found within his district are subject to the alderman's or justice's jurisdiction. He has no power over cases "where the title to lands and tenements may come in question, or actions of slander, or upon promise of marriage." A justice can do no official act out of his proper district or county. 1 Ash. 131. Therefore he cannot take the acknowledgment of a deed for lands lying in his county, anywhere but in that county. 7 S. & R. 63.

His jurisdiction in *civil cases* is derived from statutes altogether, and where the cause of action is not embraced in any of these, he cannot interfere. 1 Ash. 152.

The *real sum* due upon a bond must determine the jurisdiction of a justice, though there be a warrant of attorney to confess a judgment, and the penalty exceed one hundred dollars. 2 D. 308.

A plaintiff may, undoubtedly, remit a part of his demand to bring the residue within the jurisdiction of a justice. 1 P. R. 22.

An action will not lie before a justice of the peace for the balance due on a judgment in the court of common pleas. 8 S. & R. 343.

A justice of the peace has not jurisdiction of a cause of action against another justice, for money collected in his official capacity. 6 W. 384.

A justice of the peace has not jurisdiction of an action upon a bond given by a constable conditioned for the faithful performance of the duties of his office. 4 W. 215.

A justice of the peace has *not* jurisdiction of a suit by one joint owner of a chose

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in action against the other for damages for a refusal to prosecute the claim on it, by reason of which it was lost. 8 W. 179.

A justice has no jurisdiction of an action against a constable, for not paying over, to a landlord, a year's rent, out of the proceeds of an execution. 2 J. 379.

Nor of an action on the case for a nuisance. 1 Ash. 152.

A justice of the peace has no jurisdiction of *account render*, (10 S. & R. 227. 5 Wh. 448;) nor of an action of debt against the sheriff, (or an escape of a defendant in execution, for a sum under one hundred dollars,) (13 S. & R. 44;) nor of an action against an executor or administrator on a *devastavit*, (Ibid. ;) nor of actions of trespass on the case where the injury is *consequential*, as a *nuisance*, (13 S. & R. 420;) nor of debt for the penalty imposed by the act of April 13th 1791, for not entering satisfaction of a judgment, (13 S. & R. 102;) nor of an action to recover the penalty for travelling as a pedlar without license, (13 S. & R. 104;) nor of a suit to recover a militia fine, although the plaintiff is a constable who alleges that he has paid the amount for the defendant and seeks to recover it back as money paid laid out and expended. 2 Wh. Dig. 120.

All questions arising out of a bailment are within the jurisdiction of a justice of the peace under the act of 1810. 7 W. 542. Ibid. 175.

A justice has jurisdiction of an action against a common carrier, charged with "negligence in not delivering goods intrusted to him," and with not delivering them *according to contract*. 6 W. 47.

A justice of the peace has jurisdiction to sustain an action upon an insolvent bond. 2 P. R. 462.

A justice has jurisdiction of an action on an award. 7 Barr 109.

A justice of the peace has jurisdiction of an action of *assumpsit* for carelessness in the performance of work. 7 C. 14.

A justice has jurisdiction of an action for unliquidated damages for breach of contract. 1 Phila. R. 162.

If a bull break into the inclosure of a neighbor, and there gore a horse so that he die, his owner is liable in an action of trespass, of which a justice has jurisdiction. 7 W. & S. 367.

So, trespass lies, before a justice, under the acts of assembly, rendering owners of dogs liable for injuries committed by them to sheep. 7 Barr 254.

A magistrate has jurisdiction of a trespass by a landlord, if he enter the house of a third person, to search for and distrain goods fraudulently removed by his tenant, if no goods of the tenant be found in such house, when the damage claimed is less than one hundred dollars. 13 S. & R. 417.

A justice of the peace has jurisdiction of an action to recover the penalty for taking illegal fees. 7 W. 491.

A justice of the peace has no jurisdiction of a contract concerning the realty, where the title to lands or tenements *may* come in question. 3 P. R. 388. 6 H. 240. 8 H. 468.

A justice of the peace has not jurisdiction of an action founded on a note given in consideration of a right to dig a mill-race, and conduct water across the plaintiff's land. 6 W. 337.

An alderman has no jurisdiction of an action to recover damages for a deficiency in quantity on a contract for the sale of land. 3 R. 325.

An agreement to purchase a judgment which was a lien on real estate, is not within the provision excluding from the jurisdiction of justices cases of real contract, where the title to lands may come in question. 3 H. 358.

A justice of the peace has jurisdiction of an action upon a negotiable note in the hands of an indorsee, although the consideration of it was the sale of a tract of land: *otherwise*, if the suit be brought by the payee. 5 W. 482.

Every justice of the peace has jurisdiction upon the delivery of a transcript to him to recover the amount of a judgment rendered by another justice who has resigned his office but retains his docket. 1 W. & S. 414. 2 Phila. R. 42.

Executions issued by one justice on the transcript of another justice of the *same* county, who was at that time in commission, and acting in his office, are void; not being allowed by any act of assembly. 4 Barr 339. 2 Phila. R. 284.

If a claim be tendered by a defendant before a justice of the peace, as a set

off against the plaintiff's demand, of which claim the justice would not have had jurisdiction had the defendant first sued there, the justice cannot entertain it. 2 Ash. 150. 1 Wr. 456.

Courts of limited jurisdiction (as those of justices of the peace) must not only act within the scope of their authority, but it must *appear on the face of their proceedings*, that they *did so*; and if this do not *appear*, all that they do is *coram non judice*, and void. 1 Pet. C. C. 36.

Want of jurisdiction of a justice may be taken advantage of in every stage of the cause; after plea, trial on the merits and judgment; or on appeal entered and the cause in court. 1 B. 220. 1 Wr. 387.

A defect of jurisdiction in a justice is not cured by the defendant's appearing and going to trial. 18 Johns. 409.

No justice can take cognisance of a cause that has been previously decided by another justice. 2 D. 78, 114.

Where there exist two tribunals possessing concurrent and complete jurisdiction, the jurisdiction of that tribunal is exclusive which has *first* possession of the subject-matter of controversy. When a justice of the peace issues his process, which is served according to law on a defendant, the latter cannot turn round and sue the plaintiff before another justice for any debt or demand arising from contract not exceeding one hundred dollars, but must submit his claim *by way of set-off* to the justice before whom the plaintiff has brought suit. If a summons be issued before one justice by a real debtor against his creditor in order to prevent the latter from suing out a *capias*, and not in prosecution of a real demand, such a procedure would be disregarded by the court. 1 Ash. 171.

Where it appears, on the face of the record, that the justice has exceeded his jurisdiction, by giving judgment and issuing execution for a greater sum than the act of assembly allows, the court will consider the whole proceeding as a nullity, and discharge a defendant committed under such judgment. 1 D. 135. But where his jurisdiction evidently appears on the record, the settled rule has been to form no presumption against the accuracy of the magistrate's proceedings, (5 B. 32, 4 Y. 373;) and his judgment, though erroneous, is binding on the parties until reversed on *certiorari* or appeal. 4 S. & R. 12.

When a justice of the peace has jurisdiction of a case, his judgment, though erroneous, is binding on the parties until reversed on a *certiorari* or appeal. 9 S. & R. 12.

A justice must proceed by summons or *capias*, and cannot enter judgment upon a warrant of attorney. 1 B. 105.

Wherever a new power is given to a justice of the peace, he must proceed in the mode prescribed by the law, [he should do so at all times.] 19 Johns. 39.

As long as the commission of a justice is in force, he possesses an authority to administer oaths, of which he cannot divest himself; and although he do not subscribe himself as a justice to a deposition, he will be deemed to have acted officially. 8 B. 539.

An alderman or justice of the peace is competent to administer any oath required to support any collateral or interlocutory step found necessary in a cause in the common law or orphans' court. 2 Am. L. J. 224.

Justices of the Peace, or Aldermen.

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| I. The antiquity and authority of this officer as a conservator of the public peace. | VIII. Of the right of the accused to be heard by counsel. |
| II. The early civil jurisdiction of justices of the peace in Pennsylvania. | IX. Proceedings in a criminal case before a justice of the peace. |
| III. How, by whom, and for how long, justices shall be elected. | X. Acts of assembly relating to the election and qualification of justices. |
| IV. Aldermen and justices magistrates of the same character and authority, &c. | XI. Acts relating to the criminal jurisdiction of justices. |
| V. Their authorities and duties in criminal cases. | XII. Justices' courts in certain counties. |
| VI. Of issuing a criminal warrant, and its import. | XIII. Summary convictions. |
| VII. Proceedings when the accused is before the justice; and | XIV. Copy of an alderman's commission and oath of office. |
| | XV. Judicial decisions. |

I. "JUSTICES of the peace," says Dalton, c. 2, "are judges of record, appointed by the king (in England, but in Pennsylvania elected by the people) to be justices, within certain limits, for the conservation of the peace, and for the execution of divers things comprehended within their commissions, and divers statutes committed to their care."

This definition of a justice of the peace seems to be considered so sufficient, to this day, as to command a place in some of the latest and most approved English law publications.

Hollinshead reports that William the Conqueror ordained justices of the peace. This, however, seems to be doubted by Dalton;—himself an early and valued writer on this subject. He thinks they were established about 1327, by Edward III. The statute here referred to, by Justice Dalton, seems rather to carry with it the idea that Edward III., at the period spoken of, apportioned and located these officers, so that, in every shire, there should be a certain number of justices to keep the peace. Their power was from time to time enlarged. In 2 Hen. V., c. 1, it was enacted that justices of the peace should be made "of the most sufficient persons dwelling in the several counties." "They be," says Mr. Dalton, "called justices [of the peace] because they be judges of record, and withall to put them in mind [by their name] that they are to do justice [which is to yield to every man his own, according to the laws, customs and statutes of this realm] without respect of persons." "They may," he says, in another part of his Country Justice, "take a recognisance for the peace, &c., which is a matter of record, and which none can do but a judge of record." These quotations are accurately taken, and printed exactly as they are found in Dalton's Country Justice, London, printed 1762. "Justices of the peace are not," says Dalton, "to pervert justice, which may be done in many ways. They should arm themselves with the fear of God, the love of truth and justice, and with the authority and knowledge of the laws and statutes of the realm." "They should do justice uprightly and indifferently, without delay, partiality, fear or bribery; with stout and upright hearts and uncorrupt hands."

The statute of 34 Edward III., c. 1, provided: "*That in every county of England shall be assigned for the keeping of the peace, one Lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to restrain the offenders, rioters and all other barrators, and to pursue, arrest, take and chastise them according to their trespass or offence; and to cause them to be imprisoned and duly punished according to the law, and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisements, and also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering and will not labor as they were wont in times past, and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behavior towards the king and his people, and the other duly to punish, to the intent that the people be not by such rioters or rebels troubled or endangered, nor the peace blemished,*"

nor merchants, nor other passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders. And that fines, which are to be made before justices for a trespass done by any person, be reasonable and just, having regard to the quantity of the trespass, and the causes for which they be made." And by the 4 Edward III., c. 2, it was provided that the keepers of the peace should send their indictments before the justices of jail delivery, who should have power to deliver the same jails of those that should be indicted before the keepers of the peace.

It would seem that the election of conservators of the peace was, in England, made by the people, until the 1 Edward III., c. 16, which act took from the people, and gave to the king, the appointment of these officers. The importance of the office at that early day (Edward III. died in 1376) may be safely inferred from the enactment in the reign of his successor, Richard II., which provides, c. 7, that "the justices shall be made within the counties, of the most sufficient knights, esquires and gentlemen of the law." See 2 Reeves Hist. (by Finlason) 328.

The constitution of Pennsylvania, adopted in 1776, provided that justices of the peace should, by the freeholders, be elected in districts, and serve seven years. The constitution of 1790 vested in the governor the power of appointing and commissioning a competent number of justices of the peace, who held their offices "during good behavior."

And by the present constitution, "the qualified voters" are to elect, and the governor to commission the justices of the peace "for a term of five years." There is, at this time, in England, a property qualification necessary to hold the office of justice of the peace, of not less than £100 sterling a year. No property qualification has ever been required as necessary to qualify a citizen to hold the office of a justice of the peace, in Pennsylvania, although a property qualification was, by the constitution of 1776, made necessary to qualify an elector to vote for a justice of the peace. None but freeholders could vote at an election for justices of the peace, under the constitution of 1776.

II. At a very early period, the justices of the peace, in Pennsylvania, were vested with *civil* jurisdiction. So early as May 28th 1715, the general assembly of the province of Pennsylvania passed "an act for better determining debts and demands under forty shillings, and for laying aside the two weeks' court in the city of Philadelphia." In this act, *exclusive* jurisdiction was given to the justices of peace to hear and give judgment in all such cases, "without further appeal." They were authorized to issue execution, levy, make sale, and for want of effects to send the defendant to the "jail of the proper county." Cases of "rent and contracts for real estate" were excluded from their jurisdiction. It is somewhat remarkable, notwithstanding the great change in the value of money in one hundred and thirty years, that the legislature have not enlarged the sum for which justices of the peace may give judgment "without further appeal." It may not be improper here to remark, that since the passage of the hundred dollar law, 20th March 1810, the civil jurisdiction of the justices of the peace in matters of debt has not been extended. Their civil jurisdiction has, from time to time, been extended in amount, and enlarged so as to embrace a variety of claims which were not before within its reach. "At present," says Judge REED, "their extensive civil jurisdiction constitutes an important branch of the jurisprudence of the commonwealth."

Soon after the declaration of independence, a convention assembled in Pennsylvania to frame a new constitution for the government of the state. One of their earliest acts was to oust from office all the justices of the peace that had been appointed under the proprietary government, and to appoint others known to be favorable to the order of things about to be established. On the 3d of September 1776, "an ordinance for the appointment of justices of the peace for the state of Pennsylvania," was passed in the state convention, and "signed, by their order, B. FRANKLIN, President." They appointed justices of the peace for the city and county of Philadelphia, and the counties of Bucks, Chester, Lancaster, York, Berks, Northampton, Northumberland and Westmoreland; these nine counties being all the counties then laid off in Pennsylvania. The convention gave the said justices "full power and authority to take acknowledgments of deeds; and cognisances of

criminal offences; and breaches of the peace; and in cases of petty larceny, under five shillings, to proceed to punishment." They were sworn, or affirmed, "as justices of the peace, to do everything, in that office, to the best of their knowledge and ability; to support a government in this state on the authority of the people only." The justices, in their several counties, "were authorized to appoint jailers."

In relation to criminal matters, the power and duties of the justices of peace, in Pennsylvania, are the same as those exercised in England by the same class of officers, at the time of the revolution, except so far as they have been altered by our constitution and laws. Every criminal offence is presumed to be within the scope of their authority to inquire into, to take bail or commit the accused, unless it can be shown that the justice's jurisdiction was limited by the common law, or has been limited or taken away by our constitution or acts of assembly. In *civil* matters it is quite otherwise; and it cannot be too often repeated, that in *all* cases the justice must look to the express words of our acts of assembly for the extent of his civil jurisdiction. The magistrates should be governed by the words of the law, and exercise no other power than that expressly given, except it be to call to their aid the common law to carry the law, as written, into full effect. Where they have civil jurisdiction, they, in most cases, hold the place and exercise the authority of both court and jury. They pass upon the law and the facts.

III. Justices of the peace, or aldermen, shall be elected in the several wards, boroughs and townships, at the time of the election of constables, by the qualified voters thereof, in such number as shall be directed by law; and shall be commissioned by the governor for a term of five years. But no township, ward or district shall elect more than two justices of peace, or aldermen, without the consent of a majority of the qualified electors within such township. Const. Penn., Art. VI., sect. 7.

The 12th sect. of the schedule to the constitution of Pennsylvania directed that the first election for aldermen and justices of the peace should be held in the year 1840, at the time fixed for the election of constables; the legislature to provide for subsequent similar elections. By an act of 21st June 1839, it is provided that elections for aldermen and justices of the peace shall be held at the times and places fixed for the election of constables, so often as they shall become necessary, and be conducted in the mode and manner, and by the same officers and persons, as the constables' elections are held and conducted. The returns of the election being made to the governor, and undisputed, it becomes his duty to issue a commission to such person as shall appear to be duly elected.

In the constitution of the state, the words "justices of the peace, or aldermen," are used as synonymous; as representing a magistrate in all respects of the same authority and character. In the 28th section of the act of 20th March 1810, it is provided that "the aldermen appointed within the city of Philadelphia, shall, in *all* cases, exercise *all* the powers which *any* justice of the peace may exercise within any county of this state; and shall be entitled to *like* fees; and, in *all* cases, shall be under, and subject to, *such* limitations, restrictions and provisions, as justices of the peace are, in like circumstances, subjected to by this act."

IV. In consequence of these provisions and enactments, these officers are, to all intents and purposes, the same; enjoying like privileges and authorities, and entitled, for similar services, to like emoluments; in a word, as one authority, acting under two different names, and in no other respect whatever differing from each other. It is for this reason that the names, aldermen or justices of the peace, are, occasionally, just as they present themselves, used, in this publication, without discrimination, as representing the jurisdiction and authority which they mutually and equally possess. Aldermen are the creatures of corporations, and exist only within their bounds. Justices of the peace exercise the same authorities in the country, usually beyond the limits of incorporated districts.

Justices of the peace "are as solemnly bound by the law, both common and statute, as the judges of the courts, though the same precision and technical formality are not required of them. The parties to a suit; the cause of action; the

evidence required to support it; the competency of witnesses and of testimony generally; the order of proceeding; the operation of a judgment and the right to execution and satisfaction; the whole range of judicial duties and proceedings, are but a branch of the general jurisprudence of the state, and are to be regulated and conducted by the same municipal laws, whether in court or before a justice. What is sufficient, as a whole, to maintain a suit in court, or to constitute a defence, is sufficient before a justice, and *vice versa*." "Where an appeal is allowed it would be absurd for the first tribunal [the justice] to try and determine the case by any other rule than the common law of the land; for, by an appeal, either party may have his cause ultimately determined by that standard." "Where no rule is prescribed by act of assembly, the principles of the common law must be resorted to, and they will never fail, if properly understood, to conduct to a safe and sure result." 2 Penn. Black. 390.(a)

V. All criminal prosecutions are carried on in the name of the commonwealth, and ostensibly at the expense of the several counties in which the crimes are alleged to have been committed. It therefore becomes the justices, as far as in them lies, to prevent the name of the commonwealth from being used as an engine to gratify private malice, rather than an instrument to promote "the peace and dignity of the commonwealth." They should discourage all criminal prosecutions of a trivial nature. The magistrate, who, from selfish considerations, encourages the angry and revengeful passions, is a nuisance in his neighborhood, and the earliest occasion should be taken to make him feel the force of public opinion by his removal from office.

No warrant should issue on the oath, or affirmation, of any person who is disqualified by nature, by opinion or crime, from being heard as a witness, in support of the charge, when brought before a court and jury. A prosecution once instituted is not in the power of the prosecutor to withdraw, at his pleasure. He is only a witness on the part of the commonwealth. The offender, having heard the evidence, before the justice, often becomes alarmed as to the consequences of his offence, and frequently moves everything in his power to put an end to the prosecution. This must not be permitted, by the justice, when the public interest is at stake and requires the prosecution of the accused. It is a criminal offence to compound a felony, and any contract made, or security given, in consideration of dropping a criminal prosecution, or suppressing the evidence on the part of the commonwealth, is invalid. It is punishable for a man to receive even his own goods which had been stolen, *under a promise* not to prosecute.

The only exception to these general principles, in Pennsylvania, is contained in the 9th section of the Code of Criminal Procedure, which provides that in all cases where a person shall, on the complaint of another, be bound by recognisance, or committed for an assault and battery, or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by action, if the party complaining shall appear before the magistrate, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate, in his discretion, to discharge the recognisance which may have been taken for the appearance of the defendant, or, in case of committal, to discharge the prisoner, upon payment of costs. This section, however, does not extend to any assault and battery, or other misdemeanor, committed by or on any officer or minister of justice. The authority of the justice in these cases is a trust of much importance. It should be exercised with prudence, and a regard not only to the feelings of the complainant and defendant, but with strict attention to the public weal.

The right to a preliminary hearing before a magistrate, on a criminal charge, is a fundamental one, of which the accused cannot be deprived, by sending a bill before the grand jury in the first instance; the only exceptions are cases of violations of the revenue laws, and of innovations upon the peace and good order of society, where there are no private prosecutors. 2 Luz. Leg. Obs. 409.

(a) In Erie and Venango counties, justices are prohibited, by statute, from keeping their offices in the same room with an attorney, or person engaged in the prosecution or defence

of suits. Any judgment rendered, under such circumstances, is void, and will be reversed, with costs, on *certiorari*. Pord. 1374.

If a justice of the peace see a felony or breach of the peace committed, he may either arrest the party offending, or order any other person to take him into custody. This is a power which requires to be cautiously exercised, and only in cases of necessity. He should be careful never to assume the exercise of a doubtful authority, nor exercise in a hesitating or doubtful manner the authority with which he is certainly invested.

A justice may refuse to issue a warrant, if, upon deliberate consideration, he shall come to the conclusion that it ought not to issue. He must be honest and fearless, and have, in the language of Dalton, c. 6, a "stout and upright heart, and clean and uncorrupted hands," not fearing to offend, nor lending himself or his office to evil-minded persons, but holding the balance even between the parties and the commonwealth. Pursuing such a course, he need apprehend no injury, and he may be assured much good will result from his official conduct.

If he shall be satisfied that a warrant ought to issue, let it issue forthwith, and be put, for service, into the hands of a constable, or some other trusty person. It is always better to place the warrant, for service, in the hands of a constable, than in those of a private person. The officer is to be presumed to *know* his powers and duties, and he has been legally qualified to discharge them with fidelity. Such qualifications may not reasonably be expected in private persons. It is, however, if necessary, in the power of a justice to appoint a private person to serve a *criminal* * warrant, although it does not appear that *he* can, although a constable may, depute a private person to serve a *civil* warrant. It must be directed, as the law requires, to a constable.

VI. The name of the party to be apprehended should, if known, be correctly stated in the warrant. If his name be not known, he should be described with as much certainty and precision as the case will allow; thus—"Take the body of a short, fat, white man, in his shirt sleeves, with a straw hat on, driving a hackney carriage, No: 774." A warrant to apprehend a person to be *pointed out*, or a person *suspected*, without naming or describing *any* person in particular, is *illegal* and *void* from its uncertainty. Such a warrant should never issue, and, if issued, should never be served. No officer or other person, is bound to serve a process which carries its illegality on its face. The justice should never permit any person to insert a name, or presume to describe a person on a warrant. The authority vested in the justice is only vested in *him*. It is not in his power, on this or any other occasion, to appoint a deputy.

The warrant should clearly state the offence charged, but it is immaterial whether it be stated in technical language, or in the language of the witness. The warrant will be good whether it shall charge the offender C. D. "with having committed an assault and battery on the said A. B.," or with "having with a piece of wood, or other hard substance, struck the said A. B. on the head and cut him." All that is necessary is, that the warrant shall, with sufficient clearness, make known the nature of the offence charged and the person who is charged with having committed it.

A criminal warrant should be issued on the oath or affirmation of one or more qualified persons; it should be under the hand and seal of the justice, and set forth the day and year on which it was granted. The style of the warrant, as well as "of all process, shall be, The Commonwealth of Pennsylvania." Constitution of Pennsylvania, Art. V. § 11. The warrant continues in force until it is fully executed; although the practice is to make it returnable *forthwith*. By an act of assembly passed 16 April 1829, and re-enacted by the revised code of criminal procedure of 1860, the practice of backing warrants has been sanctioned and regulated.

All persons, without distinction, are subject to arrest when accused of a criminal offence; of treason, felony or breach of the peace. The exemptions from arrest which exist in *civil* cases have no existence in *criminal* ones. Thus, married women, freeholders, minors, every one who is charged with having offended against the law, broken the peace, or subjected him or herself to punishment for a crime alleged to have been by them committed, are liable to be apprehended; the necessary oath or affirmation having first been made, and the necessary process, by

the justice, having been issued. *Arrests* on criminal warrants may be made on Sundays or in the night-time. (a)

VII. The accused being brought before the magistrate, he may, after the examination of witnesses, discharge the prisoner, take bail, or commit him for trial; or, he may take bail, or commit him for a further hearing, before himself. (b) "Where a justice has authority to inquire into an offence, and commit the prisoner, hold him to bail or discharge him, as circumstances may require, he may take a recognisance for his appearance before him, from time to time, pending the examination. And the condition of such a recognisance is not fulfilled by the appearance of the accused, if he abscond during the examination." 6 S. & R. 427. But, *it seems*, a

(a) In the case of *Bailey v. Simpson*, the district court for the city and county of Philadelphia determined, on the 23d March 1850, "that a warrant issued by an alderman for obtaining goods by false pretences, cannot be executed on Sunday; that the execution of such a warrant, on that day, is void by the act of 1705, and the person executing it becomes a trespasser, and liable to an action for false imprisonment." MS. This decision renders expedient an inquiry into the right of an officer to execute a criminal warrant for a misdemeanor not involving an *actual* breach of the peace, upon Sunday. The act of 1705 provides, that "no person or persons, upon the first day of the week, shall serve or execute, or cause to be served or executed, any writ, precept, warrant, order, judgment or decree, except in cases of treason, felony or *breach of the peace*; but the serving of any such writ, precept, warrant, order, judgment or decree shall be void to all intents and purposes whatsoever; and the person or persons serving or executing the same, shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, precept, warrant, order, judgment or decree at all." Purd. 924. This act is an exact transcript of the statute of 29 Car. II., c. 7, which has received a judicial construction in several reported decisions; and the exemption from arrest is contained in similar terms to the constitutional provision that senators and representatives "shall in all cases, except treason, felony and *breach of the peace*, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same." The like privilege is enjoyed by members of parliament in Great Britain. 1 Bl. Com. 166. In *The King v. Wilkes*, Lord CAMDEN delivered the unanimous judgment of the court of common pleas, that a *libel* is not a breach of the peace, and that a member of parliament is not liable to arrest by reason of having been convicted of that offence. 2 Wils. 151. (See also 1 S. & R. 351.) Very soon afterwards, however, it was resolved by both houses of parliament, that the writing and publishing seditious libels was not entitled to privilege. 1 Bl. Com. 166. In *Hawkins v. Fackman*, the court of King's Bench discharged a man upon motion, who had been arrested upon a Sunday under an attachment for non-payment of costs. 2 Ridg. P. C. 309, n. And in *Osborne v. Carter*, a defendant taken on a *capias ulagatum*, on a Sunday, was discharged. Barnes 319. So, an arrest on that day, on a commission of

rebellion, out of the exchequer of pleas, is illegal. *Impey on Sheriff*, 81. And see 24 Eng. L. & Eq. 146. None of these cases, however, with the exception of that in 2 Wils. 151, were indictable offences, and in opposition to that authority, we have the opinion of Lord HOLT, in *Cecil v. Nottingham*, who said in reference to an arrest on Sunday under an attachment for contempt—"Suppose it were a warrant to take for forgery, perjury, &c., shall they not be served on Sunday? And shall not any process at the king's suit, be served on Sunday? Sure, the Lord's day ought not to be a sanctuary for malefactors; and this partakes of the nature of process upon an indictment." 12 Mod. 348. So, one may be taken on Sunday upon an escape-warrant. 2 Salk. 626. 6 Mod. 95. 1 Atk. 55. 2 Ridg. P. C. 289. Cas. temp. Hardw. 102. And Sir William BLACKSTONE says, "it seems to have been understood that no privilege of parliament was allowable to the members, their families or servants, in any crime whatsoever; for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting wherein privileged persons have been convicted of *misdeemeanors*, and committed, or prosecuted to outlawry, even in the middle of a session; which proceeding has afterward received the sanction and approbation of parliament." 1 Bl. Com. 166. Cas. temp. Hardw. 103, n. Willes 459. 1 Tidd's Pr. 191. The weight of authority, therefore, appears to be decidedly in favor of the right to make an arrest on Sunday for any crime, although not involving an *actual* breach of the peace; and accordingly, the court of common pleas of Bucks county decided, in 1839, that a warrant of arrest, on a charge of *malicious mischief*, could be executed on Sunday, and was not rendered unlawful by the act of 1705. Haz. U. S. Reg., Oct. 1839, p. 263. See also Dalt. Just. 9, ch. 3. 1 S. & R. 351, 352.

(b) The act 23 February 1870 provides that when any one is arrested on a warrant or bail-piece in any criminal case in which a justice of the peace would by existing laws be allowed to take recognisance of bail for his appearance to answer the offence or crime complained of, the officer or person making the arrest may take the accused before a justice and have him released on the requisite security being given; and his return, when properly made, shall exonerate him from further liability. The title of this act is, "An act to authorize justices of the peace to take recognisances of bail, in certain cases, in *Crawford county*;" but the enacting clause is a general one.

See Page 496 as to 1705

committing magistrate has no right to detain a prisoner for examination for a longer period than three days, unless under extraordinary circumstances. 1 Hale's P. C. 585. Ibid. 120. Cro. Eliz. 829. 1 U. S. Law Mag. 101. 16 Eng. L. & Eq. 503.

As little time should be permitted to elapse before a final decision is made, by the magistrate, as is consistent with a due administration of justice. The magistrate may, verbally, direct the constable to detain the prisoner until he can make out his *mittimus*. The justice has authority to cause to come before him all persons who he has reason to believe may be material witnesses for the commonwealth, or the defendant, in whose presence the witnesses should be examined. In the language of the constitution of Pennsylvania, "the accused hath a right to be heard by himself and his counsel;" "to demand the nature and cause of the accusation against him," and "to meet the witnesses *face to face*."

There is no disqualification on the ground of relationship between the accused and the witness, save only that of husband and wife. *They* may not testify for or against each other, save, only, when they are themselves the party threatened or injured, and so threatened or injured by the husband or the wife against whom they appear as a witness. From the necessity of the case, the complainant is permitted to be examined as a witness.

When the accused is brought before the justice, he should be informed that he is neither bound to confess his guilt, nor to accuse himself. To induce him so to do, by promises or threats, is as unbecoming as it is unjust. Neither the prosecutor, nor the officer, who has him in custody, should be permitted to use any influence to induce or to betray him into a confession. A confession so obtained, is, in itself, of no value; it is not even admissible, as evidence, on the trial of the party.

The duty of a justice of the peace, when the accused is brought before him, is thus stated by Lord HALE, (vol. i. p. 588.) "Lastly, what is to be done after the warrant is served, and when the person accused is brought before the justice thereupon?

"If there be no cause to commit him, found by the justice, on examination of the fact, he may discharge him.

"If the case be bailable, [before him,] he may bail him.

"If he has no bail, or the case appears not to be bailable, he must commit him.

"And being either bailed or committed, he is not to be discharged, till he be convicted, or acquitted, or delivered, by proclamation."

The power to take recognisances for the appearance of parties accused of criminal offences, was expressly conferred on justices of the peace by the act of 1722, which provided that they should have full power and authority to take all manner of recognisances and obligations, as any justice of the peace of Great Britain may, can or usually do. And this power, except in cases of certain heinous crimes, is continued to them by the 7th section of the Code of Criminal Procedure. *Purd.* 250.

If the magistrate take bail, it must be for the appearance of the accused at the next term of the court, to answer the charge preferred against him. But if he commit, in default of bail, it is not for trial at any particular term of the court. And in such cases, the prisoner may be brought to trial immediately, if the court be then in session. There is no reason, on the one hand, why a prisoner should not be entitled to a trial during the term at which he is committed, and as speedily as the business of the court will permit; nor, on the other hand, why, if witnesses be present and ready to testify, the case must be postponed until a succeeding term, *when the postponement is not necessary to enable the defendant to prepare his case.* *Commonwealth v. Hart*, Q. S. Phila. 1858.

VIII. "An attorney has no right to interfere as advocate, or otherwise, for or against a prisoner, charged before a magistrate with felony or indictable misdemeanor; indeed he has no right even to be present; for this being merely a preliminary proceeding, to ascertain whether there are sufficient grounds for sending the prisoner to his trial before a jury, it is similar to the inquiry before the grand jury, and no person has a right to interfere, nor is the justice's room, upon such an occasion, deemed an open court. 1 B. & C. 37. The justices may, and frequently do, allow attorneys to act for the prisoner or prosecutor, and even sometimes allow a case to stand over until the prisoner's attorney is in attendance, but this must be considered a matter of courtesy, not of right." Arch. Justice of Peace. The 9th

article of the Declaration of Rights, contained in the Constitution of Pennsylvania, declares, that "in all criminal prosecutions, the accused hath a *right* to be heard by himself and his counsel." But it has not been decided by our courts, and is extremely doubtful, whether this provision applies to a preliminary hearing before a committing magistrate. It would appear, from the context, to apply only to trials before a court having authority to convict of the offence charged.

It too frequently happens that magistrates bind over or commit, without having given the question of guilt or innocence, that grave consideration to which it is entitled. This is sometimes done under the idea, that such binding over will but slightly, if at all, affect the interest, or the character, of the accused. This is acting upon mistaken principles. No man can, after a hearing, be called upon, by a justice, to give bail for his appearance, to answer to a criminal charge, without having his character, in some measure, tainted; and the taint will be faint or deep, according to the nature of the charge, and the general business character of the committing magistrate.

No magistrate can legally bind over any person or persons, charged with a criminal offence, without probable cause being either admitted or conceded by the party or parties defendant, or its existence being proved on oath, by the person or persons making the charge. The necessary prerequisite for binding over, is probable cause for the act, and a magistrate cannot know of the fact, without its admission, or due proof. *Vaux's Dec. 13.* In all cases where it is clear from the evidence adduced on a primary hearing, that the party has committed the offence of which he stands charged, or where there is good reason to believe he has committed the offence; or where, from all the facts in the case, there is reasonable doubt as to his having committed the offence or not, the justice holding the primary hearing, under any of these circumstances, must bind the party over to be tried by a jury. The right of an accusing party to go before a court and jury with his complaint and his evidence, that it may be sustained and the party punished for a violation of law, is equal to the right of the accused party to seek the same source for an acquittal. *Ibid. 28.* But if there shall not have been such evidence as would warrant a jury in finding a defendant guilty, it would be wrong for a judge or justice to send such a defendant to a jury for trial. *United States v. Hough, Dist. Court, U. S., 22d April 1850, KANE, J.*

In *Philpot v. Bailey*, it was said by Mr. Justice BURNSIDE, that in a criminal case a magistrate is only to decide whether there is sufficient evidence to hold to bail, but he ought to hear the defendant's evidence of matters which could be easily explained, if the accused were allowed to offer testimony. The practice ought to be so moulded that the magistrate could hear and judge of the reasonableness of the defendant's explanations. At the same time, he ought not to try the case, but to moderate the rule in accordance with justice. *Court of Nisi Prius, 9th April 1850.* He may examine witnesses who were present at the time when the offence is said to have been committed, to explain what is said by the witnesses for the prosecution. *2 W. C. C. 30.* Evidence may be heard for the defendant where it is of that positive, absolute and convincing kind, that it leaves no doubt of his innocence; but if it merely tend to throw doubt upon the case, and impose the duty of deliberation and comparison on the magistrate, it must be rejected. Thus, although it is the duty of a committing magistrate to determine the credibility of the witnesses for the prosecution, from the character of the testimony and from conflicting evidence; yet he has no authority to hear evidence directly to impeach the credibility of the prosecutor's witnesses. He has no power to find the facts, but only to determine whether there be probable cause to put the defendant on his trial; and if his guilt or innocence be doubtful, he should be held to answer. *6 Pittsburgh Leg. J. 37.(a)*

(a) The 3d section of the act of 13th April 1867 provides that in all cases of arrest upon warrant, of any person charged with any crime of a grade of which the court of quarter sessions has jurisdiction, the defendant, upon the preliminary hearing before the magistrate, may subpoena, and produce and examine, witnesses in his or her behalf. *Purd. 1574.* This

section is, in terms, a general law, but it is contained in an act relating "to the jurisdiction of justices of the peace, mayor and burgesses in Erie county;" whether its provisions are operative beyond that county is extremely doubtful. It ought to receive a judicial interpretation.

These are some of the high and important duties which appertain to the office of an alderman, or justice of the peace, in criminal cases. It would be difficult for any man, however delicate and correct may be his feelings, or his respect for the feelings of others, or however sound may be his judgment, or extensive his knowledge of the world, to make any reasonable estimate of what would be the solemnity of his feelings, or his deep sense of responsibility, if called upon to fill the office of a justice of the peace, when citizens, who have, up to the time they are brought before him, sustained high and general characters for integrity and honor, are now arraigned before him, and charged with offences of the deepest dye! The duties, which then devolve upon the magistrate, require all his collectedness of mind and independence, to carry him through, with the dignity and firmness which his station demands.

IX. PROCEEDINGS IN THE OFFICE OF A JUSTICE OF THE PEACE, OR ALDERMAN, IN A CRIMINAL CASE.

THE COMMONWEALTH OF PENNSYLVANIA }
v.
JAMES CRIB. }

Nov. 14, 1860, 3 o'clock, P. M. George Jones complains to the alderman, that James Crib had assaulted and beat him, and asks that a warrant may issue to have him apprehended.

Alderman.—You must make your complaint under oath, or I cannot issue a warrant. The constitution provides that no criminal or search-warrant shall issue, unless the application is supported "by oath or affirmation." *Jones.*—I am ready to do so.

Alderman. (administering an oath).—You do swear that you will true answers make to such questions as I shall ask you. *Answer.*—I do.

Alderman.—Did James Crib commit on you an assault and battery? *Jones.*—He did; in the presence of Patrick Ward and John Smith.

Alderman.—You had better, if convenient, have one or both of them here at the hearing. *Jones.*—I do not think they will come without a subpoena.

Alderman.—I should not know at what time to require their attendance, as I do not know at what time the constable may arrest him. If, however, their testimony shall be found necessary, the defendant may be held to bail, and a time fixed for another hearing. Then subpoenas may issue, and you can have your witnesses present. Where will the constable find James Crib? *Constable.*—I know Crib. I think I can soon find him.

The alderman issues the warrant, and delivers it to the constable, who says: I expect to have him here at four o'clock this afternoon.

Same day, alderman's office, 4 o'clock, P. M.

Constable.—I have here the body of James Crib, as I am commanded in this warrant. If the alderman is at leisure to hear the case, the complainant is here.

Alderman.—I am ready. You, George Jones, do swear that the evidence you will give shall be the truth, the whole truth, and nothing but the truth. State your complaint.

Jones.—I was going down Eighth street, above Market, this morning, when James Crib, this man, ran across the street, from John Grog's tavern. He appeared intoxicated, and rushing up to me, with his fist doubled, swore that if I did not cry out "Hurrah for the Mayor!" he would lick me. I said I would not cry out any such thing. He then struck me on the face with his fist, and knocked me down. When I got up, he made at me to strike me again, but I caught hold of him, and held him until some men came and separated us.

Alderman. (to Crib).—You may ask him any questions you think proper.

Crib.—At what hour was it that you say you saw me this morning? *Jones.*—About 10 o'clock.

Crib.—Who was with you? *Jones.*—No one.

Crib.—Was anybody with you? *Jones.*—No.

Crib.—Where were you going? *Jones.*—To my shop in Decatur street.

Crib.—Did you not call out to me, from the other side of the street, that we had been beat at the election? *Jones.*—Yes, I did.

Crib.—Did not you come across the street towards me, shaking your fist? *Jones.*—Not till you first left your side of the street, and came toward me, threatening me.

Crib.—Did you not give me the first blow? *Jones.*—No; you struck me first, as I can prove by witnesses.

Crib.—What witnesses? *Jones.*—Patrick Ward and John Smith.

Crib.—I ask that these witnesses be produced and examined, before further proceedings. *Jones.*—I have no objection.

Alderman.—I adjourn this case until to-morrow morning at 9 o'clock. James Crib, you must find bail, in \$100, for your appearance at that hour, at this office; and that, in the mean time, you will keep the peace. The complainant is held in \$50, to appear.

Crib.—Amos Carroll would bail me, if he was here.

Alderman, addressing the constable, says: Here is a commitment for James Crib; and they both leave the office.

Jones.—I want a subpoena for Ward and Smith.

Alderman makes out a subpoena, returnable Nov. 15, 9 o'clock, A. M.

Jones.—Will it do for me to serve the subpoena myself? *Alderman*.—Yes; you have a right to serve the subpoena yourself.

The constable, Crib and Carroll return to the office.

Crib.—I offer Amos Carroll as bail for my appearance to-morrow.

Alderman, (administers an oath to Carroll to make true answers to such questions as shall be asked him).—Are you a householder? *Carroll*.—Yes; I keep house No. 75, North Seventh street.

Alderman.—Are you worth \$100, after the payment of all your debts and responsibilities? *Carroll*.—I am.

Alderman notes the recognisance on his docket, which was in the common form.

Nov. 15, 1860, 9 o'clock, A. M. Present, Crib, Patrick Ward, John Smith, George Jones.

Alderman, (to Jones).—Are your witnesses here? *Jones*.—Yes. Patrick Ward.

Alderman., (administers oath to Ward).—State what you saw of the struggle between Jones and Cribb.

Ward states, in substance, that he saw Cribb running hastily across the street, towards Jones, who was calling out something to him; that he saw Cribb instantly strike Jones with his fist, on the face, and Jones fell. After Jones got up there was a struggle, and they clenched each other. Some persons came up, and we separated them.

Crib, (cross-examines).—Can you swear that I struck the first blow? *Ward*.—The first and only blow I saw struck, was by you.

John Smith sworn. His testimony was much the same as Ward's.

Alderman.—Crib, I must bind you over, in \$200, to answer, at the next court of quarter sessions for the county of Philadelphia, on a charge of assault and battery. Have you any bail? *Crib*.—No.

Alderman.—Then I must commit you.

Makes out commitment.

Crib.—I suppose Carroll would bail me. He is outside the door.

Alderman.—Get him here. You ought to have mentioned that before the commitment was made out, and saved yourself the cost of the commitment.

Carroll having justified, in \$200, his recognisance, together with that of Crib, is taken by the alderman. The witnesses are all bound over, in \$50 each, to appear and testify.

Alderman's office, November 15, 1860.

Enter George Jones, (to the alderman).—In this affair I think I was too hasty, and should be willing to settle the matter with Crib. He is a good-natured fellow; everybody says he is never quarrelsome except he has been drinking.

Alderman.—In a matter of this kind I have authority to settle it, provided such is the desire of both complainant and defendant. Take a friend with you and call on Crib and talk the matter over, and should you agree on terms of settlement, I shall be pleased to discharge it from my docket. Inasmuch as you think you have been hasty in the matter, I think you should pay part of the costs. But you may settle that as you and he shall agree.

After a lapse of some days, Crib and Jones come to the alderman, and say that they have agreed to settle the matter, that they have divided the costs, and desire the complaint to be dismissed.

The alderman then makes the following entry on his docket which is signed by both, viz:

We, the complainant and defendant in the above case having agreed to settle the same, hereby mutually request that the complaint be dismissed and all proceedings be stayed.

GEORGE JONES,
JAMES CRIB.

Dismissed accordingly, November 18, 1860.

X. OF THE ELECTION AND QUALIFICATION OF JUSTICES.

1. Mode of Conducting the Election.

The qualified voters of the respective wards, boroughs and townships, in this commonwealth, shall, in the year of our Lord eighteen hundred and forty, and whenever by this act it becomes necessary thereafter, at the times (a) and places fixed for the election of constables in the said wards, boroughs and townships, elect justices of the peace and aldermen as follows: for each township shall be elected two justices of the peace; for each borough, not divided into wards, shall be elected two justices of the peace; for each ward in a borough shall be elected two justices

(a) On the second Tuesday of October, by act 17 April 1869, § 15. Purd. 1557.

of the peace; for each ward in a city shall be elected two aldermen, [except in the city and incorporated districts of the county of Philadelphia, where one alderman shall be elected for each ward;] (a) and such election shall be held, and conducted in the mode and manner, and by the same officers and persons, as the constables' elections are held and conducted. But where a borough forms part of a township in which it is situated, the qualified voters of said borough shall not be permitted to vote for justices of said township, nor shall the qualified voters of the township be permitted to vote for justices of said borough. Act 21 June 1839, § 1. Purd. 589.

When a borough forms part of a township or townships, composing together one general election district, and which are entitled by the act to which this is a supplement, to separately elect two justices of the peace, it shall be the duty of the judge and inspectors elected, to hold the general and township elections of each year, to provide a separate box into which they shall put the tickets voted for justices of the peace for said borough; and the tickets voted for justices of the peace by the qualified voters of the township, shall have the word "Township" written or printed on the outside; and the tickets voted for justices of the peace by the qualified voters of the borough shall have the word "Borough" written or printed on the outside, and the said judge and inspectors shall count the votes so voted for justices of peace for said borough, and return the same in like manner, as provided for in the election of justices of the peace for townships. Act 7 March 1840, § 1. Purd. 589.

It may be lawful for the qualified electors of any township that is or may hereafter be created, to elect such number of justices of the peace as by law the said township may be entitled to, at such times and places as are already prescribed by law. Act 11 July 1842, § 44. Purd. 589.

When any new township shall be erected in any county of this commonwealth, it shall be lawful for the court of quarter sessions of the proper county to authorize the citizens of said new township to hold an election for justices of the peace, and all other township officers, upon such notice as the court may direct. Act 5 April 1849, § 32. Purd. 589.

Elections under this act shall be held and conducted in the same manner and by the same officers who are or shall be required by law to hold and conduct elections of constables in the respective wards, boroughs and townships in this commonwealth. Act 21 June 1839, § 8. Purd. 589.

The officers and other persons holding and conducting such election for aldermen and justices of the peace, shall make true duplicate returns of such elections, one of which returns [shall be immediately transmitted by mail, by the proper constable, to the governor, and the other return] shall be handed by such constable to the prothonotary of the proper county, to be filed in his office; and the said prothonotary shall forthwith send a certified copy of such return to the secretary of the commonwealth. Ibid. § 2.

So much of an act of assembly as requires constables to send copies of the returns of the election of aldermen and justices of the peace, to the governor of the commonwealth, is hereby repealed. Act 13 April 1859, § 2. Purd. 589.

2. Contested Elections.

The returns of the elections under this act shall be subject to the inquiry, determination and judgment of the court of common pleas of the proper county, upon complaint of fifteen or more of the qualified voters of the proper township, ward or borough, of an undue election or false return, two of whom (b) shall take and subscribe an oath or affirmation, that the facts set forth in such complaint are true to the best of their knowledge and belief, and the said court shall, in judging of such elections, proceed upon the merits thereof, (c) and shall determine finally concerning the same, according to the laws of this commonwealth; and the protho-

(a) So much of the consolidation act of the 2d February 1854, as provided that there should be but two aldermen in each of the wards of the city of Philadelphia, was repealed by act of 18th April 1855, as to the 21st, 22d,

23d and 24th wards. Purd. 589.

(b) It is not sufficient that it be sworn to by two other voters, resident in the ward. 2 P. 521.

(c) See 2 P. 503.

notary of the said court shall immediately certify to the governor the decree of the said court, and in whose favor such contested election shall have terminated, and the governor shall then commission such person in whose favor such contested election terminated, and such complaint shall not be valid or regarded by the court, unless the same shall have been filed within ten days after the election in the prothonotary's office, and in case such complaint be filed in due time, the prothonotary shall transmit by mail immediately to the governor a certified copy thereof, and in such case no commission shall be issued until the court shall have determined and adjudged on such complaint as aforesaid. *Ibid.* § 3.

All contested elections of aldermen or justices of the peace shall be tried in the courts of common pleas, according to the provisions of the act to which this is a further supplement; and said courts, in the trial of such contests, shall have all the powers conferred by the 155th, 156th and 157th sections of the act entitled "An act relating to elections of this commonwealth, passed the 2d day of July 1839; but no proceeding commenced and now pending in the courts of quarter sessions shall be dismissed by reason of the passage of this act, but the same shall be pursued to completion, with like power and effect as though it had been commenced in the court of common pleas. Act 13 June 1840, § 4. *Purd.* 590.

In all cases where the election of justices of the peace shall be contested, the justices then in commission shall continue to exercise and discharge the duties of their respective offices, until their successors are duly commissioned and qualified. Act 15 April 1845, § 21. *Purd.* 590.

In all cases where an equal number of legal votes has been or shall hereafter be polled, for two or more candidates for the office of alderman or justice of the peace, in any ward, borough, township or district, so that the said officers required by law shall not be duly elected, or where any election shall be declared void by the court, it shall be lawful for the qualified voters of such ward, borough, township or district, to hold another election for the choice of such officer or officers to fill such vacancy. But before holding the same, it shall be the duty of the constable of the proper ward, borough, township or district to give notice in the manner prescribed by law, that on a certain day mentioned in said notice, not less than twenty nor more than thirty days thereafter, an election will be held to fill such vacancy; which election shall be held and conducted in the mode and manner, and by the same officers and persons, as the constables' elections are held and conducted; and at the same place and between the same hours, and be subject to the like inquiry and judgment of the court of the proper county, as aldermen or justices elected, under the provisions of the act to which this is a further supplement: *Provided*, That when the election of any such officer shall be vacated or set aside by a decision of the court, the said court shall fix the time of holding such new election, which shall not be less than twenty days thereafter. Act 13 June 1840, § 1. *Purd.* 590.

3. *Increasing Number of Justices.*

If the qualified voters of any ward, borough or township, in this commonwealth, shall desire to elect more than the number of justices of the peace or aldermen, prescribed by this law for such ward, borough or township, such qualified voters may at the times and places of holding constables' elections, (a) express such desire and consent in the following manner, namely: such of the said voters as are in favor of electing more justices or aldermen, shall vote tickets labelled on the outside with the word "Justices" or "Aldermen," and the inside of such tickets shall contain the words "Increase one" or "Increase two," as they may desire, and such of the said voters who are opposed to the election of more justices or aldermen shall vote tickets labelled "Justices" or "Aldermen" on the outside, and the inside of such tickets shall contain the words "No increase." And if it shall appear by such election that a majority of the qualified voters within such ward, borough or township are in favor of electing more justices or aldermen, then such additional number of justices or aldermen shall, at the next constables' election thereafter, (a) be elected and commissioned in the same manner as the other justices or aldermen

(a) On the second Tuesday of October, by act 17 April 1869, § 15. *Purd.* 1557.

are under this act: *Provided*, That no election shall be held under this section unless at least fifty qualified voters of the proper ward, borough or township, shall give notice in writing to the constable thereof, that they desire to vote, at the next constables' election thereafter, for such increase, and on receiving such notice the said constable shall, by at least ten written or printed handbills, put up in the most public places in said ward, borough or township, at least twenty days before said election, give notice that at said election a vote will be taken to ascertain whether the qualified voters of said ward, borough or township, consent to the election of a greater number of justices or aldermen. And it shall be the duty of the officers and others holding such election under this section, to make out true duplicate returns of the same, and file one of said returns in the office of the prothonotary of the proper county, and in case a majority of the voters of such borough or township are in favor of an increase, the proper constable shall immediately transmit by mail to the governor the other of the said returns, and no such increase in any ward, borough or township, shall exceed two. Act 21 June 1839, § 4. Purd. 590.

4. Elections to supply Vacancies, &c.

If any vacancy shall take place in any ward, borough or township, by the neglect or refusal of any person elected to accept a commission within six months after the date thereof, or by death, resignation or otherwise, such vacancy shall be supplied at the next election, and the election to supply such vacancy shall be held and conducted in the same manner as the other elections for justices under this act. (a) Ibid. § 7.

In all cases of the creation of any new township, borough or ward, in any city or county of this commonwealth, the commissions of justices of the peace and aldermen, within the respective territories out of which such township, borough or ward, has been or may be created, shall continue for the proper township, borough or ward, in which such justices or aldermen may respectively reside for the balance of the official term; and any deficiency in the proper number of aldermen or justices of the peace within the territories of either of such new divisions, according to the number allowed to each township, borough and ward, by the act of the 21st day of June 1839, shall be supplied at the next succeeding elections for constables in the said township, boroughs and wards. Act 9 March 1846, § 1. Purd. 592.

In all cases where a township has been divided, so as to leave one or more of the justices of the peace of said township in a new township, the official acts of said justice or justices in said new township heretofore done, shall be held to be as good and valid, as if done in the township for which he or they were originally elected. Act 16 July 1842, § 28. Purd. 592.

If in any ward [of the city of Philadelphia] the term of any alderman or justice of the peace shall expire between any two municipal elections, and there shall not be more than one alderman or justice of the peace holding over, it shall and may be lawful for the qualified voters of said ward, at the constables' election next preceding the expiration of such term, to elect one qualified person to act as alderman, although the term of the one whose place he is to fill shall not have expired: *Provided*, That this section shall only apply in such cases where the term so to be filled shall expire within seven months next after the election, when such successor may be elected. Act 18 April 1855, § 2. P. L. 254.

5. Of Justices' Commissions.

The governor shall issue commissions on the twenty-fifth day after the elections for justices under this act shall have been held, to such persons as shall appear to be duly elected, [for which said commission, each person so elected a justice or alderman, shall pay two dollars, to be received by the recorder of the proper county, to be by him transmitted to the secretary of the commonwealth, as fees for other commissions are transmitted;] and the said justice shall be, by the said recorder, sworn or affirmed in the manner now prescribed by law. (b) Act 21 June 1839, § 5. Purd. 591.

The commissions issued to aldermen or justices of the peace, elected under the

(a) See act 6 May 1864, as to Washington the fact that a person is commissioned as a county. Purd. 1339. justice of the peace. 2 H. 413-417. See 1

(b) The courts will take judicial notice of Greenl. Ev. § 6, note 7.

provisions of this act, shall take effect from the same date and time, and continue until the same period as commissions, issued under the act of the 21st June 1839, to which this is a further supplement, and shall expire at the same time, with commissions issued to such officers elected, at the time of electing constables. Act 13 June 1840, § 2. *Purd.* 591.

No state tax shall hereafter be charged on account of recording the commission,^(a) oath, bond or other paper connected with the election and appointment of aldermen and justices of the peace within this commonwealth. *Ibid.* § 5.

Every person hereafter elected to the office of justice of the peace or alderman, shall, within thirty days after the election, if he intends to accept said office, give notice thereof in writing to the prothonotary of the common pleas of the proper county, who shall immediately inform the secretary of the commonwealth of said acceptance; and no commission shall issue until the secretary of the commonwealth has received the notice aforesaid. Act 13 April 1859, § 1. *Purd.* 591.

6. Of Justices' Bonds.

Before any person elected a justice of the peace or alderman shall enter upon the discharge of the duties of his office, such person shall give bond in such sum, not less than five hundred dollars nor more than three thousand dollars, as the court of common pleas, or one of the judges, in vacation, shall direct, with one or more sufficient securities, unless in the opinion of the court or of said judge, the person elected is possessed of a freehold estate of a value beyond all reprises, equal to the amount in which security should otherwise be required, which bond shall be taken by the prothonotary in the name of the commonwealth,^(b) with conditions for the faithful application of all moneys that come into his hands as an officer, and such bond shall be held in trust for the benefit of all persons who may sustain injury from the said justice or alderman in his official capacity:^(c) *Provided*, That the surety shall in no case be liable where proceedings shall not have been commenced within eight years from the date of the bond, in the manner prescribed by the act of the 14th of June 1836, in relation to official bonds, and be proceeded in agreeably to the provisions of said act. Act 21 June 1839, § 6. *Purd.* 591.

Whenever upon petition and due proof, if it shall be made to appear to the court of common pleas of the proper county, that any justice of the peace or alderman of any city or county, who has not been required to give security, has become or is likely to become insolvent; or that any surety of any justice or alderman has removed from the state, or become insolvent, or is likely to become insolvent; and when, upon the petition of any surety of any justice or alderman, and proof as aforesaid, it shall appear such justice or alderman has become or is likely to become insolvent, such court may require any such justice or alderman to give security, or additional security, or counter security, to indemnify the surety so petitioning against loss by reason of his suretyship, as the case may be, in the manner provided by the 6th section of the act, entitled "An act providing for the election of aldermen and justices of the peace," in such sum, and by such time as the court may think necessary and proper. Act 21 April 1846, § 5. *Purd.* 591.

The 5th section of the act passed the 21st day of April 1846, entitled "An act in relation to certain public officers and their sureties," be and the same is hereby altered and amended; that the application therein contemplated may be made in

(a) The universality of the practice of recording justices' commissions in the proper county, proves that it rests in the mandate of a statute lost or forgotten. There are ancient rolls which, by reason of the confusion that has prevailed in that office, do not appear among the printed statutes. But the antiquity of the practice would give it the force of customary law. And such being the case, a copy of a justice's commission, certified by the recorder of deeds, is competent evidence to prove his official character. 7 W. 334-5.

(b) A justice's bond, duly filed and indorsed "approved" by the prothonotary, is a record of the court, and may be read in evi-

dence, without further proof of execution. 1 Gr. 359.

(c) The sureties are liable for money received by the justice, in an action before him, wherein the defendant confessed judgment for a sum beyond his jurisdiction. 8 Barr 415. They are liable for all moneys received by him on suits, or claims to be put in suit, or on execution, or received from a constable on execution; but not for anything received on claims to be collected as an agent, and without suit. 2 Barr 448. They are liable for money collected by the justice in his official capacity, though without suit. 11 Wr. 335.

vacation to any one or more judges of the court of common pleas, when (whose) action in the premises shall have the same force and effect as though made by the court in session. Act 8 May 1850, § 9. Purd. 591.

Whenever upon the petition of any surety and due proof, it shall be made to appear to the court of common pleas of the proper county, that any alderman or justice of the peace of any city or county of this commonwealth, by reason of habits of intemperance, is likely to increase the responsibility of his sureties, such court may require such alderman or justice of the peace to give security to indemnify the surety so petitioning against loss by reason of his suretyship, in the manner provided by the 6th section of the act, entitled "An act providing for the election of aldermen and justices of the peace," in such sum and by such time as the court may think necessary and proper. Act 16 April 1849, § 3. Purd. 591.

7. Removal and Residence.

The several aldermen and justices of the peace, elected and commissioned under this act, shall be subject to removal in the same manner and for the same causes prescribed by the existing laws of this commonwealth, and during their continuance in office, shall respectively keep their offices in the ward, borough or township, for which they shall have been elected. Act 21 June 1839, § 13. Purd. 591.

No justice of the peace shall act as such, unless he shall reside within the limits of the district for which he was commissioned. Act 22 February 1802, § 1. Purd. 592.

No license for keeping a tavern or public house of entertainment, shall be granted to any person either directly or indirectly, who at the same time holds a commission of the peace; and if any justice of the peace or alderman shall keep his stated office in any tavern or public houses of entertainment, or any building appertaining thereto, he shall, for every such offence, on conviction thereof in any court of quarter sessions of the peace, or mayor's court of the proper city or county, forfeit and pay the sum of fifty dollars, one moiety thereof to the overseers, guardians or directors of the poor of the township, district or county where such offence shall have been committed, to be applied to the support of the poor, and the other moiety thereof to the prosecutor. Ibid. § 2.

8. Aldermen of Philadelphia.

The like jurisdictions and authorities vested by this act in the justices of the peace within this commonwealth, shall be and they are hereby vested in each and every of the aldermen appointed within the city of Philadelphia, who shall, in all cases, exercise all such powers within the said city, which any justice of the peace may exercise within any county in this state, and shall be entitled to like fees, and in all cases shall be under and subject to such limitations, restrictions and provisions, as justices of the peace are in like circumstances subjected to by this act. Act 20 March 1810, § 28. Purd. 592.

XI. CRIMINAL JURISDICTION.

1. Power to take Recognisances.

In all cases the party accused, on oath or affirmation, of any crime or misdemeanor against the laws, shall be admitted to bail by one or more sufficient sureties, to be taken before any judge, justice, mayor, recorder or alderman where the offence charged has been committed, except such persons as are precluded from being bailed by the constitution of this commonwealth: (a) *Provided also*, That persons

(a) A justice may take bail after commitment for trial. 6 W. & S. 314. 2 P. 458. And see 7 W. 454. 5 B. 512. 1 Sm. 57, n. A recognisance taken by a justice to answer the charge of arson is *coram non iudice*, and void. Com. v. Philips, 2 U. S. Law Mag. 316. The act 23 February 1870 provides that when any one is arrested on a warrant or bail-piece, in any criminal case in which a justice of the peace would by existing laws be allowed

to take recognisance of bail for his appearance to answer the offence or crime complained of, the officer or person making the arrest may take the accused before a justice, and have him released on the requisite security being given; and his return, when properly made, shall exonerate him from further liability. P. L. 227. The title of this act refers only to Crawford county, but the enactment is general.

accused as aforesaid, of murder or manslaughter, shall only be admitted to bail by the supreme court or one of the judges thereof, or a president or associate law judge of a court of common pleas: persons accused, as aforesaid, of arson, rape, mayhem, sodomy, buggery, robbery or burglary, shall only be bailable by the supreme court, the court of common pleas, or any of the judges thereof, or a mayor or recorder of a city. Act 31 March 1860, § 7. *Purd.* 250.

It shall be the duty of every justice of the peace of the county or alderman of the city of Philadelphia before whom any recognisance of bail or surety in any criminal or supposed criminal case shall be taken, to set down accurately and at large in a docket or record to be kept for that purpose the name, place of abode, particularly describing the same, and the occupation or business of such recognisor or surety, and if the said recognisor or surety shall not be a housekeeper, the name and place of abode, particularly describing the same, and the occupation or business of the person or persons with whom such recognisor or surety may reside, and the said justices of the peace of said county, or aldermen of the said city, are hereby required and enjoined to make a full and complete return of said recognisance or surety, to the proper court of the city or county having cognisance of the case, of all and every the sureties so made on his docket or record touching or relating to such recognisance, together with the proceedings of such justice of the peace or alderman, relating to the case in which such person or persons may have become bound as a recognisor or surety as aforesaid. Act 30 March 1821, § 1. *Purd.* 609.

If any alderman of the said city, or justice of the peace of said county, shall neglect or refuse to comply with the provisions of this act, such neglect or refusal shall be deemed a misdemeanor in office. *Ibid.* § 4.

The aldermen and the justices of the peace of the several counties of this commonwealth, shall be required to return to the clerk of the court of quarter sessions of the peace of the respective counties, all the recognisances entered into before them by any person or persons charged with the commission of any crime, excepting such cases as may be ended before an alderman or a justice of the peace under existing laws, at least ten days before the commencement of the session of the court to which they are made returnable respectively; and in all cases where any recognisances are entered into less than ten days before the commencement of the session to which they are made returnable, the said aldermen and justices are required to return the same, in the same manner as if this act had not been passed. (a) Act 8 May 1854, § 1. *Purd.* 609.

2. Backing Warrants.

In case any person against whom a warrant may be issued by any judge or alderman of any city, or justice of the peace of any county in this commonwealth, for any offence there committed, shall escape, go into, reside or be in any other city or county out of the jurisdiction of the judge, alderman, justice or justices of the city or county granting such warrant as aforesaid, it shall and may be lawful for, and it is hereby declared to be the duty of any alderman, justice or justices of the city or county where such person shall escape, go into, reside or be, upon proof being made, upon oath or affirmation, of the handwriting of the judge, alderman, justice or justices granting such warrant, to indorse his or their name or names on such warrant, which shall be sufficient authority to the person or persons bringing such warrant, and to all other persons to whom such warrant was originally directed, to execute the same in such other city or county, out of the jurisdiction of the alderman, justice or justices, granting such warrant as aforesaid, and to apprehend and carry such offender before the alderman, justice or justices who indorsed such warrant, or some other alderman, justice or justices of such other city and county where such warrant was indorsed. And in case the offence for which such offender shall be so apprehended, shall be bailable in law by an alderman or justice of the peace, and such offender shall be willing and ready to give bail for his appearance at the next court of general jail delivery or quarter sessions, to be held in and for the city and county where the offence was committed, such alderman, justice or

(a) See act 26 March 1869, as to Lebanon, Crawford, Carbon and Northampton counties, Dauphin, Adams and Franklin counties, P. L. 147; and act 28 March 1870, as to *Purd.* 1574; act 15 February 1870, as to Allegheny county, P. L. 594.

justices shall and may take such bail for his appearance, in the same manner as the alderman or justice of the peace of the proper city or county might have done; and the said alderman, justice or justices of the peace of such other city or county so taking bail, shall deliver or transmit such recognisance and other proceeding to the clerk of the court of general jail delivery or quarter sessions, where such offender is required to appear by virtue of such recognisance, and such recognisance and other proceedings shall be as good and effectual in law as if the same had been entered into, taken or acknowledged in the proper county where the offence was committed, and the same proceedings shall be had therein. And in case the offence for which such offender shall be apprehended in any other city or county, shall not be bailable in law by an alderman or justice of the peace, or such offender shall not give bail for his appearance at the proper court having cognisance of his crime, to the satisfaction of the alderman or justice before whom he shall be brought, then the constable or other person so apprehending such offender, shall carry and convey him before one of the aldermen or justices of the peace of the proper city or county where such offence was committed, there to be dealt with according to law. (a) Act 3 March 1860, § 3. Purd. 249.

No action of trespass, or false imprisonment, or information, or indictment, shall be brought, sued, commenced, exhibited or prosecuted by any person, against the alderman, justice or justices, who shall indorse such warrant, for or by reason of his or their indorsing the same, but such person shall be at liberty to bring or prosecute his or their action or suit against the alderman or justice who originally granted the warrant. Ibid. § 4.

8. Settlement of Criminal Cases.

In all cases where a person shall, on the complaint of another, be bound by recognisance to appear, or shall, for want of security, be committed, or shall be indicted for an assault and battery or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy, by action, if the party complaining shall appear before the magistrate who may have taken recognisance or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate, in his discretion, to discharge the recognisance which may have been taken for the appearance of the defendant, or in case of committal, to discharge the prisoner, or for the court also where such proceeding has been returned to the court, in their discretion, to order a *nolle prosequi* to be entered on the indictment, as the case may require, upon payment of costs: *Provided*, That this act shall not extend to any assault and battery, or other misdemeanor, committed by or on any officer or minister of justice. Act 31 March 1860, § 9. Purd. 251.

4. Holding Inquisitions.

In all cases where by law the coroner of any county is required to hold an inquest over a dead body, it shall be lawful for a justice of the peace of the proper county to hold the same where there is no lawfully appointed coroner, or he is absent from the county, unable to attend, or his office is held more than ten miles distant from the place where the death occurred or the body found, and said justice shall have like power to select, summon and compel the attendance of jurors and witnesses, and shall receive like fees and tax like costs, and the inquest shall have like force and effect in law: *Provided*, That no fees or costs shall be allowed or paid said justice or inquest, until the proceedings are submitted to the court of quarter sessions of the proper county, and said court shall adjudge that there was reasonable cause for holding said inquest, and approve of the same. (b) Act 27 May 1841, § 15. Purd. 609.

(a) A warrant issued by a justice of the peace in one county, and indorsed by a justice in another county, charging a misdemeanor to have been committed in the county whence the warrant issued, will not justify the detention of the offender in the jail of the county where the warrant was indorsed. 1 Gr. 218.

(b) Independently of this act, a justice has no right to hold an inquisition *super visum corporis*. 6 Wh. 269-70. The act 19th April 1856 provides that in Allegheny county, justices shall not hold inquests except it be impracticable to obtain the personal attendance of the coroner, after notice given to him, or reasonable and

XII. JUSTICES' COURTS.

The justices of the peace of certain counties have been invested by the following statutes with the power to hold justices' courts for the trial of petty offences. They form a distinct system of criminal procedure, as yet untried in this commonwealth, but which, no doubt, will be gradually extended to other portions of the state.

ACT 1 MAY 1861. Purd. 1339.

SECT. 1. The several justices of the peace of the county of Erie and Union (a) be and are hereby authorized to hold monthly courts, (b) with jurisdiction to hear and determine, in the manner hereinafter provided, the several offences and misdemeanors mentioned in the 80th, 81st, 44th, 46th, 69th, 72d, 97th, 103d, 112th, 140th, 148th, 152d sections of the act of the 31st day of March, Anno Domini 1860, entitled "An act to consolidate, revise and amend the penal laws of this commonwealth." (c)

SECT. 2. Whenever any person shall be brought before a justice, on a warrant issued by said justice, founded on the oath or information of the party aggrieved, or of some one acting for the party aggrieved, the complaint or information shall be fully read aloud in the hearing of the defendant or party accused; and if the defendant shall plead guilty to the charge against him, the justice shall proceed to inquire into the circumstances of the case, so far as he shall think best for a proper understanding of the defendant's guilt, and shall proceed to pass sentence upon the defendant, which sentence shall have the full force and effect of a sentence pronounced by the court of quarter sessions, in like cases, and the defendant shall be committed to the jail of the county until the sentence be complied with.

SECT. 3. If the defendant shall plead not guilty to the offence charged, and shall at the same time signify his determination to be tried by a jury of six, before the said justice, the justice shall make an entry to that effect upon his docket, and the defendant shall then enter into recognisance with good and sufficient surety or sureties, conditioned for his appearance before the said justice, at the ensuing monthly session, and not to depart without leave until discharged according to law, but if the defendant shall not enter into such recognisance as aforesaid, it shall be the duty of the constable to keep him or her safely, until duly discharged by course of law, and in either case the justice shall proceed to the trial of the cause in the manner pointed out in the following sections of this act; but if the defendant shall not signify his or her determination to be tried before said justice, the justice shall proceed with the said defendant as if this act had not been passed.

SECT. 4. Whenever a defendant shall signify his or her determination to be tried

proper efforts made to give him notice of the death. The act of 1841 is repealed as to Northampton county, by act 1 May 1861, and the coroner of that county is thereby empowered to appoint deputies in such sections of the county as he may deem necessary. P. L. 560. So is the coroner of Lancaster, by act 3 April 1852. Purd. 897. The coroner of Schuylkill, by act 14 February 1863. P. L. 30. And the coroner of Chester, by act 17 March 1864. P. L. 21. And see act 30 January 1866, as to Schuylkill and Mercer counties. P. L. 6.

(a) Extended to Crawford county, by act 1 April 1863. P. L. 215. To Venango county, by act 22 April 1863. P. L. 551. To Lehigh, Mercer and Northampton counties, by act 30 March 1864. P. L. 184. To Snyder county, by act 14 February 1865. Purd. 1398. To Luzerne county, by act 11 April 1866. Purd. 1430. To Perry county, by act 11 April 1866. P. L. 613. To Bradford county, by act 14 February 1867. Purd. 1511. To Wayne county, by act 6 March 1867. P. L. 354. To Forest county, by act 13 April 1867. P. L. 1217. To Northumberland county, by act 11

April 1868. P. L. 846. To Wyoming county, by act 13 April 1868. P. L. 981. To Wayne and Pike counties, by act 18 February 1870. P. L. 187. And to Lawrence county, by act 25 February 1870. P. L. 254. And see act 12 April 1867, as to Potter county, P. L. 1161; act 15 April 1867, as to Indiana county, P. L. 1264; act 11 April 1868, as to Butler and Armstrong counties, P. L. 858; act 3 April 1869, as to certain boroughs in the county of Cambria, P. L. 695; and act 19 February 1870, as to Tioga and Susquehanna counties. P. L. 204.

(b) See act 5 April 1862, § 1, *infra*.

(c) The offences enumerated in this section are blasphemy, disturbance of public meetings, lewdness, cruelty to animals, selling unwholesome provisions or adulterated liquors or medicines, revealing telegraphic dispatches, assault and battery, larceny (where the value does not exceed \$10), cheating innkeepers and boarding-house keepers by false pretences, firing of woods, malicious trespasses, and cutting down timber trees in the land of another. Purd. tit. "Crimes," 32, 33, 46, 48, 77, 80, 105, 111, 120, 149, 157, 161.

by a jury of six, before the justice of the peace, for any of the offences of which a justice of the peace shall have jurisdiction, according to the provisions of the first section of this act, in the manner pointed out in the foregoing section, the said justice, upon such demand, is hereby required to continue the cause to the ensuing monthly court, and to issue a *venire*, directed to any constable of the proper borough, city or township, where the said cause is to be tried, commanding him to summon six good and lawful men, citizens of said township, city or borough, and having the qualifications of electors therein, who shall be in no wise of kin to either defendant or complainant, nor in any manner interested, who shall be chosen as follows, to wit: The justice shall write in a panel the names of eighteen persons, from which the defendant or his agent or attorney shall strike one name, the complainant or prosecutor one, and so on alternately until each shall have stricken six names; and the remaining six shall constitute the jury, to be and appear before such justice at the time to which said cause shall have been adjourned, to serve as a jury for the trial of such cause: *Provided*, That in case either party shall neglect or refuse to aid in striking the jury as aforesaid, the justice shall strike the same in behalf of such party.

SECT. 5. It shall be the duty of such constable to make service of said *venire*, and to return the same with the names of the persons by him summoned, at the time appointed for the trial of the cause.

SECT. 6. It shall be the further duty of such constable, to be in attendance on said court, at the time appointed for said trial, and during the progress of the same; and if, by reason of challenge for cause, sickness or other disability, the persons whose names shall be returned by the *venire*, or any of them, shall not be impanelled as jurors, the said constable shall fill the panel from the bystanders, as is done by the sheriffs, in the courts of common pleas; and the said constable shall be allowed for his attendance on said court, one dollar per day, to be taxed in the bill of costs; and at the close of the trial, the jury shall be conducted by the constable to some private and convenient place, where they may deliberately and without interruption consult upon their verdict.

SECT. 7. The competence and credibility of witnesses, the form of the oaths to jurors and witnesses, and the constable who shall wait upon the jury, shall be the same as in the trial of the same offences in the court of quarter sessions, and the jury shall have the same jurisdiction and control over the payment of costs: *Provided*, That the county shall in no case be liable for either the prosecutor's or the defendant's bill of costs; and the justice, in case the jury shall, by their verdict, direct that the prosecutor or the defendant shall pay the whole or any part of the costs, shall proceed to pass sentence accordingly, and the party who shall be thus sentenced, shall be committed until the sentence be complied with.

SECT. 8. The verdict of the jury shall be final and conclusive upon all the questions of fact involved therein, and no writ of *certiorari*, or of error or appeal, shall be allowed for the review of such case of fact so tried by the jury; and in case the proceedings shall be removed to a higher court upon *certiorari* or otherwise, the district attorney shall thereafter conduct the proceedings in behalf of the commonwealth, and his fee shall be the same as upon indictments formed by the grand jury, to be taxed and paid as the other costs of the case; and if the proceedings shall be reversed on any *certiorari* or writ of error, sued out on behalf of the defendant, on account of any defect in the statement of the offence with which the party is charged, the court shall send the proceedings back to the justice for a new trial, and direct [the information or accusation in said case to be amended by] the district attorney and sworn to by the prosecutor, and thereupon the defendant shall be required to enter his plea to such amended information or accusation, and thereupon the new trial shall proceed before the justice as on the former meaning [hearing.](a)

SECT. 9. Whenever the jury shall render a verdict of guilty the justice shall proceed to pass sentence upon the defendant according to law, and with the like effect as if the defendant had plead guilty or then convicted in the court of quarter sessions; and any sentence of imprisonment which may be imposed, shall only be inflicted in the jail of the proper county; and all fines imposed shall be collected

and paid into the school fund of the school district in which the offence was committed; and it shall be the duty of the justice to receive the amount of the fine and pay it into the treasury of the proper district, and any neglect to pay the same as aforesaid, shall be considered a misdemeanor in office.

SECT. 10. In all cases which shall be tried by a jury under the provisions of this act, the justice of the peace trying the same shall be entitled to a fee of two dollars, and each juror shall be entitled to fifty cents per day, to be taxed as costs.

SECT. 11. When any person shall be summoned to attend as a juror, and shall fail to attend at the time and place specified in the *venire*, having no reasonable excuse to assign for such failure, every such person shall be fined in any sum not exceeding ten dollars, for which fine the justice of the peace shall render judgment in the name of the commonwealth, and issue execution therefor; and when collected, shall pay the same into the township, borough or city school treasury, for the use of the common schools therein.

ACT 5 APRIL 1862. Purd. 1341.

SECT. 1. That so much of the 1st, 3d and 4th sections of said act, as requires the several justices of the peace in said counties to hold monthly courts, be and the same is hereby repealed; and the said justices are hereby required to hear and determine all cases arising under the first section of said act, forthwith, except as hereinafter provided.

SECT. 2. If the defendant shall plead not guilty, and demand a trial by jury, as provided by section three of said act, the justice shall make an entry to that effect in his docket, and require the defendant to enter into a recognisance, with good and sufficient surety or sureties, conditioned for his or her appearance before said justice, not less than four nor more than ten days thereafter, unless the defendant shall then make affidavit that he or she cannot, within the longest time herein mentioned, procure the necessary witnesses for his or her defence, when the hearing shall be continued by the justice to such time as will give the defendant a reasonable and fair opportunity to procure the evidence; and if the defendant shall not enter into such recognisance, and the day of trial shall be postponed for a longer period than ten days, the constable may commit the defendant to the jail of the county for safe keeping until the day of trial, and for such service he shall be allowed the fees now provided by law: *Provided*, That if the office of the justice shall be within ten miles of the jail of said county, the constable may in every case in which bail is not given, commit the said defendant to jail for safe keeping.

SECT. 3. The jury provided for in the act to which this is a supplement, shall be selected and struck on the day on which the defendant shall first be brought before said justice, if both the parties are present in person, or by attorney, but if the defendant desires counsel, he shall have a reasonable time to procure such counsel, and in the mean time he shall be securely kept by the constable, and the day of trial shall in all cases be computed from the time of choosing said jury: *Provided*, That if, after said jury is struck, both parties desire to proceed to trial immediately, the justice shall make an entry to that effect in his docket, and forthwith proceed with said trial.

SECT. 4. The 8th section of the act to which this is a supplement, is hereby amended, by the insertion in the 14th line of said act, as the same is published in the pamphlet laws of 1861, after the word "direct," in said line, the words, "the information or accusation in said case to be amended by," and the last word in said section is hereby struck out, and the word "hearing" substituted therefor.

SECT. 5. The justices of the peace in said counties shall not have jurisdiction to hear and determine, in the manner provided by this act, and the act to which it is a supplement, offences mentioned in the 103d section of the act of March 31st 1860, if the value of the property stolen shall exceed the sum of ten dollars.

ACT 22 MARCH 1865. Purd. 1398.

SECT. 1. The several justices of the peace, in and for the county of Mercer, shall have like jurisdiction, in all actions of affray, as they now have of assault and battery, by virtue of an act, entitled "An act to change the mode of criminal proceedings in Erie and Union counties," approved May 1st 1861, and a supple-

ment thereto, approved April 5th 1862, and which act, and several supplements, were extended to the said county of Mercer, by an act approved March 30th 1864.

ACT 14 FEBRUARY 1867. Purd. 1511.

SECT. 1. That the provisions of the act, entitled "An act to change the mode of criminal proceedings in Erie and Union counties," approved the first day of May, Anno Domini 1861, with its several supplements, be and the same are hereby extended to the county of Bradford.

SECT. 2. The several justices of the peace in and for the said county of Bradford shall have like jurisdiction, in all actions of affray, and in all criminal actions for any violation of an act, entitled "An act to protect certain domestic and private rights, and prevent abuses in the sale and use of intoxicating drinks," approved the 8th day of May, Anno Domini 1854.

ACT 28 FEBRUARY 1868. Purd. 1511.

SECT. 1. The several justices of the peace in and for the said county of Bradford shall have like jurisdiction as provided in the act, entitled "An act to change the mode of criminal proceedings in Erie and Union counties," approved May 1st 1861, and the several supplements thereto, for any violation of any of the laws of the commonwealth of Pennsylvania, prohibiting or restricting the sale of, or furnishing ardent spirits, malt or brewed liquors, wine or cider, under any of the statute laws of said commonwealth, including any violation aforesaid done or committed on the first day of the week, commonly called Sunday.

SECT. 2. Any person or persons electing to be tried under the provisions of the aforesaid act of May 1st 1861, or its several supplements, so far as it relates to the county of Bradford, who after having been convicted shall remove the same, by *certiorari* or otherwise, to the court of quarter sessions, and who shall be discharged by the said court upon any informality of the record or proceedings, or upon any pretext not involving the merits, shall be liable to be tried for the offence charged; and it shall be the duty of the said court or any judge thereof who shall discharge any person or persons, who shall have been convicted under the provisions of this act, or the act to which this is a supplement, for any informality in such proceeding, to require said person or persons so discharged to enter good and sufficient bail for his, her or their appearance at the next court of quarter sessions, in and for said county, to answer said charge or complaint, in the same manner as if the defendant or defendants had been required by the justice before whom the proceedings were commenced, to have entered into a recognisance for his, her or their appearance to the said term of court; and all costs under any of the said proceedings shall be a part of the legal costs of said suit, and abide the event thereof.

SECT. 3. The pay of jurors under the provisions of this act, and the act to which this is a supplement, in and for said county of Bradford, shall be one dollar per day; also the said justices of the peace and the constables of said county shall each be entitled to the sum of two dollars per day, for each day necessarily required in the trial of any such cause, after the day on which the jury is selected, in addition to such other fees as they are now allowed by law, except that the two dollars per day shall be in full for services rendered by the said justices during the trial, and including the finding of the jury and the sentence of the court.

ACT 11 APRIL 1868. Purd. 1511.

SECT. 1. In all the counties of this commonwealth, wherein the said act of the 1st day of May, Anno Domini 1861, and its supplements, are in force, if the prosecutor in any criminal proceeding before a justice of the peace shall, in the information made before the justice, charge the defendant with any crime or misdemeanor not triable before a justice and a jury of six, under the provisions of said act, and the defendant shall be required to answer to the charge in the court of quarter sessions of the county, and shall there be convicted only of an offence triable before a justice of the peace and a jury of six, the defendant shall not be liable to pay the costs of the prosecutor or other witnesses for the commonwealth, but the same

shall be paid by the prosecutor, in all cases of conviction after the passage of this act, and he shall be sentenced by the court to pay the same: *Provided*, That the provisions of this act shall not apply to the county of Potter: *Provided*, That if the president judge of the court trying the cause shall certify that the prosecutor had good cause to believe, at the time he made the information, that an offence not triable before a justice and a jury of six had been committed by the defendant or defendants, as alleged in the information, then and in that case, the prosecutor shall have his costs taxed and paid as if this act had not passed.

ACT 12 MARCH 1869. Purd. 1574.

SECT. 1. The several justices of the peace in and for the counties of Bradford, Perry, Indiana, Warren and Erie, in case of the disagreement of the jury, under the provisions of an act, entitled "An act to change the mode of criminal proceedings in Erie and Union counties," approved May 1st 1861, or its several supplements thereto, shall have power, and are hereby authorized and empowered, under the same rules and regulations, to proceed to draw another jury and proceed to trial in the same manner: *Provided*, That the said justice may continue the same from time to time, as he may deem proper, always requiring the defendant or defendants to enter into recognisance in a sufficient sum for his, her or their appearance at the time specified.

XIII. SUMMARY CONVICTIONS.

The following acts provide for the summary conviction of professional thieves, &c., in the city of Philadelphia, and elsewhere:

ACT 13 MARCH 1862. Purd. 1271.

SECT. 1. If any person shall be charged on oath or affirmation before the mayor or police magistrate of the central station of the city of Philadelphia, (a) with being a professional thief, burglar or pickpocket, and who shall have been arrested by the police authorities at any steamboat-landing, railroad-depot, church, banking institution, broker's office, place of public amusement, auction room, store or crowded thoroughfare in the city of Philadelphia, and if it shall be proven to the satisfaction of the said mayor or police magistrate, appointed by the mayor for the central station, (b) by sufficient testimony, that he or she was frequenting or attending such place or places for an unlawful purpose, he or she shall be committed by the said mayor or said police magistrate to the jail of the county of Philadelphia, for a term not exceeding ninety days, there to be kept at hard labor, or in the discretion of the said mayor or police magistrate of said central station, he or she shall be required to enter security for his or her good behavior for a period not exceeding one year. (c)

SECT. 2. Any person who may or shall feel aggrieved at any such act, judgment or determination of the said mayor or police magistrate of said central station, in and concerning the execution of this act, may apply to any judge of the court of quarter sessions for a writ of *habeas corpus*, and upon return thereof, there shall be a rehearing of the evidence; and the judge may either discharge, modify or confirm the commitment.

ACT 16 MARCH 1864. Purd. 1822.

SECT. 1. That the provisions of the first section of an act to authorize the arrest of professional thieves, burglars, et cetera, in the city of Philadelphia, approved March 13th 1862, be and the same are hereby extended to authorize the arrest of professional thieves, burglars or pickpockets, at any hotel, restaurant, auction sale in private residence, passenger car, or at any other gathering of people, whether

(a) Extended to the borough of Norristown, by act 12 March 1867. P. L. 405.

(b) The same jurisdiction is given to all the aldermen of the city of Philadelphia, by act 12 April 1867. P. L. 1210.

(c) This act is constitutional. The right to trial by jury, secured by the bill of rights, does not interfere with the summary conviction and punishment of rogues and vagabonds. 6 Wr. 89.

few or many, in the cities of Philadelphia, Allegheny, Lancaster, Harrisburg and Pittsburgh.

ACT 12 MARCH 1866. Purd. 1421.

SECT. 1. It shall be the duty of the constables, and of the several police constables, officers, or detectives, appointed by the proper authorities, in the counties aforesaid [of Erie, Luzerne, Susquehanna, Pike and Crawford,](a) and they are hereby authorized and required, to arrest any professional thief, pickpocket, or burglar, who may be found at any steamboat-landing, railroad-depot, church, banking institution, broker's office, place of public amusement, auction room or common thoroughfare, in the city of Erie, in Corry, in the county of Erie, and in Meadville or Titusville, in the county of Crawford, and carry them forthwith to the mayor of the city, or burgess of the borough, or a police magistrate, to be appointed by the mayor, burgess, or city or town council respectively; and if it shall be proven, to the satisfaction of the mayor, burgess or other police magistrate, by sufficient testimony, that the person so arrested was attending or frequenting such place or places for an unlawful purpose, he or she shall be committed by the said mayor, burgess or police magistrate, to the jail of the proper county, for a term not exceeding ninety days, at hard labor, or, at his discretion, require the person to give security for his or her good behavior, for a period not exceeding one year, and require the person to pay the costs incident to his or her arrest, examination and commitment.

SECT. 2. The conductors on the several railroads, while passing through either of the counties aforesaid, shall have like power to arrest any one who may be found stealing, or picking the pockets of passengers, or others, or committing any breach of the peace on the cars, and detain him or her till reaching any one of the places, Erie, Corry, Meadville or Titusville, and then deliver him or her to a constable, or other police authority, to be taken before one of the authorities mentioned in the preceding section, to be dealt with in like manner as is there provided for real or suspicious offenders; and the several magistrates before named shall have power to order the detention of the person or persons so arrested, for a period not exceeding ten days, if it shall be deemed necessary to obtain the requisite testimony of absent witnesses to establish their guilt.

ACT 21 MARCH 1866. Purd. 1446.

SECT. 1. If any person shall be found, by any constable, police officer or detective, staying or loitering in or around any steamboat-landing, railroad-depot, gambling or drinking saloon, restaurant, banking-house, broker's office or any place of public amusement, crowded thoroughfare or other place of public resort, in any city or incorporated borough, within the counties of Erie, Crawford, Venango and Warren,(b) having no apparent business, trade or occupation, and without any visible avocation or means of subsistence, it shall be the duty of said officer to arrest such person, and take him or her, as soon as may be, before the mayor of any city, the burgess of any borough, or any convenient magistrate of the place where the arrest is made; and upon due proof of the fact, by one or more witnesses, or by confession, and upon the party arrested failing to furnish any reasonable or satisfactory account of his or her name, residence, character or business at that place, he or she shall be deemed and taken to be a vagrant, and shall be subject to all the existing laws respecting vagrants now in force in this commonwealth; and the mayor of any city and the burgess of every borough within the said counties are hereby vested with full authority and jurisdiction to execute all the provisions of this act, and all existing laws relative to vagrants.

SECT. 4. After the arrest of any such person as is hereinbefore described, and upon the oath or affirmation of the arresting officer or other person that he has reason to suspect, and does suspect such person of being a gambler, burglar, thief or pickpocket, it shall be lawful for the mayor, burgess or justice before whom

(a) By act 11 April 1866, P. L. 745, the acts of 13 March 1862, and 16th March 1864 (*supra*), are extended to the city of Reading.

(b) See act 11 April 1866, as to Franklin county. P. L. 720.

such person is brought, to direct the officer, in his presence, or that of some disinterested person named by him, to search the person, the baggage, and place of residence or resort of such suspected person, and return to the presiding magistrate everything he may find or take, deemed confirmatory of such suspicion, and everything not so deemed shall be left with or returned to the owner; and if, upon said examination and search, such mayor, burgess or other magistrate shall be satisfied such suspected person is a professional gambler, thief, pickpocket or burglar, he shall have power so to render his judgment, and then to sentence such party to pay a fine of any sum not exceeding one hundred dollars, and the costs of prosecution, and to undergo imprisonment, in the county jail, for any period not exceeding three months, or to require such party to enter into recognisance, and give bail for his or her appearance at the next court of quarter sessions in such sum as he may fix; and upon the failure of any such party to comply with said sentence, or give the required recognisance and bail, to commit him or her to the jail of the county; of all of which doings the said magistrate shall keep a record, and transmit a certified copy of the same to the clerk of the quarter sessions, at or before the next succeeding term.

SECT. 5. If any person shall feel him or herself aggrieved by the final adjudication of any mayor, burgess or justice, under this act, he shall have the right to sue out a writ of *habeas corpus*, before any judge of the county in which he shall be so arrested, and have a rehearing of his case; or by giving satisfactory security, in the usual form, shall have the right to have a writ of *certiorari* to remove the proceedings to the next court of quarter sessions for review, which shall suspend the further execution of the judgment or sentence until the case is heard and finally determined by the court.

ACT 13 APRIL 1867. Purd. 1490.

SECT. 1. That the provisions of an act, entitled "An act to authorize the arrest of professional thieves, burglars, et cetera, in the city of Philadelphia," approved the 13th day of March 1862, be and the same are hereby extended to authorize the arrest and commitment of professional counterfeiters and forgers.

XIV. The following is an *exact* copy of an alderman's commission. The words here printed in *italic*, are *written* in the original. The rest of the commission is printed.

PENNSYLVANIA, ss.

In the name and by the authority of the Commonwealth of Pennsylvania:

DAVID R. PORTER,

[Arms of the state.]

Governor of the said Commonwealth.

David R. Porter,

[Seal of commonwealth.]

To *John Binns*, of the *city of Philadelphia*, Esquire: Whereas it appears by the return made and transmitted to me, according to law, that you, the said *John Binns*, have been duly elected an alderman of *Walnut* ward of the *city of Philadelphia*; Now know you, that in conformity with the constitution and laws of the commonwealth, in such case made and provided, I do, by these presents, commission you to be an alderman in and for the said *Walnut* ward of the *city of Philadelphia*; hereby giving and granting unto you full right and title to have and to execute all and singular the powers, jurisdictions and authorities, and to receive and enjoy all and singular the emoluments, to an alderman lawfully belonging, or in any wise appertaining, by virtue of the constitution and laws of this commonwealth.

To have and to hold this commission, and the office hereby granted unto you, the said *John Binns*, for the term of five years, to be computed from the day of the date of these presents, if you shall so long behave yourself well.

Given under my hand, and the great seal of the state, at Harrisburg, this *fourteenth* day of *April*, in the year of our Lord one thousand eight hundred and forty, and of the commonwealth the sixty-fourth.

By the Governor,

FR'S R. SHUNK,

Secretary of the Commonwealth.

[SEAL.]

On the back of this commission is the following written indorsement:

PHILADELPHIA, ss.

I, George Smith, recorder of deeds, &c., for the city and county of Philadelphia, do certify, that on the 22d day of April, A. D. 1840, the within-named John Binns, Esq., personally appeared before me, and by virtue of a commission of *dedimus potestatem*, to me directed, was duly sworn to support the constitution of the United States, and the constitution of the state of Pennsylvania, and to execute and perform the duties of the office of alderman of Walnut ward of the city of Philadelphia, with fidelity, and according to the best of his judgment and abilities. And I further certify, that the within commission, and the said official oath, are recorded in my office, in commission book G. S., No.

2, page

[SEAL.] Witness my hand and seal of office, the 22d day of April, A. D. 1840.

G. SMITH, Rec.

XIV. A justice of the peace can do no official act out of his proper district or county. 7 S. & R. 43. 1 Ash. 131.

A justice of the peace commissioned within a certain district and county, cannot act under his commission upon a division of the county, if he reside in the new county, though his district remain in it entire. By the division of a county the commissions of justices, who are thereby thrown into the new county, are vacated, unless provision against it be made in the act dividing the former county. 4 Y. 399.

An alderman or justice of the peace is competent to administer any oath required to support any collateral or interlocutory step found necessary in a cause, in the common law or orphans' courts. 2 Am. L. J. 224.

As long as the commission of a justice is in force, he possesses an authority to administer oaths, of which he cannot divest himself; and though he do not subscribe himself as a justice to a deposition, he shall be deemed to have acted officially. 3 B. 539.

The letters "J. P." are a sufficient designation of the official character of a justice of the peace. 8 C. 514.

The offence of a justice acting as agent for *either* party who sues before him, is indictable. 14 S. & R. 158.

Trespass has been held to lie against a justice of the peace who issued execution against the body of a person privileged from imprisonment. 2 Johns. Cas. 249.

Justices of the Peace, Actions against.

- I. Actions against justices regulated.
- II. Form of notice.
- III. How testimony to be taken on applica-

- tions for removal of justices.
- IV. Proceedings on neglect to pay over the amount of a judgment.

I. ACT 21 MARCH 1772. Purd. 607.

WHEREAS, justices of the peace may be discouraged in the execution of their office, by vexatious actions (a) brought against them, for or by reason of small and involuntary errors in their proceedings : and whereas it is necessary that they should be (as far as is consistent with justice, and the safety and liberty of the subjects over whom their authority extends) rendered safe in the execution of the said office and trust : and whereas it is also necessary that the subject should be protected from all wilful and oppressive abuse of the several laws committed to the care and execution of the said justices of the peace : *Be it enacted,*

SECT. 1. No writ shall be sued out against, nor any copy of any process, at the suit of a subject, shall be served on any justice of the peace, for anything by him done in the execution of his office, (b) until notice, in writing, of such intended writ or process (c) shall have been delivered to him, or left at the usual place of his abode, by the party, his attorney or agent, (d) who intends to sue, or cause the same to be sued out or served, at least thirty days (e) before the suing out or serving the

(a) This act applies to suits before magistrates. 5 S. & R. 209. And therefore a notice is necessary in an action brought before a justice of the peace, to recover the penalty for taking illegal fees. 5 S. & R. 44, 209. 12 Ibid. 75. 7 W. 491. 2 Wr. 273. 1 Ash. 60. And for the penalty for marrying a minor, without the consent of the parent or guardian. 4 B. 20. 8 S. & R. 295. If the suit be brought before a justice, it must appear by his record that notice was duly given; otherwise his judgment will be reversed on *certiorari*. 2 Phila. R. 89.

(b) A justice of the peace is entitled to notice, under this act, whenever the act complained of was done by him, *by virtue of his office*. 4 B. 20. Although the justice has acted illegally, yet if he have a general jurisdiction of the subject, and intended to act, or assume to act, as a magistrate, he is within the protection of the act. 5 S. & R. 802. Therefore, if a magistrate cause one who was travelling on Sunday, to be arrested on his own view, he is entitled to notice. Ibid. 299. It may be laid down as a general rule, that wherever the officer has acted *honestly*, though *mistakenly*; where he supposed he was in the execution of his duty, although he had no authority to act; he is entitled to the protection of the act of assembly. Ibid. 4 Eng. L. & Eq. 374. So, in a suit by the administrator of a constable, against a justice, to recover back money alleged to have been received by him as a justice of the peace, by fraud and mistake, it was *held*, that the defendant was entitled to notice. 2 R. 208. And where an action was brought against an alderman for issuing an execution upon the transcript of another alderman of the same city, who was then in commission, and acting in his office; it was *held*, that he was entitled to notice, under the act of 1772, although his act was void, and wholly without authority;

it being done, nevertheless, by virtue of his office. *Hubert v. Mitchell*, Dist. Court, Phila., 19 March 1849. But if the justice act merely *under color of his office*, and not *by virtue of it*, he is not entitled to notice under the statute; as, if he issue a warrant of arrest on a criminal accusation, without probable cause, supported by oath or affirmation; the power to do which is expressly excepted from all the powers of the government, by the bill of rights of Pennsylvania. 1 Bald. 602.

(c) The notice need not state the kind of writ intended to be issued, whether summons or *capias*. 4 B. 25. Nor the kind of action, whether trespass or case. 6 B. 85. 12 S. & R. 148. Nor the court in which the action is intended to be brought. Notice, stating that plaintiff would sue in the common pleas, is sufficient, although the action be brought in the district court of the county; both those courts having jurisdiction of the subject-matter. 8 W. 317. But if the notice state the kind of action intended to be brought, and the action afterwards brought is of a different kind from that contained in the notice, the variance will be fatal on the trial. 7 T. R. 631. 4 B. 26. For, if the notice may mislead, or if it be expressed in equivocal terms, it is bad. 1 Br. 65. 7 W. 297. So if a circumstance be unnecessarily set out in the notice,—as the date of an act of assembly, which is misstated,—the plaintiff cannot recover. 7 W. & S. 362. 1 H. 9.

(d) The witness must identify the notice, and prove the time of service. 1 Barr 403. It need not be delivered by the agent or attorney, but may be served by any messenger employed for that purpose. 13 S. & R. 490.

(e) The rule is to include the first day and exclude the last. 4 H. 14. And see 5 C. 524-5.

same; in which notice shall be clearly and explicitly contained the cause of action, (a) which the said party hath or claimeth to have, against such justice of the peace; on the back of which notice shall be indorsed the name of such attorney or agent, (b) together with the place of his abode, (c) who shall be entitled to the fee of twenty shillings for the preparing and serving such notice, and no more. (d)

SECT. 2. It shall and may be lawful to and for such justice of the peace, at any time within thirty days after such notice given as aforesaid, to tender amends (e) to the party complaining, or his or her agent or attorney; and in case the same is not accepted, to plead (g) such tender in bar to any action to be brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea, with leave of the court; and if, upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or shall discontinue his or her action, or in case judgment shall be given for such defendant or defendants, upon demurrer, such justice shall be entitled to the like costs

(a) It is not necessary that the notice should have all the form and accuracy of a declaration; a *substantial* notice of the cause of action is alone required. 12 S. & R. 148. 7 W. 298, 491. 10 C. 824. 2 Wr. 278. A notice to a justice, of an intended suit for the penalty of fifty dollars, for taking illegal fees, need not specify what fees he was entitled to receive. 17 S. & R. 75. "The justice was apprised of the sum," said Gisson, C. J., "and the occasion on which it is alleged to have been extorted; and this is sufficient to enable him to judge of the extent of the injury, and the propriety of tendering amends; all beyond this, lay more in the knowledge of the justice than any one else." Ibid. But the notice must clearly and explicitly set forth the cause of action on account of which the plaintiff claims amends. 3 W. 144. 10 C. 824. And see 26 Eng. L. & Eq. 285. A claim for two penalties for taking illegal fees may be included in one notice. 2 Wr. 278.

(b) A notice directed to a justice, signed by the plaintiff, and thus indorsed—"Notice to J. S., Esquire; Henry Read, living in Poplar Lane, between 8d and 4th Streets," was held to be defective, in not stating that Henry Read was the *agent* of the plaintiff, and in not containing anything from which it might be inferred that he was his agent, having authority to receive a tender of amends. 5 S. & R. 517. But the indorsement of the name and residence of an attorney is sufficient without more. 2 W. 278. Whether it be essential that the name and abode of the plaintiff's attorney or agent should be written on the *back* of the notice, if it be sufficiently inserted on its face, has not been determined. See 3 S. & R. 295. But it would seem that this act is to be strictly construed. 7 W. & S. 368. And therefore, it is advisable in all cases, that the name and abode should be written on the back of the notice, as the act prescribes. The indorsement on the notice of the name and residence of the plaintiff's attorney, is equivalent to an assertion that he is the agent of the plaintiff, and authorized to receive amends. 2 Wr. 278. If the plaintiff himself give the notice, the indorsement of the name and residence of his attorney is unnecessary. 5 W. 871.

(c) A notice served by the plaintiff himself, and indorsed by an attorney of another county from that in which suit was brought,

is sufficient; the act not requiring the attorney to be of the proper county. 5 W. 370. Service of the notice by the plaintiff himself, will not dispense with the necessity of his signature, or that of his attorney, to the notice. 9 Barr 185. If the plaintiff himself sign the notice, and no attorney be indorsed, the abode of the plaintiff should be set forth. 5 S. & R. 518. 5 W. 871. A notice indorsed, "T. B., of Washington, is my attorney," was held sufficient; the notice being given in Washington county, and the seat of justice, where the attorney resided, being of the same name. 6 B. 88. But a notice *subscribed* thus—"J. L., attorney for T. K., No. 79 So. 5th St.," is not a sufficient notice of the attorney's place of abode; a subscription of this sort would indeed be evidence that the party was *there* when he wrote it, but it is not evidence, under the act of assembly, that it is his place of abode, which must be expressly stated. 1 Br. 65. So, where a notice to a justice was *signed* by the plaintiff's attorney, and dated at Wilkesbarre, but there was no indorsement of his name, neither was it said in any part of the notice, or on the back of it, that he resided at Wilkesbarre, it was held to be insufficient. 8 S. & R. 295.

(d) This fee of twenty shillings, for preparing and serving the notice, must be charged in the bill of costs, and paid by the defendant, upon a recovery against him. 1 Ash. 60. See 7 S. & R. 448-9.

(e) In demands founded on torts, and sounding in damages, any sum of money may be treated as amends, if sufficient in amount; of which the jury are to judge. 3 W. 819. Payment of any sum accepted as satisfaction for a personal injury, is sufficient. 1 Bac. Abr. 41. But where the action is for a specific penalty, given to the party grieved, nothing less than the amount of the penalty is sufficient amends, and available as a defence. 4 B. 25 3 W. 817. 7 Ibid. 491. It is not necessary, however, for the justice to make a regular tender of amends, if the other party, by his conduct, dispense with it, by a previous refusal to accept. 3 P. R. 519.

(g) If the justice rely upon a tender of amends before suit brought, it must be specially pleaded; in which case only does the statute authorize the court and jury to pass on it. 3 W. 819.

as he would have been entitled unto, in case he had pleaded the general issue only; and if, upon issue so joined, the jury shall find that no amends were tendered, or that the same were insufficient, and also against the defendant or defendants on such other plea or pleas, then they shall give a verdict for the plaintiff, and such damages as they shall think proper, which he or she shall recover, together with his or her costs of suit.

SECT. 3. No such plaintiff shall recover any verdict against such justice, in any case where an action shall be grounded on any act of the defendant, as justice of the peace, unless it is proved, upon the trial of such action, that such notice was given as aforesaid; but in default thereof, such justice shall recover a verdict and costs as aforesaid.

SECT. 4. In case such justice shall neglect to tender any amends, or shall have tendered insufficient amends, before the action brought, it shall and may be lawful for him, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall see fit; whereupon such proceedings, orders and judgments, shall be had, made and given, in and by such court, as in other actions where the defendant is allowed to pay money in court.

SECT. 5. No evidence shall be permitted to be given by the plaintiff, on the trial of any such action as aforesaid, of any cause of action, except such as is contained in the notice hereby directed to be given.

SECT. 7. *Provided always*, That no action shall be brought against any justice of the peace, for anything done in the execution of his office, or against any constable or other officer, or person or persons acting as aforesaid, unless commenced within six months after the act committed. (a)

NOTICE TO AN ALDERMAN OF AN INTENDED ACTION FOR TAKING ILLEGAL FEES.

PHILADELPHIA, November 13th 1848.

To J. B., Esquire, one of the aldermen of the county of Philadelphia:

SIR:—Take notice, that unless you tender amends within thirty days, I will bring my action against you for the following cause, to wit: That on the 19th day of October, A. D. 1848, you did demand and take from me the sum of thirty-seven cents, as and for your fees for issuing an execution and entering the return thereof, in a certain action, wherein judgment was rendered by you for the sum of one dollar and costs, on the 5th day of October 1848, in which one C. S. was plaintiff, and I, G. N., was defendant; the said sum of thirty-seven cents being a greater fee than is expressed and limited for the said services by the act of assembly in such case made and provided, whereby you have forfeited to me the sum of fifty dollars. (b)

G. N.

Indorsed.—Notice to J. B., Esquire. W. H. D., Esquire, is my attorney; his place of abode is No. 75 Walnut Street, in the city of Philadelphia.

G. N.

III. ACT 14 JANUARY 1804. Purd. 608.

SECT. 1. Whereas, frequent applications are made to the legislature for the removal of justices of the peace from office; and whereas, the parties frequently reside so far from the seat of government as in a great measure to prevent that full and fair examination of witnesses and investigation of the subject which the nature of the case requires: therefore, *Be it enacted*, That it shall be the duty of the chief justice of the state, or any other of the justices of the supreme court, or the president, or any associate judge of any of the courts of common pleas, on complaint made in writing, signed by at least twenty of the taxable inhabitants of any township or county, against any justice of the peace residing therein, to issue his process to any constable, commanding him to summon the said justice so complained of, as aforesaid, to appear before him on a day to be mentioned therein, which shall not be more than ten nor less than five days from the date of such process; and

(a) The limitation may be taken advantage of on the general issue. 9 S. & R. 14. In an action against a justice for maliciously entering judgment against the plaintiff in a suit in which he had no jurisdiction, the limitation will commence to run from the time the plain-

tiff had knowledge of the proceedings. 1 Phila. R. 216.

(b) For other forms of notice, see 4 B. 26; 6 B. 88; 12 S. & R. 145; 8 W. 144; 7 W. 297, 491, 497; 17 S. & R. 75; 7 W. & S. 362; 3 Tr. & H. Pr. 676; 1 H. 9; 10 C. 324.

also to issue compulsory process to compel the attendance as well of the witnesses named by the complainants as those whom such justice of the peace shall require in his behalf: and on the day appointed for a hearing the said judge shall proceed to examine, on oath or affirmation, all such witnesses as may appear, as well those who may be produced to substantiate any of the charges against such justice of the peace, as those whom he may produce in his behalf, and shall fairly, carefully and impartially write down all depositions, cross-examinations and interrogatories as aforesaid taken, and shall thereupon seal up and transmit the same to the secretary of the commonwealth, who shall lay them before the legislature.

SECT. 2. Each witness for attendance before any judge in conformity to the provisions of this act, shall be allowed for each day spent as aforesaid, fifty cents, and the constable serving such process shall be allowed such fees as he is entitled to by law for similar services under legal process from a justice of the peace: and the judge shall transmit a certified schedule or list of the names of the witnesses, and the time they respectively attended, together with the account of the costs upon each process served by the constable, to the commissioners of the county, and the expense of such attendance and service, together with all other necessary expenses arising under the provisions of this act, shall be paid out of the moneys raised for the use of the proper county in which such justice resides, upon warrants drawn by the commissioners of the county upon the county treasurer.

IV. ACT 28 MARCH 1820. Purd. 608.

SECT. 8. Where any alderman or justice of the peace shall receive the amount of a judgment rendered by him, or any part thereof, and shall refuse to pay the same over to the plaintiff or his agent, or the person to whom it is owing, such refusal shall be a misdemeanor in office; and, besides the remedy for such misdemeanor, the party aggrieved may petition the court of common pleas of the proper county where the justice resides, setting forth the refusal of the alderman or justice of the peace to pay over the moneys by him collected, and the said court shall take immediate order therein, by directing a notice to issue, directed to the said alderman or justice, returnable forthwith, or at such certain day as will suit the convenience of the court, setting forth the contents of the petition, and on return of the said notice and due proof of the service thereof, if the said justice appears in pursuance of the notice, and admits the facts set forth in the petition, or shall neglect or refuse to appear, in either case, the said court shall enter judgment for the amount so retained by the justice, with interest from the receipt thereof, and four dollars to the party aggrieved, besides costs; but should the facts stated in the petition be disputed by the alderman or justice, the said court shall, upon his appearance, form an issue in such manner as is calculated to do justice to the contending parties, and the whole issue shall be fully and fairly tried, and judgment shall be entered on the verdict of the jury, which shall be final and conclusive between the parties, and on judgment being rendered against any alderman or justice of the peace in manner aforesaid, for refusing to pay over money by him received, execution shall forthwith issue at the instance of the complainant, without any stay: *Provided*, The court before whom any issued is tried pursuant to this section shall have power to decree touching the costs of such issue, as to right and justice shall appertain.

Justices of the Peace,

Jurisdiction of, under the United States Laws.

- | | |
|---------------------------------------------|---------------------------------------------------|
| I. Of suits for debts. | IV. Proceedings for desertion and seamen's wages. |
| II. Of suits for penalties and forfeitures. | V. Judicial decisions. |
| III. Of criminal prosecutions. | |

THE mode of proceeding to execute the powers of a *state magistrate*, under the federal authority, is given with brevity and clearness in the following extract from 2 Bache's Manual 95-7.

I. SUITS FOR DEBTS.

The United States may sue (in their own name, or in the name of an authorised public officer) in any state court, or *before any state magistrate*, for the recovery of debts due to them, in all cases where the acts of congress do not vest an exclusive jurisdiction in the federal courts. Such suits, however, both in their nature and in their amount, must be within the jurisdiction of the state court or state magistrate, according to the laws of that state providing for suits instituted by private persons.

The process for commencing, prosecuting and terminating suits of the United States, is the same as in suits between individuals.

II. SUITS FOR PENALTIES AND FORFEITURES.

By the judicial act, the district court of the United States is vested with exclusive original cognisance of all seizures on land or water, and of all suits for penalties and forfeitures incurred under the laws of the United States; but it has been seen that subsequent acts of congress have given jurisdiction to state courts and *state magistrates*, for the recovery of particular penalties and forfeitures. It is to be likewise observed, that the *state magistrates*, having received due information of offences committed, or goods concealed, in violation of the laws of the United States, may, lawfully, issue warrants of arrest, and search-warrants, as in similar cases occurring under the state laws. Upon examination of the case, if it be found to be within the state magistrate's jurisdiction, he will proceed to decide it; if not, he will refer the case to the competent federal judge or tribunal.

The process in cases of penalty is the same as in actions of debt, for money due. The process in cases of forfeiture of goods is an information *in rem*. In both descriptions of cases, the cause of action should be in the express terms of the act of congress, and the declaration or information should state that the same occurred "contrary to the form of the act of congress in such case made and provided."

III. CRIMINAL PROSECUTIONS.

For any crime or offence against the United States, the offender may be arrested, imprisoned or bailed, (as the case may be,) by any justice of the peace or other *state magistrate*; but where the punishment may be death, bail can only be admitted by the supreme court or circuit court of the United States, or by a justice of the supreme court, or a judge of a district court. If, however, a person committed by a justice of the supreme, or a judge of a district court, for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme, or superior court of law of the state.

The usual form of process against offenders in the state is to be issued, and at the expense of the United States. If the crime or offence charged be not capital, the state magistrate, when the offender is brought before him, may imprison or bail him for trial before such court of the United States, or of the state, (in the specified cases,) as have cognisance of the offence. Where the punishment of the offence may be death, the state magistrate cannot admit the offender to bail, but must commit him for trial, or until discharged by the due course of law.

In cases bailable by the *state magistrate*, he must take a recognisance from the

offender and his sureties, in a form similar to that adopted in cases arising under the state laws. He must also take the recognisances of the witnesses for their appearance to testify in the case, which may be required on pain of imprisonment. And it has been judicially decided, that the accused has a right to the same process to compel the attendance of the witnesses on his behalf.

The *state magistrate* must return, as speedily as may be, into the clerk's office of the court having cognisance of the offence, copies of the process, together with the original recognisance taken from the party accused and the witnesses.

IV. PROCEEDINGS FOR DESERTION AND SEAMEN'S WAGES.

Justices of the peace are also empowered by act of congress, in case any seaman, who shall have signed a contract to perform a voyage, shall at any port or place, desert or absent himself from his vessel, without leave of the master, or commanding officer, to issue their warrant to apprehend such deserter and bring him before them; and if the complaint of the master shall be sustained, to commit such seaman to jail, there to remain until the vessel be ready to proceed on her voyage, or the master require his discharge; and then to be delivered to the master, on payment of the costs, which are to be deducted from the seaman's wages.

They are also empowered, on the application, in writing, of a consul or vice-consul of any foreign government having a treaty with the United States for the restoration of seamen deserting, to issue process for the arrest and examination of any seaman who may have deserted from a vessel of such government, and if the complaint be sustained, such deserter, not being a citizen of the United States, is to be delivered up to such consul or vice-consul, to be sent back to the dominions of such government; or, on the request, and at the expense of the said consul or vice-consul, shall be detained, until the consul or vice-consul finds an opportunity of sending him back, not exceeding two months.

They are also authorized to summon the master of a vessel to show cause why process should not issue out of the admiralty court for wages due to the seamen of a vessel; and to grant a certificate thereof to the clerk of the district court.

PROCESS TO RECOVER SEAMEN'S WAGES.

EASTERN DISTRICT OF PENNSYLVANIA, }
CITY OF PHILADELPHIA, ss. }

To the Marshal of said district, or to any Constable of the said City:

You are hereby commanded forthwith to summon C. D., master of the ship or vessel called the *Argus*, if he be found within the said city or county, to be and appear before me, the subscriber, one of the aldermen of the said city, at my office, No. 56 South Fourth street, on the sixth day of May, at ten o'clock in the forenoon, (the residence of the judge of the district being more than three miles from this place,) to show cause why process should not issue against the said vessel, her tackle, furniture and apparel, according to the course of admiralty courts, to answer for the wages of A. B., mariner on board the said vessel. Witness my hand and seal this first day of May, in the year of our Lord one thousand eight hundred and sixty.

E. F., Alderman. [SEAL.]

CERTIFICATE TO THE CLERK OF THE DISTRICT COURT.

A. B. } Claim for seaman's wages.
vs. } Summons issued 1st May 1860.
C. D. } Returnable 6th inst., at 10 o'clock.

It appearing that the wages are not paid, satisfied or forfeited, or the matter in dispute settled, I therefore certify, that there is sufficient cause of complaint whereupon to found admiralty process.

Philadelphia, 6th May, A. D. 1860.

E. F. Alderman. [SEAL.]

To F. H., Esq., Clerk of the District Court.

NOTE.—For any crime or offence against the United States, the offender may be arrested, &c., agreeably to the usual mode of process against offenders in the state where he may be found. The caption, however, of the process must be altered, and "*The United States of America*" inserted in the place of "*The Commonwealth of Pennsylvania*."

V. If a person be committed by a state magistrate, for an offence against the United States, he may be admitted to bail by a state judge. 5 B. 512. A state magistrate, acting under the laws of the United States, cannot issue compulsory process into another state. 2 W. C. C. 159.

The court will not look beyond the certificate of the justice for the authority of the clerk to issue process for seamen's wages; but such certificate must show, on its face, the officer's authority to act. 1 Newb. 6. 6 McLean 184.

The power given to arrest and confine deserters by warrant from a magistrate, does not supersede the authority given to the master under the general maritime law. Ware. 83.

An alderman or justice of the peace has no power to imprison, for desertion, a seaman who was shipped in a foreign port. 1 S. & R. 392.

Nor to take cognisance of a charge of assault and battery alleged to have been committed by an officer of a foreign merchant vessel upon one of his seamen, while on board the ship. *United States v. Jenkins*, U. S. Dist. Court, May 1851. KANE, J.

Landlord and Tenant.

[See DISTRESS FOR RENT.]

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|----------------------------------------------------------------------|-------------------------------------------------------------------------------------------|
| I. Of the relation of landlord and tenant. | V. Of the rights of the landlord where the tenant's goods are seized in execution. |
| II. Proceedings to recover possession at the expiration of the term. | VI. Rights of a purchaser at a sheriff's sale of the landlord's interest in the premises. |
| III. Proceedings to recover possession for non-payment of rent. | |
| IV. Proceedings in case of a fraudulent removal of goods. | |

I. OF THE RELATION OF LANDLORD AND TENANT.

OF all the jurisdiction confided to the magistrate by the laws of Pennsylvania, there is no portion more important, and probably none so little understood, as that relating to the rights and duties of landlords and tenants.

By many, the existing laws are inveighed against as being oppressive upon the tenants and too favorable to the landlord; while an equal number reprobate them as affording no proper security to landlords, and as inviting tenants to a failure of rent and duty. A slight examination will serve to show that these complaints are groundless, and that while the rights of the landlord are defended and protected, the proper privileges of the tenant are sacredly regarded. Legislation on this subject has been frequent, its debates protracted, and the existing system devised after careful and studied deliberation and examination, and it will be found as impartial in its protection and as summary in its redress as the nature of the case will admit, and inferior to the system of no other state or country. Indeed, if there be any defect in our system, it is, that the recent legislation has been too favorable to the tenant.

The relation of landlord and tenant subsists by virtue of an agreement, express or implied, between two or more persons, for the possession of lands or tenements, in consideration of a certain rent to be paid therefor. The contract itself is called a *lease* or *demise*; and is a species of conveyance for life, for years, or at the will of one of the parties, usually containing a reservation of rent to the lessor. Delivery of the lease, is as necessary on the part of the lessor, though he retain possession of the instrument, as it is on the part of the lessee. 9 P. F. Sm. 184.

Leases may be granted, by express terms, for one or more years, or for any part of a year; in this latter case, however, the lessee will be treated as tenant for years. A lease for six months, or any time less than a year, is a lease for years. 5 B. 238. A *parol lease*, "by the year," unaccompanied by more specific words, is a lease for one year, and is not binding on the parties for more than one year. 2 M. 302. A

lease for no determinate period of time, by which an annual rent is reserved, payable quarterly, is a lease from year to year, so long as both parties please. It is binding on the parties prospectively for one year only, capable, however, of being extended to a second, third, fourth or fifth year, and so on, unless determined by the consent of either party, which may be done at the close of any one year, by giving three months' previous notice to that effect, but at no time before the close of a year, after it has commenced. 4 R. 123.

Where there is no stipulation postponing the commencement of a lease, the day on which the demise was made is inclusive, and is to be considered in computing the commencement and termination of the lease. Thus, where a demise is made on the first of January, to hold from year to year, the rent payable quarterly, the first quarter's rent is due on the 31st March, and the landlord may distrain at any time on the first of April, and so for each quarter; and the year expires with the 31st of December following. 1 Ash. 197.

Where a tenant remains in possession of the demised premises, after the expiration of his term, without any new agreement, the presumption of law is, that he holds the premises as a tenant from year to year, subject to all such covenants in the original lease as are applicable to his present situation. 4 Wh. 226. And if, in the original lease, the rent be payable monthly, it continues to be so payable, and may be distrained for at the expiration of any month. 11 C. 45. The landlord, however, at his option, may treat a lessee holding over after the expiration of his term, as a tenant at will, whom he may enter upon and dispossess, and in doing so use as much force as is necessary for that purpose. 1 W. & S. 90.

If the duration of the lease be left optional, without saying at whose option, it is construed to mean at the option of the tenant. 26 Leg. Int. 205. The words "this lease to be renewable at the pleasure of the lessees," give the latter the option of a renewal for a like term, and upon similar conditions, as the original demise. 2 Brewst. 383. An agreement to pay an increased rent, during the term, is a mere variation of the original contract; it effects no change in the time of the commencement or termination of the current term. If made on no new consideration, such agreement is merely void. 14 Am. L. R. 438.

A proviso in the lease from year to year for a termination of the demise on thirty days' notice before the expiration of any year, is not complied with by a general notice to quit at the expiration of the tenant's term. Such a proviso is not a waiver of the three months' notice to quit, required by law. 22 Leg. Int. 356. If a lease stipulate for a discount on the rent reserved, if paid within five days after it becomes due, no forfeiture can be incurred for non-payment, until the expiration of that time. 2 Brewst. 484.

Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*, yet there is no occasion for it to be, as it usually is, a sum of money; for corn and other matters may be, and frequently are, rendered by way of rent. It may also consist in services or manual operations, which services, in the eye of the law, are profits. 2 Bl. Com. 41. But where, by the terms of the lease, the lessor is to receive, as rent, a share of the grain raised on the demised premises, he has no interest in it until it be severed and delivered to him. 5 W. & S. 157. 7 C. 426.

An assignee of the lease is liable in equity for a violation of the contract, though the original lessee covenanted not to assign without the consent of the lessor. 23 Leg. Int. 222. The conveyance of an undivided portion of the reversion to a stranger, to whom the tenant has not attorned, does not take away the lessor's right to recover possession, according to the terms of the lease. Ibid. 332. A covenant to renew, runs with the land, and an assignee may claim the benefit of it. 25 Leg. Int. 149.

If the lessor enter into part of the premises, the whole rent is suspended, for he cannot apportion it by any wrongful act of his own. 1 Y. 176. 1 R. 435. 2 Brewst. 524. Thus, where the landlord claims and uses a right of passage through the premises, without the tenant's consent, it is incumbent on him to show that such right was reserved, otherwise the whole rent will be suspended. 4 D. 124. But the suspension of rent resulting from the entry of a lessor is not of any past rent, but of the accruing rent. Therefore, where rent is payable monthly, the entry of a

lessor suspends only the month's rent, and does not prevent his recovery of the previous rent. 1 R. 435. 9 Barr 341. 7 Wr. 404. And the rule is the same, though the rent be payable in advance. 4 N. Y. 270. 11 Ibid. 216. A mere entry, however, of a landlord upon the premises demised, without an *eviction or expulsion* of the lessee from at least some part of the demised premises, is insufficient to produce a suspension of the rent. 4 R. 339. It is no more than a trespass. 2 Wr. 340. To constitute an eviction there must have been an antecedent possession by the lessee. 9 P. F. Sm. 420. And see 33 Eng. L. & E. 212.

Under a parol demise, the law implies an agreement for quiet enjoyment. 8 H. 482. In fact, every lease contains an implied covenant for quiet enjoyment; and when the lessor suffers the demised premises to be recovered from his tenant, in ejectment, by an outstanding title, his right to recover rent is gone. The covenant to pay rent is reciprocal to that for quiet enjoyment. 9 C. 452. But this is the only covenant which is implied on the part of the lessor. There is no implied covenant for good title; or to keep the premises in repair; or that they are in good condition when leased; or that they are fit and suitable for the particular purpose for which the lessor demises them. 20 Eng. L. & Eq. 374-7. Taylor on Landlord and Tenant, ch. 8. If there be no stipulation on the subject of repairs, the tenant is bound to make fair and tenantable repairs. 1 W. & S. 580. But the untenable condition of the premises is a good defence to an action for use and occupation. 5 Phila. 81.

Any act of the lessee by which he disaffirms or impugns the title of the person indisputably entitled to the rent, is a forfeiture of the lease, and the landlord may consider him as his tenant, or as a trespasser. 8 W. 51. See 40 N. Y. 105. But the general rule of law that a tenant shall not dispute the title of his landlord, is restricted to cases in which the lease has been fairly obtained without any misrepresentation, mismanagement or fraud. 1 P. R. 402. 6 W. 44. 11 C. 108. And although he may not dispute his landlord's title, he may show that it has expired, or has been divested. 1 W. & S. 498. 2 Gr. 417. 8 P. F. Sm. 139. 16 Eng. L. & Eq. 232.

In an action by the landlord, *upon the lease*, for the recovery of the rent reserved, it is no defence that the tenant has assigned the term even with the assent of the landlord. 11 H. 18. The tenant is bound by his covenant to pay the rent, though he assign his lease with the landlord's assent, and though the latter accept the assignee for his tenant, and receive rent from him. 8 Barr 120. 4 Phila. 342. 6 Wr. 77.

It is waste for an outgoing tenant to remove the manure made on the premises. 5 H. 262. 1 P. 304. 2 Am. L. J. 6. 4 Ibid. 516. A tenant is bound to farm the demised premises in a husbandlike manner, according to the custom of the country where the land is situate; and if he attempt to divert the land from the usual course of husbandry, it is waste. 1 P. 304. It is not waste to turn arable land into meadow, or *vice versa*; nor is it waste to clear land by a tenant for life; but whether the cutting of timber, by tenant for life, is waste, must depend upon the custom of farmers, the situation of the country and the value of the timber. 1 H. 438, 443. Even fixtures erected by the tenant, and which he is entitled to remove, must be removed during the term; after the expiration of it he can neither remove them nor recover their value from the landlord. 6 W. 91. If a tenant wrongfully sever fixtures from the demised premises, they become at once the chattels of the landlord, and he has the right to immediate possession. 14 Pitta. Leg. J. 223.

A tenant of a farm, under a lease from year to year, for agricultural purposes, is entitled to the way-going crop. 4 P. F. Sm. 142. But a tenant who has been evicted for condition broken, cannot re-enter to gather the crops left in the ground. 2 Brewst. 370.

The tenant of premises destroyed by fire, is entitled to contribution from the landlord, for the expenses of removing a wall left in a dangerous condition. 25 Leg. Int. 125. The expense of cleansing a privy well is to be borne by the landlord, not by the tenant. 26 Leg. Int. 98. A landlord who employs a mechanic to do repairs on the demised premises, is not liable for damages resulting from his defective work. 24 Leg. Int. 389.

A warrant of attorney to confess judgment in ejectment, on certain terms mentioned in a lease, will not authorize the entry of judgment in favor of a purchaser of part of the premises. 25 Leg. Int. 52. A tenant at sufferance may be dispossessed at the pleasure of the landlord; but trespass will lie for any unnecessary violence or injury to goods, in the removal. 26 Leg. Int. 228.

A lease for a term of less than three years, whether written or not, may be surrendered or transferred by a parol expression of assent. An abandonment by the tenant of demised premises, is such a relinquishment as amounts to an implied surrender, and justifies an immediate resumption of the possession by the landlord. 7 W. 123. But where a tenant left the premises in the middle of the year, and sent the key to his landlord, who gave notice that he should continue to hold the tenant liable for the rent, and then took possession and offered the house to let; it was held, that he might recover the rent up to the time when the premises were again rented. 6 Wh. 500. To render a parol lease for three years good under the statute of frauds, the time must be computed from the date of the agreement, and not from the commencement of the term. 24 Leg. Int. 61.

II. PROCEEDINGS TO RECOVER POSSESSION AT THE EXPIRATION OF THE TERM.

The legislature have carefully avoided giving to magistrates any jurisdiction upon questions of *title* to lands, and have confined their authority to cases requiring prompt remedy, leaving the right of trial by jury to the judicial tribunals, in all cases involving the right of ownership. To have subjected a landlord to the delay of ordinary trials in a court of law, in the cases provided for before justices of the peace, would have been to jeopard the collection of rent in arrear, and deprive landlords of their right of possession, without any adequate security for redress of such wrongs. The jurisdiction of magistrates extends only to restore or change possession of real estate; and the various acts of assembly prescribe the circumstances and the manner under which this jurisdiction shall be exercised.

The proceedings to recover possession by a landlord at the expiration of the term for which the premises were demised are prescribed by the acts of 21st March 1772, and 14th December 1863. Prior to the passage of these acts, the only mode of obtaining possession was by ejectment; a process which was found to be dilatory, and tended to increase the vexations with which a troublesome tenant might choose to harass his landlord. Inasmuch as it has been determined that the act of 1772 has not been repealed by that of 1863, but that the remedies thereby given are cumulative, (4 P. F. Sm. 224,) the text of the former act, and the forms of proceeding under it, have been retained in this work, although it has become practically almost obsolete. The act of 1863 is a constitutional exercise of the power vested in the legislature. 1 P. F. Sm. 412. 22 Leg. Int. 198.

ACT 21 MARCH 1772. Purd. 618.

SECT. 12. Where any person or persons in this province having leased, or demised, any lands or tenements, to any person or persons, for a term of one or more years, or at will, paying certain rents, and he, or they, or his or their heirs or assigns, shall be desirous, upon the determination of the lease, to have again and repossess his or their estate so demised, and for that purpose shall demand and require his or their lessee or tenant to remove from and leave the same, if the lessee or tenant shall refuse to comply therewith, in three months after such request to him made, it shall and may be lawful to and for such lessor or lessors, his or their heirs and assigns, to complain thereof to any two justices of the city, town or county, where the demised premises are situated, and upon due proof made before the said justices, that the said lessor or lessors had been quietly and peaceably possessed of the lands or tenements so demanded to be delivered up, that he or they demised the same under certain rents to the then tenant in possession, or some person or persons, under whom such tenant claims or came into possession, and that the term for which the same was demised is fully ended; that then and in such case, it shall and may be lawful for the said two justices to whom complaint shall be made as aforesaid, and they are hereby enjoined and required, forthwith to issue their warrant, in nature of a summons, directed to the sheriff of the county, thereby commanding

the sheriff to summon twelve substantial freeholders, to appear before the said justices, within four days next after issuing the said summons, and also to summon the lessee or tenant, or other person claiming or coming into possession under the said lessee or tenant, at the same time to appear before them, the said justices and freeholders, to show cause, if any he has, why restitution of the possession of the demised premises should not be forthwith made to such lessor or lessors, his or their heirs or assigns.

And if upon hearing the parties, or in case the tenants, or other persons, claiming or coming into possession under the said lessee or tenant, neglect to appear after being summoned as aforesaid, it shall appear to the said justices and freeholders that the lessor or lessors had been possessed of the lands or tenements in question; that he, or they, had demised the same for a term of years, or at will, to the person in possession, or some other under whom he, or she, claims or came into possession, at a certain yearly or other rent, and that the term is fully ended; that demand had been made of the lessee or other person in possession as aforesaid, to leave the premises three months before such application to the said justices; that then, and in every such case, it shall and may be lawful for the said two justices to make a record of such finding by them the said justices and freeholders; and the said freeholders shall assess such damages as they think right against the tenant or other person in possession as aforesaid, for the unjust detention of the demised premises, for which damages and reasonable costs judgment shall be entered by the said justices, which judgment shall be final and conclusive to the parties; and upon which the said justices shall, and they are hereby enjoined and required to issue their warrant, under their hands and seals, directed to the sheriff of the county, commanding him forthwith to deliver to the lessor or lessors, his or their heirs or assigns, full possession of the demised premises aforesaid, and to levy the costs taxed by the justices, and damages so by the freeholders aforesaid assessed, of the goods and chattels of the lessee or tenant, or other person in possession, as aforesaid, any law, custom or usage to the contrary notwithstanding.

SECT. 18. Provided always, that if the tenant shall allege that the title to the lands and tenements in question is disputed and claimed by some other person or persons, whom he shall name, in virtue of a right or title accrued or happening since the commencement of the lease, so as aforesaid made to him, by descent, deed or from or under the last will of the lessor, and if, thereupon, the person so claiming shall, forthwith, or upon a summons, immediately to be issued by the said justices, returnable in six days next following, before them appear, and on oath or affirmation, to be by the said justices administered, declare that he verily believes that he is entitled to the premises in dispute, and shall, with one or more sufficient sureties, become bound by recognisance, in the sum of one hundred pounds, to the lessor or lessors, his or their heirs or assigns, to prosecute his claim at the next court of common pleas, to be held for the county where the said lands and tenements shall be, then and in such case, and not otherwise, the said justices shall forbear to give the said judgment: *Provided also*, that if the said claim shall not be prosecuted according to the true intent and meaning of the said recognisance, it shall be forfeited to the use of the lessor or landlord, and the justices aforesaid shall proceed to give judgment, and cause the lands and tenements aforesaid to be delivered to him in the manner hereinbefore enjoined and directed.

From a careful perusal of this act, it will be seen that there must have been a letting or lease, (a) or permission to use and occupy, under which the party in pos-

(a) "Letting, or lease, or permission to use and occupy." Here is the origin of the relation of landlord and tenant. The owner has more land than he wants for his own use. The tenant is willing to use the land and to comply with the terms of the landlord. They agree upon the terms as to rent, time and other circumstances, and this constitutes a "letting." The agreement is mutual, the tenant to hire, and the owner to receive a compensation for the use of his property, whether houses or lands. Such an agreement is binding for any

period not exceeding three years, even when made verbally. For a longer period than three years it must be in writing, and whether verbal or by writing, it should be witnessed, and must, if required, be proved as any ordinary contract.

The landlord must agree to the letting: merely lending the key of a house to a person constitutes no lease. Cases sometimes occur where the key is loaned for the examination of the premises, and unlawfully retained, and possession is taken and kept. In such cases

session became tenant of the party claiming as landlord. (a) This tenancy, or permission, may have been either by written or verbal lease or agreement, provided, in the latter case, that such lease does not extend beyond three years, in which event the law requires it to be in *writing*. Purd. 497.

It is also requisite that there should have been, at the inception of the tenancy, *a rent reserved*, payable yearly or otherwise, according to the terms of the agreement; or in the absence of any agreement as to the time of its payment, according to established usage; but though the times of payment may be inferred, and need no specific agreement, yet it is well settled that there *must be a rent* agreed upon to be paid, reserved by the lessor and promised by the lessee; for the act of assembly, before recited, limits the operation of this remedy to cases in which there has been a demise to a person or persons "*paying certain rents*." And where no *certain rent* (b) has been reserved, the landlord cannot claim the benefit of this act of assembly, but is left to his action of ejectment (the remedy by which possession was universally sought before the passage of this act) a mode which is tardy and inconvenient in its operation, and expensive in its execution.

The lease must have expired, or if it be a tenancy at will, the lessor must be desirous to terminate the tenancy, and must, in either case, have given to the tenant three months' notice to quit the premises; and it is only where, at the expiration of the three months, the tenant disregards the notice, that the assistance of this act can be invoked. (c)

A tenancy at will, or for no definite time, where rent is reserved payable quarterly, or on any certain times, has been holden to be a lease from year to year, so long as both parties please. 4 R. 123. And in Pennsylvania, where the letting is not intended for more than a year, it is general, without naming any time; and pursuant to this decision, is always deemed a lease for one year, and unless at or before the expiration of the year, dissented from by either party, is deemed to continue to the subsequent year, always being a lease for a single year and no longer.

Where the lease is for years, or for a time certain, the notice to quit may be given at any time before the expiration of the term, and the proceedings under this act may be taken three months after such notice, the term having expired, if the tenant has not complied with the request contained in the notice. 4 R. 126. 24 Leg. Int. 140. Where, however, the tenancy is at will, which, as before mentioned, has been decided to be from year to year, the notice to quit must be given at least three months before the expiration of the year, in order to entitle the landlord to the benefit of this remedy. 1 B. 254. 2 Ash. 131.

the wrong-doer being, of course, worthless and irresponsible, the landlord should carefully avoid recognising him as a tenant. On discovering the fraud, he should immediately apply to a magistrate, whose duty it would be to proceed against the party, criminally, for the forcible entry and detainer, or for forcible detainer only, as the facts might warrant.

(a) To authorize the institution of summary proceedings to recover possession, the relation of landlord and tenant must be shown to have existed between the parties by agreement, and not a tenancy created by the mere operation of law. 28 N. Y. 55.

(b) "*Certain rent*." The smallest amount of money, goods or services, at stated times, or when required, has been decided to be "*a certain rent*." 5 Binn. 529.

Rent is often stipulated to be paid quarterly or monthly, in *advance*, in which case the remedy by distress exists as completely as if the rent were payable at the end of the month or quarter. Such contract also entitles a landlord to a lien against an execution upon money in the sheriff's or constable's hands. 2 Wh. 95. See 2 T. & H. Pr. 192, where the subjects of distress and replevin are fully treated.

(c) Where the legislature has thus carefully guarded the tenant against any arbitrary or precipitate conduct on the part of his landlord, it might be supposed that a mutual or reciprocal protection would be generally presumed and conceded to landlords by their tenants; and although the law, fortunately, is adequate to that purpose, yet no error is more popular and apparently inveterate, than the notion that a tenant either in town or country, has the right, of his own accord, to put an end to a lease for years, at any quarter-day during his tenure, without the assent of his landlord, the moment he finds or chooses to imagine that his lease is unprofitable or inconvenient. We can furnish no explanation of the causes and continuance of this extraordinary notion, so different from the general accurate ideas of the binding character of contracts, which requires both parties to unmake as well as to make them, except this, that the landlords themselves have adopted the same delusion, or that they either deliberately surrender their strict rights when the tenant is solvent, or wisely deem "*an empty house preferable to a bad tenant*," when he is irresponsible.

The reason for the difference is said to be, that in case of a lease for a certain time, the expiration of it is well known to both parties, and there is an implied agreement to surrender upon the termination of the lease, and therefore it does not require notice three months previously to the ending of the term. It is, however, not so where the tenancy is at will, determinable at pleasure; and therefore the law seems to require that the notice should be given at least three months before the expiration of the year, so that the tenant may have a timely admonition of the landlord's intention to have his premises upon the termination of the existing or current year. (a)

On a lease for three years, containing a proviso that, if the tenant should continue in possession, then the lease should be in force for another year, and so on from year to year, the notice to quit need not be given until the end of the term of three years. 24 Leg. Int. 253. 25 Leg. Int. 148.

A *parol* notice to quit is sufficient. 1 Brewst. 304. 2 Ibid. 528. No notice is necessary to be given to the under-tenants. 5 B. & P. 330. Notice to one of two joint tenants in possession is sufficient. 5 Esp. 196. In a written notice, a misdescription of the premises, which cannot mislead the tenant, is immaterial. 4 Esp. 185. In all cases, leaving the notice at the dwelling-house of the tenant is sufficient. 4 T. R. 465. It may be given to the assignee of the tenant, who is in possession of the premises. 2 Ash. 131.

A clause in a lease agreeing to surrender possession, "*without further notice*," will dispense with the three months' notice required to sustain proceedings under the act of 1772; but if such agreement of waiver be not *found* by the inquest, its finding will be quashed on *certiorari*. 1 J. 472.

The notice to quit must be positive: if it be in the alternative, to quit, or pay an increased rent, it is insufficient to support proceedings under the statute. O'Neill v. Cahill, Com. Pleas, Phila. 2 Brewst. 357. 1 Doug. 167. 11 Mis. 548. The case of O'Neill v. Cahill was subsequently affirmed by the supreme court, on another point; but they gave no opinion as to the effect of the notice. It seems, however, that if the tenant receive such a notice, without objection, and hold over, it will operate as a contract to pay the increased rent. 14 Leg. Int. 121. 15 N. Y. 374. So, if the tenant *personally* receive notice to quit at a particular day, without objection, it is an admission that his tenancy expires on that day. 1 Greenl. Ev. § 197. 2 Ibid. § 323. A notice to quit given by the assignee of the lessor is not good, unless it appear that the tenant was informed of the right of the assignee. 2 Brewst. 486, 528.

The payment to a clerk of rent which accrued subsequently to the expiration of a notice to quit, the clerk having no special authority to waive the notice, does not amount to a waiver thereof. 2 Brewst. 365.

If, at the expiration of three months after notice, the tenancy having expired, the tenant still remains in possession, either by himself or his sub-tenants, then recourse is had to this act of assembly as the means of obtaining possession.

FORM OF NOTICE TO QUIT.

To C. D.

Philadelphia, November 30th 1869.

SIR,—You are hereby notified and required to quit, remove from and deliver up to me, possession of the premises situated on the [north] side of [Chestnut] street, [No. 373,] between [Third] and [Fourth] streets, in the [city] of [Philadelphia,] (which you now hold as tenant under me,) at the end of your current term, (b) as I desire to have again and repossess the same.

Yours respectfully,

(Signed),

A. B.

The person who serves a copy of this notice should compare it carefully, and note,

(a) It has recently been decided in the case of Cook v. Neilson, 10 Barr 41, that a tenant from quarter to quarter, who has held over, is not bound to give notice of his intention to quit at the end of the current quarter. Upon this question the supreme court were divided, and the decision of the district court was affirmed, without any written opinion being delivered. The learned dissenting opinion of Judge SHARS-

wood in the court below is reported in Bright. R. 463.

(b) It is not necessary to specify in the notice the time of the expiration of the current term; the tenant is bound to take notice of the ending of his term; it is a matter as much within his knowledge as in that of the landlord. 4 P. F. Sm. 94.

on the back of the notice, the day on which it was served, so that, if required, he may be ready to prove these facts.

Landlords are sometimes in doubt as to their remedy in cases like the following: A. rents a house to B. for one year. At the proper time A. gives notice to B. that at the expiration of the year he shall require a surrender of the premises. B. says, "I shall be ready, but I have just had a quarter's rent in advance from C. and D. for the store and first floor, and they refuse to remove." What is A. to do to get possession at the time he requires it, B. not being able to pay the rent, much less damages?

In such a case it is clear that the landlord has nothing to do with the sub-tenants. They are liable to expulsion upon the process so issued against B. after regular notice to B., precisely as if the sub-tenants had made no such bargain with B. The remedy against B. is under the act of 1772, or that of 1863, to be presently noticed, unless he be in arrear of rent, and there are not sufficient goods on the premises, when a more summary process, of which we shall treat hereafter, is furnished by the act of 1830.

When the landlord wishes to proceed under the act of 1772, (which cannot be done until the relation of landlord and tenant is dissolved; 8 S. & R. 470; 8 W. & S. 231); proof is made before two magistrates of the city, borough or county, wheresoever the demised premises are situate—

That the lessor had been possessed of the premises, and had demised the same to the tenant in possession, or to some person or persons under whom the tenant claims, or under whom he obtained possession;

That a certain rent had been reserved;

That the term for which the premises were demised had fully ended;

That notice to quit had been given three months previously;

And that the tenant had neglected or refused to comply with the notice.

Upon proof being made of these facts, it is the duty of the two magistrates to *issue a venire* to the sheriff, commanding him to summon a jury, pursuant to the requisitions of the act, to appear at a place, and on a day certain.

FORM OF A COMPLAINT, UNDER THE ACT OF 1772.

To G. H., and H. J., two of the Aldermen of the City of Philadelphia.

THE complaint of [A. B.] respectfully sets forth, that he is the owner of a certain [house] with the appurtenances, situate [on the north side of Chestnut street, No. 373, between Third and Fourth streets, in the city of Philadelphia,] and was in peaceable possession thereof [on the tenth day of June, A. D. 1868,] when he demised the said premises to a certain [C. D.] for the full term of [two years,] at the [annual] rent of [five hundred dollars,] which said term is fully ended. (a) That he the said [A. B.] being desirous, upon the determination of the said term, to have again and repossess [his] said estate, for that purpose did on the [thirtieth] day of [November] last past, demand and require the said [C. D.] to remove from and leave the same, and that the said [C. D.] hath hitherto refused and still doth refuse to comply therewith; that three months having elapsed since the service of the said notice, [he] makes this [his] complaint, that such proceedings may be taken by you, as are directed by the act of assembly in such case made and provided.

(Signed,) A. B.

Sworn and subscribed before us, this [tenth day of June 1870.]

G. H., Alderman.

H. J., Alderman.

FORM OF VENIRE, UNDER THE ACT OF 1772.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the sheriff of Philadelphia county, greeting:

WHEREAS, complaint and due proof were this day made before [G. H.], Esq., and [H. J.], Esq., two of our [Aldermen of the city of Philadelphia], that [A. B.] on the [tenth]

(a) In case of an assignee, add here the words—And the said A. B., after making the demise aforesaid, to wit, on the [first] day of [July,] A. D. 1868, by his certain deed of conveyance, duly made and executed, bearing date the same day and year, for the consideration therein mentioned, did grant, bargain and sell the premises aforesaid, with the appurtenances,

unto the said J. K., his heirs and assigns, and the said J. K. being desirous to have again and repossess the said premises, so as aforesaid demised by the said A. B. to the said C. D., for that purpose did, &c. One who purchases from the landlord, after the giving of a notice to quit, may recover possession under the act of 1772. 4 P. F. Sm. 224.

day of [June] 1868, was quietly and peaceably possessed of a [certain house with the appurtenances, situate on the north side of Chestnut street, No. 373, between Third and Fourth streets, in the city of Philadelphia], and being so thereof possessed on the same day and year aforesaid, did demise the said premises to one [C. D.] for the term of [two years] then next ensuing, at the [annual] rent of [five hundred dollars], and that the said [C. D.] by virtue of the said demise entered in possession of the said demised premises, and held the same during the said term, and is still possessed of the same, and that the said term for which the said premises were demised is fully ended, and the said [A. B.], being desirous, upon the said determination of the said term, to have again and repossess the said premises, for that purpose did on the [thirteenth] day of [November, 1869], demand of and require the said [C. D.] to remove from and leave the same, and that the said [C. D.] hath hitherto refused and still doth refuse to comply with the said demand and requisition to remove from and leave the said premises. Therefore we command you, that you summon twelve substantial freeholders of your bailiwick, so that they be and appear before our said [aldermen] at [the Wetherill House, in Sansom street], on [Tuesday], the [fourteenth] day of [June], 1870, at [four] o'clock in the [afternoon] of that day, and that you also summon the said [C. D.] so that he be and appear before our said [aldermen], and the said freeholders, at the day and place last aforesaid, to show cause, if any he has, why restitution of the possession of the said demised premises should not be forthwith made to the aforesaid [A. B.] according to the form and effect of the act of the general assembly in such case made and provided. And this you shall nowise omit. And have you then and there this writ. Witness the said [G. H.], Esquire, and [H. J.], Esquire, at the [city of Philadelphia] aforesaid, the [tenth] day of [June], 1870.

G. H., Alderman. [SEAL.]
H. J., Alderman. [SEAL.]

Return of the Sheriff.—To the justices within named, I do respectfully certify that I have summoned twelve substantial freeholders, and have also summoned the within-named C. D. to be and appear at the day and place mentioned, as by the within precept I am commanded.

D. F., Sheriff.

The affidavit of the landlord is sufficient to found the proceedings. 4 W. & S. 120. The summons may be made returnable before the fourth day. 15 S. & R. 43. It must be served in the mode prescribed by the act of 1836. 2 Leg. Gaz. 12. If there be more than four days between issuing and return of the precept, it is cured by the tenant's appearance. 4 Y. 523. 2 S. & R. 481-2. The tenant must, however, be allowed a reasonable time to procure testimony. 1 Y. 49.

If due proof of the truth of the complaint be submitted to the two justices and jury composed of twelve freeholders, which, thus assembled, constitute what is commonly termed "A Landlord's and Tenant's Court," and they shall find the complaint to have been well founded, a record of their finding of these facts is made by the two justices, who, together with the jury, assess damages for the unjust detention of the property.

OATH OF A JUROR, UNDER THE ACT OF 1772.

You do swear [or affirm] that you will well and truly inquire of and concerning the premises in this [the foregoing] precept mentioned, and assess such damages, if any, as the complainant hath sustained thereby. So help you God.

FORM OF INQUISITION UNDER THE ACT OF 1772.

INQUISITION taken at [the Wetherill House, in Sansom street, in the city of Philadelphia], on the [fourteenth] day of [June], in the year one thousand eight hundred and [seventy], before [G. H.], Esq., and [H. J.], Esq., two of our [aldermen of the city of Philadelphia], by the oaths of [K. L., M. N., &c.], and the solemn affirmations of [E. R., Z. Y.], twelve substantial freeholders of the said [city], who upon their oaths and affirmations respectively do say, that [A. B.] on the [tenth] day of [June], in the year eighteen hundred and [sixty-eight], was quietly and peaceably possessed of a [certain house with the appurtenances, situate on the north side of Chestnut street, No. 373, between Third and Fourth streets, in the city of Philadelphia], and being so thereof possessed, on the same day and year last aforesaid, did demise the said premises to one [C. D.], for the term of [two years] then next ensuing, at the [annual] rent of [five hundred dollars], and that the said [C. D.] by virtue of the said demise entered into possession of the said demised premises, and held the same during the said term, and is still possessed of the same, and that the said term for which the said premises were demised is fully ended; and the said [A. B.] being desirous upon the said determination of the said term, to have again and repossess the said premises, for that purpose did, on

the [thirtieth] day of [November, 1868,] demand of and require the said [C. D.] to remove from and leave the same, and that the said [C. D.] hath hitherto refused, and still doth refuse to comply with the said demand and requisition to remove from and leave the said premises. And the said freeholders do assess damages against the said [C. D.] for the unjust detention of the said demised premises at [one hundred and forty dollars,] besides all costs of suit. Whereupon, it is considered by the said [aldermen,] that restitution of the said demised premises be made to the said [A. B.,] and that he recover of the said [C. D.] his damages aforesaid, together with the costs of suit, amounting to [forty dollars.] In testimony whereof as well the said aldermen as the said freeholders have hereunto set their hands and seals, the day and year first above written, at the city of Philadelphia aforesaid.

G. H., Alderman. [SEAL.]
H. J., Alderman. [SEAL.]

A., B., C., D., E., F.
and [SEALS.]
G., H., I., J., K. and L.

The finding of the jury, both upon the point of *possession* and amount of *damages*, being thus entered of record by the magistrates, is final and conclusive, and the magistrates issue a writ of possession directed to the sheriff, commanding restitution of the premises to the landlord, and also that the sheriff levy the amount awarded of damages and costs.

FORM OF WARRANT TO DELIVER POSSESSION, UNDER THE ACT OF 1772.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Sheriff of Philadelphia County, greeting:

WHEREAS, due proof hath been made before [G. H.] and [H. J.,] Esquires, two of the [aldermen of the city of Philadelphia,] and twelve substantial freeholders, summoned for that purpose, that [A. B. did, on the tenth day of June, A. D. 1868, demise to C. D. a certain house situate on the north side of Chestnut street, No. 373, between Third and Fourth streets, in the city of Philadelphia, for the term of two years, at the annual rent of five hundred dollars,] and that the said [C. D.,] by virtue of the said demise, entered into possession of the said premises, and held them during the said term, and is still possessed thereof; and that the said term is fully ended, and that the said [A. B.,] being desirous upon the determination of the said term to have again and repossess the said premises, for that purpose did, on the [thirtieth] day of [November] 1869, demand of and require the said [C. D.] to remove from and leave the same, and that the said [C. D.] had hitherto refused and still doth refuse to comply therewith; all which premises being duly found by the said [aldermen] and freeholders, according to the form of the act of general assembly in such case made and provided: We, therefore, command you, the said sheriff, forthwith to deliver to the said [A. B.] full possession of the demised premises aforesaid. And we also command you, that of the goods and chattels of the said [C. D.,] in your bailiwick, you cause to be levied as well the sum of [one hundred and forty dollars,] which to the said [A. B.] was awarded for [his] damages sustained by the unjust detention of the premises, as [forty dollars] for [his] costs and charges, by [him] in and about [his] suit in that behalf expended, whereof the said [C. D.] is convict. And hereof fail not. Witness the said [G. H.] and [H. J.,] at Philadelphia, in the county aforesaid, the [fourteenth] day of [June,] A. D. one thousand eight hundred and [seventy.]

G. H., Alderman. [SEAL.]
H. J., Alderman. [SEAL.]

All the facts necessary to give jurisdiction must be set out on the record. 1 Barr 126. 2 S. & R. 480. 4 Y. 523. The proceedings are bad, unless it appear from the record that the term was ended. 5 S. & R. 174. It is enough, that the description in the inquisition follow that in the case. 4 P. F. Sm. 224.

If the jury cannot agree, they may be discharged and another *venire* issued. 4 W. & S. 120. And the landlord is not concluded by the finding, though the tenant is; he may renew his complaint before other justices. 8 Barr 414.

The practice is, for the justices to give judgment for a gross sum for costs; and the court, on *certiorari*, will presume they were duly taxed. 5 W. 17.

There is no appeal from the judgment of the justices. 7 P. F. Sm. 446. But although the act of assembly declares that the judgment shall be final and conclusive to the parties, yet the proceedings may be examined by *certiorari* from the common pleas, or the supreme court; and a writ of error lies to the judgment of the common pleas. A. 192. 1 B. 383, 334. 4 B. 185. 6 B. 128, 460. 3 S. & R. 195. 1 R. 317. And the finding may be traversed in an ejectment brought

by the tenant to try the title. 4 S. & R. 207. But a *certiorari* is no supersedeas. 6 B. 460. (a) It does not bring up the evidence; the regularity of the proceedings can alone be examined. 7 H. 137. 4 Barr 140. 11 P. F. Sm. 491. And on a reversal, restitution is *ex gratia*, and may be refused. 1 Barr 126. It will not be granted on a bald legal right against equity and justice. 23 Leg. Int. 141.

If there be an adverse claimant to the property, by virtue of a right acquired since the commencement of the lease, it becomes the duty of the justices to issue a summons to make him a party to the proceedings, under the 13th section of the act.

SUMMONS TO A THIRD PARTY CLAIMING TITLE.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Sheriff of Philadelphia County, greeting:

WHEREAS, complaint and due proof have been made before [G. H.] and [H. J.], two of our aldermen of the city of Philadelphia, that [A. B.], on the [tenth] day of [June,] in the year one thousand eight hundred and [sixty-eight,] was quietly and peaceably possessed of a certain house with the appurtenances, situate [on the north side of Chestnut street, No. 373, between Third and Fourth streets, in the city of Philadelphia;] and being so thereof possessed, on the same day and year aforesaid did demise the said premises to one [C. D.] for the term of two years then next ensuing, at the yearly rent of five hundred dollars, lawful money, payable for the same; and that the said [C. D.] by virtue of the said demise, entered into possession of the said demised premises, with the appurtenances, and held the same during the said term, and is still possessed thereof; and that the said term for which the said premises were demised is fully ended; and that the said [A. B.], being desirous, upon the determination of the said lease, to have again and repossess his said estate, so demised, for that purpose, did, on the [thirtieth] day of [November 1869,] require the said [C. D.] to remove from and leave the same, and that the said [C. D.] hath hitherto refused, and still doth refuse, to comply therewith. And whereas, the said [C. D.], being duly summoned, doth appear before our said aldermen, and doth allege that the title to the said premises is disputed and claimed by [O. P., of — in the city of Philadelphia,] in virtue of a right or title accrued or happening since the commencement of the lease so as aforesaid made to him the said [C. D.], by virtue of a deed made by the said A. B. to the said O. P. YOU ARE THEREFORE COMMANDED to summon the said [O. P.] to appear before our said aldermen, at the house of [Jacob I. Moyer, No. 393 Chestnut street, in the city aforesaid,] on the [twenty-fourth] day of [June 1870, at eleven o'clock in the forenoon,] to declare on oath or affirmation, to be by our said aldermen administered, that he verily believes that he is entitled to the premises in dispute; and with one or more sufficient sureties, to become bound by recognisance in the sum of one hundred pounds, to the said [A. B.], his heirs and assigns, to prosecute his claim at the next court of common pleas, to be held for the said county (if to him it shall be expedient). Make return hereof according to law.

Witness the said [G. H.] and [H. J.], at the city of Philadelphia aforesaid, the [eighteenth] day of [June] in the year of our Lord one thousand eight hundred and [seventy.]

G. H. [SEAL.]
H. J. [SEAL.]

It seems, that the tenant himself may claim title under this section. 3 P. R. 37. 4 W. & S. 126. He cannot dispute his landlord's title; but he may show that it has expired. 1 W. & S. 498. Or that the complainant, claiming to be the assignee of the lease, has no title, and that he was induced to attorn to him by fraud. 8 Phila. 360. He must, however, show either a conveyance or such an equitable right to one, as would sustain a decree for specific performance. 2 Gr. 417. 7 P. F. Sm. 446. He cannot set up the outstanding title of a stranger who does not appear and claim. 4 W. & S. 120. 8 P. F. Sm. 139.

The tenant's wife is not competent to interpose a claim of title in a third person, unless it appear that she do so, by her husband's authority. To oust the magistrate's jurisdiction, it must be shown that the title is disputed by virtue of a right which accrued since the commencement of the lease. 26 Leg. Int. 61.

The intention of the act is to confine the inquiry to the matters set forth in the 12th section of the act; if any more complicated case presents itself, the justices should arrest the proceedings. 3 P. R. 34. 1 W. & S. 499. 8 W. & S. 226.

(a) See act 24 March 1865, *infra*, as to the effect of a *certiorari* in the city of Philadelphia.

When a case comes into court under the 13th section of the act of 1772, the sole question to be tried is that of title to the reversion acquired after the demise; and the *onus* is on the tenant. 7 P. F. Sm. 446.

If the condition of the recognisance be not punctually and in all things complied with, the recognisance will be forfeited to the use of the lessor, and the proceedings gone on with before the magistrate and jury, as at first proposed.

FORM OF RECORD OF PROCEEDINGS, UNDER THE ACT OF 1772.

BE IT REMEMBERED, that on the [fourteenth] day of [June,] in the year one thousand eight hundred and [seventy,] at [Philadelphia city,] due proof was made before us, [G. H., Esq., and [H. J.,] Esq., two of our [aldermen,] that [A. B.,] on the [tenth] day of [June,] in the year eighteen hundred and [sixty-eight,] was quietly and peaceably possessed of a [certain house with the appurtenances, situate on the north side of Chestnut street, No. 373, between Third and Fourth streets, in the city of Philadelphia,] and being so thereof possessed on the same day and year last aforesaid, did demise the said premises to one [C. D.,] for the term of [two years, then next ensuing, at the [annual] rent of [five hundred dollars,] and that the said [C. D.] by virtue of the said demise entered into possession of the said demised premises, and held the same during the said term, and is still possessed of the same, and that the said term for which the said premises were demised is fully ended, and the said [A. B.] being desirous, upon the said termination of the said term, to have again and repossess the said premises, for that purpose did, on the [thirtieth] day of [November 1869,] demand of and require the said [C. D.] to remove from and leave the same, and that the said [C. D.] hath hitherto refused and still doth refuse to comply with the said demand and requisition to remove from and leave the said premises. Whereupon the said [A. B.] then, to wit, on the said [fourteenth] day of [June,] eighteen hundred and [seventy,] at the [city] aforesaid, prayed us the said [aldermen,] that a due remedy in that behalf be provided for him, according to the form of the act of the general assembly of the state of Pennsylvania in such case made and provided, upon which proof and complaint the sheriff of the county of [Philadelphia] is commanded that he summon twelve substantial freeholders of his bailiwick, so that they be and appear before us, the said [aldermen,] at the [house of Jacob I. Moyer, No. 393 Chestnut street,] on [Tuesday,] the [eighteenth] day of [June 1870,] at [four] o'clock in the [afternoon] of that day, and that he also summon the said [C. D.,] so that he be and appear before us, the said [aldermen,] and the said freeholders, at the day and place last aforesaid, to show cause, if any he has, why restitution of the possession of the said demised premises should not be forthwith made to the aforesaid [A. B.] Afterwards, to wit, on the said [eighteenth] day of [June, 1870,] at the house aforesaid, [D. F.,] sheriff of the county of [Philadelphia,] appears before us, the said [aldermen,] and returns, that by virtue of the said warrant to him directed, he had summoned twelve substantial freeholders, to wit: [G. H., R. L., M. N., Z. Y., &c.,] and had also summoned the said [C. D.] to be and appear at this day and place, as by the said warrant he was commanded, and the said freeholders, being called, appear, and are severally sworn or affirmed. And the said [A. B.] also appears, and we, the said [aldermen,] and the aforesaid freeholders, proceed to hear and examine the proofs and allegations offered by the said parties, and do find that the said [A. B.,] on the [tenth] day of [June 1868,] was quietly and peaceably possessed of a [certain house with the appurtenances, situate on the north side of Chestnut street, No. 373, between Third and Fourth streets, in the city of Philadelphia,] and being so thereof possessed on the same day and year last aforesaid, demised the said premises to the said [C. D.] for the term of [two years] then next ensuing, at the [annual] rent of [five hundred dollars,] and that the said [C. D.,] by virtue of the said demise, entered into possession of the said demised premises, and held the same during the said term, and is still possessed of the same, and that the said term for which the said premises were demised is fully ended, and the said [A. B.] being desirous, upon the said determination of the said term, to have again and repossess the said premises, for that purpose did, on the [thirtieth] day of [November 1869,] demand of and require the said [C. D.] to remove from and leave the same, and that the said [C. D.] hath hitherto refused, and still doth refuse, to comply with the said demand and requisition to remove from and leave the said premises, and the said freeholders assess the sum of [one hundred and forty dollars] for the damages of the said [A. B.,] occasioned by the unjust detention of the said demised premises. Therefore, it is considered and adjudged by us, the said [aldermen,] that the said [A. B.] shall and do recover and have of the said [C. D.] as well the said sum of [one hundred and forty dollars,] for his damages aforesaid, as [forty dollars] for his reasonable costs by him expended in and about this suit in this behalf, concerning which the premises aforesaid we do make this our record. In testimony whereof, we, the said [aldermen,] to this our record have set our hands and seals, at the [city] of [Philadelphia,] aforesaid, this [eighteenth] day of [June,] one thousand eight hundred and [seventy.]

G. H., Alderman.

H. J., Alderman.

[SEAL.]
[SEAL.]

ACT 14 DECEMBER 1863. Purd. 1341.

SECT. 1. Where any person or persons in this state, having leased or demised any lands or tenements to any person or persons, for a term of one or more years or at will, shall be desirous, upon the determination of said lease, to have again and repossess such demised premises, having given three months' notice of such intention to his lessee or tenant, and said lessee or tenant shall refuse to leave and surrender up the said premises at the expiration of said term, in compliance with the terms of said notice, it shall be lawful for such lessor, his agent or attorney, to complain thereof to any justice of the peace in the city, borough or county wherein the demised premises lie, whose duty it shall be to summon the defendant to appear at a day fixed, as in other civil actions, and upon due proof being made, the tenant having notice of the time and place of hearing, that the said lessor was quietly and peaceably possessed of the lands or tenements so required to be surrendered up, and that he demised the same to the tenant in possession, or to some other person under whom such tenant claims, and that the term for which the same were demised is fully ended, and that three months' previous notice had been given of his desire to repossess the same, then and in that case, if it shall appear right and proper to the said justice, he shall enter judgment against the said tenant, that he forthwith give up the possession of the said premises to the said lessor; and the said justice shall also give judgment in favor of the lessor, and against the lessee or tenant, for such damages as, in his opinion, the said lessor may have sustained, and for all the costs of the proceeding; and he shall forthwith issue his warrant to any constable in the county, commanding him immediately to deliver to the lessor, his agent or attorney, full possession of the said demised premises, and to levy the damages and costs awarded and taxed by the said justice, of the goods and chattels of the lessee or tenant, or other person in possession; any law, custom or usage to the contrary notwithstanding: *Provided*, That the defendant may, at any time within ten days after the rendition of judgment, appeal to the court of common pleas, in the manner provided in the first section of an act relative to landlords and tenants, approved April 3d 1830: *And provided further*, That such appeal shall not be a *supersedeas* to the warrant of possession aforesaid, (a) but shall be tried in the same manner as actions of ejectment; and if the jury shall find in favor of the tenant, they shall also assess the damages which he shall have sustained by reason of his removal from the premises; and for the amount found by the jury, judgment shall be rendered in his favor, with costs of suit, and that he recover possession of the premises, and he shall have the necessary writ or writs of execution to enforce said judgment: *And provided further*, That the tenant may have a writ of *certiorari*, to remove the proceedings of the justice, as in other cases.

ACT 24 MARCH 1865. Purd. 1899.

SECT. 1. In every proceeding or suit brought, in the city of Philadelphia, under any of the several acts of this commonwealth, by landlords to recover possession of property leased for a term of years or from year to year, in which a *certiorari* is now allowed, the said *certiorari* shall be a *supersedeas*; and the execution upon the judgment in the said suit or proceeding shall be suspended until the final determination of the *certiorari* by the court out of which the same issues; and the said court, if the said determination shall be made adversely to the party at whose instance the writ of *certiorari* has issued, shall proceed to issue a writ of possession directed to the sheriff of the county of Philadelphia, directing him to deliver actual possession of the premises to the lessor; and also to levy the costs on the defendant, in the same manner that costs are now by law levied and collected on other writs of execution: *Provided*, That the said *certiorari* shall be issued within ten days from the date of the judgment rendered in said proceedings, and upon oath of the party applying for the same, to be administered by the prothonotary of the court of common pleas, that it is not for the purpose of delay, but that the proceedings proposed to be removed are, to the best of his knowledge and belief, unjust and illegal, and will oblige him to pay more money than is justly due; a copy of which

(a) This provision is repealed as to Philadelphia, by act 25 June 1869, *infra*.

affidavit shall be filed in the prothonotary's office: *And provided further*, That the party applying for the same shall give security for the payment of all costs that have accrued or may accrue, and of the rent which has already or may become due up to the time of the final determination of said *certiorari*, in the event of the same being determined against him.

ACT 11 APRIL 1866. Purd. 1431.

SECT. 1. The powers and jurisdiction conferred upon justices of the peace, by the act entitled "An act relative to landlords and tenants," approved on the 15th day of December, Anno Domini 1863, are hereby conferred upon the several aldermen in this commonwealth; any one of whom may act with the like effect as may be done by any justice of the peace, by virtue of said act.

ACT 20 FEBRUARY 1867. Purd. 1465.

SECT. 1. The provisions of an act, entitled "An act relative to landlords and tenants," approved the 14th day of December, Anno Domini 1863, and the supplement thereto, approved the 11th day of April, Anno Domini 1866, shall be so construed as to apply to cases in which the owner or owners of the demised premises have acquired title thereto, by descent or purchase from the original lessor or lessors.

ACT 25 JUNE 1869. Purd. 1574

SECT. 1. That so much of the first section of the act of assembly, approved the 14th day of December 1863, entitled "An act relating to landlords and tenants," as provides that such appeal shall not be a *supersedeas* as to warrant of possession aforesaid, be and the same is hereby repealed, so far as the same relates to the city and county of Philadelphia.

ACT 28 FEBRUARY 1865. Purd. 1399.

SECT. 1. Whereas in the city of Philadelphia great inconvenience and trouble have frequently arisen from the loss of evidences of the commencement and termination of leases, and periods of letting of property from year to year, the landlords in such cases being unable to give the requisite notice to quit or to proceed in obtaining possession, and being deprived of the possession of the demised premises at the pleasure of the tenants; therefore be it enacted, that in all cases in the city of Philadelphia where there is a lease or verbal letting of property for a term of years, or from year to year, and the landlord, whether the owner at the time of such lease or letting, or by purchase subsequent thereto, has lost the lease or evidence of the beginning and conclusion of the term, or cannot produce proof of the same, it shall be lawful, at any time after the first year, or after the term of years, as the case may be, for the landlord desiring to recover possession of the demised property, to give notice in writing to the tenant that he has lost such lease or is unable to make such proof, and requiring the tenant, within thirty days from the time of service of such notice, to furnish him in writing with the date at which his term of tenancy commenced, and such notice, if supported by affidavit, shall be evidence of what it sets forth; if the tenant shall furnish in writing the date as required, such writing shall be evidence of the facts contained in it; but if the tenant shall fail or refuse, within thirty days, to comply with the said requirement, the landlord may, at the expiration of that period, give to the tenant three months' notice to quit the premises occupied by him, and shall proceed thereafter in the same manner as is now provided in cases of the usual notice to quit at the end of the term: *Provided*, That if the tenant shall make affidavit, within the thirty days aforesaid, that he is unable to comply with the requirement of the landlord, stating the causes of such inability, the landlord shall give six months' notice to the tenant to remove from the demised premises, upon which he shall proceed as provided in the cases of the three months' notice as aforesaid.

The foregoing acts comprise the modern system for the recovery of possession by a landlord at the expiration of the tenancy. In reference to which, it is to be observed,

in the first place, that the constitutionality of the act of 14 December 1863, has been conclusively established. 1 P. F. Sm. 412. 23 Leg. Int. 44. And it is to have the same liberal construction as that previously given to the act of 1772. 4 P. F. Sm. 90.

Under this act the first thing to be considered is the notice to quit. This may be given in the same form as that under the act of 1772 (*supra*). But under this act, the notice must be given three months prior to the end of the term; whilst under that of 1772, it may be given after the end of the term. 24 Leg. Int. 116. And it is not requisite that the notice should require the tenant to quit "at the expiration of his term;" it is sufficient, that he be required "to remove from and leave the premises," and that this notice be given three months before the expiration of his term. 24 Leg. Int. 212. 4 P. F. Sm. 90. A three months' notice to quit on the 12th May, is in time, if served on the 12th of February preceding. 1 Brewst. 397. 27 Leg. Int. 77. An attornment to the grantee of the lessor does not affect the commencement and termination of the term. 26 Leg. Int. 421. 2 Leg. Gaz. 233. In the city of Philadelphia, if, from lapse of time, or change of ownership, the landlord be in doubt, as to the time of the expiration of the tenant's current term, he is provided with a perfect remedy by the act 28 February 1865. This act extends to the assignee of the original lessor. 24 Leg. Int. 92. He may give notice to the tenant of his inability to produce proof of the termination of the term, and require the latter, within thirty days to furnish him in writing with the date at which his tenancy commenced. This notice need not be accompanied by an affidavit. 24 Leg. Int. 68, 92. But to give jurisdiction under this act, the record must show a tenancy from year to year, or otherwise, and that the term, or the first year, has ended. 3 P. F. Sm. 230.

NOTICE TO A TENANT, UNDER THE ACT OF 1865.

Philadelphia, 1st January 1870.

HAVING lost the [lease or] evidence of the beginning and conclusion of your term in the following described premises demised to you by [me], to wit, all that dwelling-house and lot of ground, No. 1080 North Tenth street, in the city of Philadelphia, and being desirous to recover possession of the said described premises, you are hereby notified that I am unable to make proof of the beginning and conclusion of your said term, and therefore require you, within thirty days from the time of the service of this notice, to furnish me, in writing, with the date at which your said term of tenancy commenced, according to the terms and provisions of the act of assembly in such case made and provided.

Yours, &c.,

A. B.

To C. D.

On the receipt of this notice, the tenant should, within thirty days, make return in writing, under oath or affirmation, either of the date of the commencement of his term, or of his inability to do so.

AFFIDAVIT OF COMMENCEMENT OF TERM.

CITY OF PHILADELPHIA, ss.

Personally appeared before me, the subscriber, one of the aldermen of the said city, C. D., who, being duly sworn according to law, doth depose and say, that his tenancy of the premises, No. 1080 North Tenth street, in the city of Philadelphia, under A. B., commenced on the fifth day of November 1863.

C. D.

Sworn and subscribed before me, this 15th day of January 1870.

J. B., Alderman. [SEAL.]

AFFIDAVIT OF INABILITY TO COMPLY.

CITY OF PHILADELPHIA, ss.

Personally appeared before me, the subscriber, one of the aldermen of the said city, C. D., who, being duly sworn according to law, doth depose and say, that he is unable to comply with the requirement of his landlord A. B. by giving the date at which his tenancy of the premises, No. 1080 North Tenth street, commenced, because he became tenant thereof as assignee of G. H., the original lessee, who did not inform him when the said tenancy commenced.

C. D.

Sworn and subscribed before me, this 15th day of January 1870.

J. B., Alderman. [SEAL.]

NOTICE TO QUIT ON FAILURE OF TENANT TO COMPLY.

Philadelphia, 1st February 1870.

On the first day of January 1870, I gave you notice that the [lease or] evidence of the beginning and conclusion of the term for which the premises now occupied by you, situate No. 1080 North Tenth street, in the city of Philadelphia, was lost, &c., and that you should, within thirty days thereafter, furnish me, in writing, with the date at which your term of tenancy commenced; you having failed to comply with the requirements of said notice, I hereby require you to remove from said premises, and deliver up possession of the same to me, within three months from the time you shall receive this notice.

Yours, &c.,

A. B.

To Mr. C. D.

NOTICE TO QUIT, WHERE TENANT IS UNABLE TO COMPLY.

Philadelphia, 1st February 1870.

On the first day of January 1870, I gave you notice requiring you to furnish me in writing, within thirty days from the time of the service of the said notice, with the date, at which your term of tenancy commenced, of the premises now occupied by you, situate No. 1080 North Tenth street, in the city of Philadelphia, and you having made affidavit, within the said thirty days, that you are unable to comply with the requirements therein, you are hereby required to remove from, and surrender to me possession of said premises, within six months from the time you shall receive this notice.

Yours, &c.,

A. B.

To Mr. C. D.

If, at the expiration of the term, or expiration of the notice, the tenant still retain possession, the landlord, his agent or attorney, must present his complaint, on oath, to a justice of the peace or alderman, in the following form :

COMPLAINT UNDER THE ACT OF 1863.

CITY OF PHILADELPHIA, ss.

On the first day of March, A. D. 1870, personally appeared before me, the subscriber, one of the aldermen in and for the city of Philadelphia, A. B., who, being duly sworn according to law, doth depose and say, that on the 26th day of February, A. D. 1869, he was quietly in the possession of a certain messuage or tenement, with the appurtenances, situate on the west side of North Tenth street (No. 1080), in said city; that on the said last-mentioned day he demised said premises to a certain C. D., for the full term of one year, at the annual rent of three hundred dollars, which said term is fully ended; that the said A. B. being desirous, upon the expiration of the said term, to have again and repossess the said premises, for that purpose did, three months previous to such expiration, demand and require of the said C. D. to remove from and leave the same, and that the said C. D. having hitherto refused, and still refusing to comply therewith, he makes this complaint, that such proceedings may be taken as are directed by the act of assembly in such cases made and provided.

A. B.

Sworn and subscribed before me, this 1st day of March, A. D. 1870.

J. B., Alderman.

On such complaint being filed, the justice is required to issue a summons to the lessee or tenant.

SUMMONS UNDER THE ACT OF 1863.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To any constable of the said city, greeting :

WHEREAS, it appears to me, the subscriber, one of the aldermen in and for the city of Philadelphia, by complaint on oath, that A. B. was on the 26th day of February, A. D. 1869, quietly in the possession of a certain messuage or tenement, with the appurtenances, situate on the west side of North Tenth street, No. 1080, in said city; that on the said last-mentioned day he demised said premises to a certain C. D., for the full term of one year, at the annual rent of three hundred dollars, which said term is fully ended; and that the said A. B. being desirous, upon the expiration of the said term, to have again and repossess the said premises, for that purpose did, three months previous to such expiration, demand and require of the said C. D. to remove from and leave the same; and that the said C. D. hath hitherto refused, and still doth refuse, to comply therewith.

You are therefore hereby commanded to summon the said C. D. to be and appear on the seventh day of March, A. D. 1870, between the hours of two and three o'clock in the afternoon, at the office of the subscriber, No. 8 North Seventh street, in the said city, to show cause, if any he has, why restitution of the possession of the said demised premises should not be forthwith made to the aforesaid A. B., according to the form and effect of the act of assembly in such case made and provided. And this you shall in nowise omit.

In witness whereof, the said alderman has hereunto set his hand and seal, the first day of March, A. D. 1870. J. B., Alderman. [SEAL.]

On the return of the summons, it is the duty of the justice to go on and hear the case, and to decide on the evidence, as to right and justice may belong. A return of service "personally on the defendant at his dwelling-house, by leaving a copy of the original summons and making known the contents thereof," is sufficient. 4 P. F. Sm. 90. Having heard the case, he is required by law to make a record of the finding; and here it is that a justice experiences the greatest difficulty, more judgments being reversed on *certiorari*, for want of precision in making up the record, than from any other cause. A form of record is here given, which, it is believed, will stand the test of judicial criticism, and the decisions on the subject are also appended for the information of the magistrate.

In the first place, it is not necessary that the justice should set forth the statute under which the proceedings are had. 24 Leg. Int. 140. It is sufficient that he find all the facts essential to the jurisdiction exercised. Ibid. The averments in the record must agree with those of the complaint. 25 Leg. Int. 165. The justice must find the facts set forth in the complaint to be true. 23 Leg. Int. 126. Ibid. 15. But the act does not require him to set forth in his judgment, the date of the lease, the expiration of the term, or the date of the notice to quit. 24 Leg. Int. 212. It is not enough, however, to enter judgment for the complainant; the justice must make an inquest of the facts required to found the jurisdiction. 22 Leg. Int. 229. And it must appear that there was legal evidence before him to justify the finding. 22 Leg. Int. 237. And see 11 P. F. Sm. 491. 2 Brewst. 528.

The justice is further required to enter judgment for the damages assessed; a mere finding of the amount of damages is insufficient. 23 Leg. Int. 186. He must give judgment for the damages from the evidence in the case. 22 Leg. Int. 357. A formal judgment for rent, cures an error in assessing it. 24 Leg. Int. 212. A judgment will not be reversed because in favor of one as the agent of an estate, 24 Leg. Int. 212. A judgment for possession in favor of the lessor's agent, and for damages in favor of the lessor, is good. 24 Leg. Int. 140. It is not competent for the tenant to set up that his lessor was merely the agent of the owners of an undivided portion of the premises, and that the latter have revoked his agency. 1 P. F. Sm. 499. A claim of title in a third person cannot be interposed in a proceeding under this act. 8 P. F. Sm. 137. And see 4 Ibid. 90. 11 Ibid. 491.

Where the tenant sues out a *certiorari* to remove the case to the common pleas, it is essential that the recognisance be given in the form prescribed by the act of 1865, or the *certiorari* will be quashed. 22 Leg. Int. 214. That act making a *certiorari* a supersedeas does not apply to proceedings by a purchaser at a judicial sale, who disaffirms the lease. 24 Leg. Int. 189. A writ of error lies to the judgment of the common pleas, on *certiorari*, and it is a supersedeas. 22 Leg. Int. 356. 23 Leg. Int. 44.

A recognisance of bail in error taken on a writ of error to remove the judgment of the common pleas, on *certiorari*, under that act, binds the parties, on affirmance, to the payment, not only of the damages awarded by the alderman, but of all rent accrued and to accrue up to the time of final judgment. 23 Leg. Int. 44.

When a case is brought into the common pleas, by appeal, a declaration is unnecessary; the defendant may be ruled to plead to the statement contained in the transcript. 22 Leg. Int. 349. Where a landlord has ejected the tenant, under the judgment of a justice, and the case is tried on an appeal, the tenant can show his damage by the removal, and the value of the place to him. In such case, the landlord cannot suffer a nonsuit, on the trial of the appeal. 7 P. F. Sm. 168.

DOCKET ENTRY UNDER THE ACT OF 1863.

DAVID EVANS

vs.

JOHN JONES.

COSTS. (a)

<i>Alderman.</i>	
Complaint	75
Oath	10
Summons	75
Return and oath	35
Hearing and determining .	1.00
3 oaths	30
2 witnesses	50
Record of proceedings . . .	1.50
Writ of restitution	1.00
<i>Constable.</i>	
Serving summons	1.00
Mileage	20
Executing writ of restitution	2.00
Mileage	20
	<hr/>
	\$9.55

LANDLORD AND TENANT CASE. March 1, 1870, David EVANS appears and makes complaint, on oath, that on the 26th day of February 1869 he was quietly in the possession of a certain messuage or tenement with the appurtenances, situate on the west side of North Tenth street (No. 1080), in the city of Philadelphia; that on the said last-mentioned day he demised said premises to a certain John Jones for the full term of one year, at the annual rent of three hundred dollars, which said term is fully ended; that the said David Evans being desirous, upon the expiration of the said term, to have again and repossess the said premises, for that purpose did, three months previous to such expiration, demand and require of the said John Jones to remove from and leave the same; and the said John Jones having hitherto refused and still refusing to comply therewith, he makes this complaint that such proceedings may be taken as are directed by the act of assembly in such case made and provided. Same day, summons issued, returnable the 6th

March, between the hours of 3 and 4 o'clock P. M. J. Miller, const., returned, on oath, "served personally on defendant at his dwelling-house, by leaving a copy of the original summons, and making known the contents thereof, 1 March 1870." And now, March 6, 1870, parties appear. E. M. Evans aff'd for lessor. John J. Miller sw. for lessor. John Jones, lessee, sw. After hearing, the alderman finds the foregoing complaint in all particulars just and true, and it appearing right and proper, enters judgment against the said lessee or tenant that he shall forthwith deliver actual possession of the said premises to the said lessor; and also enters judgment, publicly, in favor of the said lessor and against the said lessee, as tenant, for the sum of twenty dollars for damages, that being the amount, in the opinion of the alderman, the lessor has sustained, besides six dollars $\frac{1}{10}$ for costs of proceeding.

If the defendant appeal, add the following :

March 10, 1870, defendant appeals. Affidavit filed. I am held in \$500 as absolute bail in this case, conditioned for the payment of all costs that may have and may accrue, in case judgment shall be affirmed; and also for all rent that has accrued or may accrue up to the time of final judgment. J. W.

Under the act of 1865, no writ of possession can be issued by the alderman, until the expiration of the ten days allowed for a *certiorari*. 22 Leg. Int. 198. After the lapse of that time, if no appeal be taken, or *certiorari* sued out, he may issue a writ of restitution, in the following form :

WRIT OF RESTITUTION UNDER ACT OF 1863.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To any constable of the said city, greeting :

WHEREAS, due proof hath been made before me, the subscriber, one of the aldermen in and for the city of Philadelphia, that A. B. did on the 26th day of February, A. D. 1869, demise to C. D. a certain messuage or tenement, with the appurtenances, situate [on the west side of North Tenth street, No. 1080.] in said city, for the full term of one year, at a yearly rent of three hundred dollars, which said term is fully ended; that the said A. B. being desirous upon the expiration of the said term to have again and repossess the said premises, for that purpose did, three months previous to such expiration, demand and require of the said C. D. to remove from and leave the same; and that the said C. D. hath hitherto refused, and still doth refuse to comply therewith: all which premises being duly found by me the said alderman, according to the form of the act of general assembly in such cases made and provided. You are therefore hereby commanded, forthwith to deliver to the said A. B. full possession of the demised premises aforesaid. And you are also commanded, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be levied as well the sum of twenty dollars, which the said A. B. has awarded for damages sustained by the unjust detention of the premises, as six dollars and forty-five cents, for his costs and charges by him in and about his suit in that behalf expended, whereof the said C. D. is convict. And hereof fail not.

Witness the said alderman, at the city of Philadelphia aforesaid, the 17th day of March, A. D. 1870.

J. B., Alderman. [SEAL.]

(a) These costs are taxed under the act of 1865, relating to the city of Philadelphia.

These details constitute the proceedings by which a landlord may repossess himself of his premises at the expiration of the time for which he had demised the property; and such are the privileges with which a tenant is invested. While it is but just that he should surrender the premises at the expiration of the time agreed upon; the law recognises it as equally fair and just that the landlord should give ample notice of his intention and desire to repossess himself of the property, when the tenure has expired, and the terms of the original agreement have been fulfilled.

The proceedings already detailed are to be had where the tenant *pays* his rent, and are only for the purpose of repossessing the landlord of his premises at the expiration of the time for which they had been demised. The damages allowed for holding over being merely incidental, and with a view to prevent a multiplicity of lawsuits.

III. PROCEEDINGS TO RECOVER POSSESSION FOR NON-PAYMENT OF RENT.

Besides these proceedings for the recovery of the demised premises at the expiration of the term, there are cases of an entirely distinct character, in which the landlord is permitted, by another course, to repossess himself of his property *during the term for which it was demised*. These are, where the tenant refuses or neglects to pay his rent, and where there are not, upon the premises, sufficient goods, liable to distress, to secure its payment. Frequent and glaring instances of the failure of justice in such case, induced the passage of the act of 1830, by which these evils are remedied.

ACT 3 APRIL 1830. Purd. 614.

SECT. 1. In case any lessee for a term of years, or at will, or otherwise, of a messuage, land or tenements, upon the demise whereof any rents are or shall be reserved, where the lessee shall neglect or refuse to pay rent reserved, as often as the same may grow due according to the terms of the contract, and where there are not goods on the premises adequate to pay the said rent, so in arrear, except such articles as are exempt from levy and sale by the laws of the commonwealth, it shall and may be lawful for the lessor to give the lessee notice to quit the premises within fifteen days from the date of the notice, if such notice is given on or after the first day of April, and before the first of September; and within thirty days from the date thereof, if given on or after the first of September, and before the first day of April.

And if the lessee shall not, within the period aforesaid, remove from and deliver up the said premises to the said lessor, or pay and satisfy the rent so due and in arrear, it shall be lawful for the lessor to make complaint, on oath or affirmation, to any two (a) aldermen or justices of the peace, as the case may require, who, on its appearing to them, that the lessor has demised the premises for a term of years, or otherwise, whereof any rent or rents have been reserved; that the said rent is in arrear and unpaid; that there are not sufficient goods and chattels on the premises to pay and satisfy the said rent, except such goods as are by law exempt from levy and sale; and that the lessee has, after being notified in manner aforesaid, refused to remove and redeliver up possession of the premises; shall then, and in that case, issue their precept, reciting substantially the complaint and allegation of the lessor, directed to any constable of the proper city or county, commanding him to summon the said lessee to appear before the said aldermen or justices, at a day and time to be therein fixed, not less than three, nor more than eight days thereafter, to answer the said complaint.

And the said aldermen or justices shall, on the day appointed, or on some other day then to be appointed by said justices or aldermen, proceed to hear the case; and if it shall appear that the said complaint, so made, as aforesaid, by the lessor, is in all particulars just and true, then the said aldermen or justices shall enter judgment against such lessee, that the premises shall be delivered up to the lessor, and, at the request of the lessor, issue a writ of possession directed to the said constable, commanding him, forthwith, to deliver actual possession of the premises to

(a) This is altered by the act of 22d March 1861, and it is thereby provided, that proceedings may be had, under the act in the text, before any single alderman or justice of the peace. Purd. 615.

the lessor, and also to levy the costs on the defendant, in the same manner that costs are now by law levied and collected on other writs of execution; but if on the hearing aforesaid, it shall appear that the said complaint is vexatious and unfounded, the said aldermen or justices shall dismiss the same with costs to be paid by the lessor.

Provided always, that at any time before the said writ of possession is actually executed, the lessee may supersede and render the said writ of none effect, by paying to the said constable, for the use of the lessor, the rent actually due and in arrear and the costs; which rent, so in arrear, shall be ascertained and determined by the said aldermen or justices on due and legal proof, and indorsed by them on the said writ of possession, together with the costs of the proceeding: of all of which doings the said constable shall make return to the said aldermen or justices, within ten days after receiving of the said writ, and the said constable shall be answerable in default of executing the said writ according to its lawful requisitions, or in returning the same, in the same manner, as to the amount of rent ascertained and determined, and costs, as constables are now by law answerable on other writs of execution.

And provided further, that no writ of possession shall be issued by the said aldermen or justices, for five days after the rendition of judgment; and if, within the said five days, the tenant shall give good, sufficient and absolute security, by recognisance, for all costs that may have and may accrue, in case the judgment shall be affirmed, and also for all rent that has accrued, or may accrue, up to the time of final judgment, (a) then the tenant shall be entitled to an appeal to the next court of common pleas; which appeal shall be then tried in the same manner that other suits are tried: *And provided further*, That nothing herein contained shall prevent the issuing of a *certiorari*, with the usual form and effect.

It will be seen that, like the act of 1772, the operation of this act is limited to cases of lease where "a certain rent" is reserved, and all that has been said in reference to what is there necessary, must be considered as applicable here. Where, therefore, a certain rent which has been reserved becomes due and payable, and there are not on the premises sufficient goods subject to distress, out of which the rent may be collected, then the landlord is entitled to the remedies of this act. If there be on the premises sufficient goods for the security of the rent, he must, in order to collect his rent, distrain, and cannot invoke the benefit of this law. But being thus within the law, his rent being due, and there not being sufficient property to distrain upon, then the landlord may give the tenant the required notice to quit the premises. With a view to guard the tenant from injustice, inconvenience or oppression, the time of notice is varied according to the season of the year. If the notice be given after the first of April and before the first of September of the same year, then *fifteen days'* notice suffices; at any other period a notice of *thirty days* is required. The notice must be express and explicit in its terms, notifying the tenant to remove at the expiration of the time fixed by law.

FORM OF NOTICE UNDER THE ACT OF 1830.

Philadelphia, April 20th 1869.

You are hereby notified to quit the premises situate in [Dock] street, No. [24,] which I have leased to you, reserving rent—¹or pay and satisfy the rent due and in arrear," being \$28.42, which amount was due on the first day of April 1869, and is hereby demanded, (you having neglected or refused to pay the amount so reserved, as often as the same has grown due, according to the terms of our contract—and there being no goods on the premises adequate to pay the rent so reserved, except such articles as are exempt from levy and sale by the laws of this commonwealth,) within fifteen days from the date hereof, or I shall proceed against you as the law directs.

To C. D.

Yours, &c.,

A. B.

[The person who serves this notice should compare the copy with the original, and note, in writing, the day on which he serves it, so that he may be ready, if called upon, to prove these facts.]

(a) The act of 20th March 1845, "concerning bail and attachments," does not apply to judgments under this act. *Purd.* 615.

If, during the days of grace allowed the tenant, that is to say, the fifteen or thirty days, as the season shall require, he remove and deliver up possession, no further action is required. The landlord must seek his rent only as a simple contract creditor, the rent becoming, what is generally called, a *common debt*. All that the notice sought to obtain, has been already attained by the removal. If he remove, however, during the pendency of the proceedings, without notice to his landlord, he continues liable for the rent until their termination. 4 Phila. 31. But if the tenant do not remove, then must the lessor, at the expiration of the time stated in the notice, apply to a magistrate and make oath or affirmation of his cause of complaint; he must also satisfy the magistrate, either by his own examination under oath or affirmation, or other satisfactory evidence, of all the matters upon which the notice was based, together with the fact of the service of the notice, and the non-compliance with its demands; and when the magistrate is satisfied of these premises, then the law makes it his duty to summon the tenant to appear before him at a place and on a day and time certain, to answer the complaint.

COMPLAINT UNDER THE ACT OF 1830.

CITY OF PHILADELPHIA, ss.

On the [sixth] day of [May,] A. D. 1869, personally appeared before me, one of the aldermen of the city of Philadelphia, [A. B.,] who, being [duly sworn] according to law saith, that he has demised the premises situated in [Walnut street, No. 356,] in the said city, to a certain [C. D.,] reserving the rent; that the said rent is in arrear and unpaid; that there are not sufficient goods and chattels on the premises to pay and satisfy the said rent, except such as are by law exempt from levy and sale; and that the said lessee has (after being notified to quit the said premises within fifteen days from the date of said notice) refused to render and deliver up possession of the said premises.

Sworn to and subscribed before

(Signed,) A. B.
G. H., Alderman.

SUMMONS UNDER THE ACT OF 1830.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said City, greeting:

WHEREAS, complaint on oath hath been made before [G. H.,] one of our aldermen of said city, by [A. B.,] that he had demised a certain tenement, situated in [Walnut street, No. 356,] in the said city, to [C. D.,] reserving rent; which rent is in arrear and unpaid; that there are not sufficient goods and chattels on the premises to pay and satisfy the said rent, except such as are by law exempt from levy and sale; and that the said lessee has, after being notified according to law, refused to remove and deliver up possession of the said premises. You are, therefore, commanded to summon the said [C. D.] to be and appear before our said alderman, at his office, [No. 20 North Fourth street,] the [tenth] day of [May] 1860, between the hours of nine and ten o'clock A. M., to answer the said complaint. In witness whereof, the said alderman hath hereunto set his hand and seal, the [sixth] day of [May] 1869.

G. H., Alderman. [SEAL.]

Upon the return of the summons, the magistrate proceeds to hear the case in the same manner as other cases; all the allegations of the complaint requiring to be supported by legal proof. The case is regularly tried, giving to both landlord and tenant equal rights and privileges in regard to the conduct of the proceedings and the production of testimony. If, upon the trial thus had, the complaint be found in all respects true, and all its allegations be sustained by legal and competent proof, then it is the duty of the magistrate to enter judgment for the redelivery of the premises by the tenant to the landlord, which, if he do not, *within five days*, writ of possession may issue, by authority of which, possession of the demised premises is delivered to the complainant, and at the same time the *costs* of the proceeding are collected.

WRIT OF POSSESSION UNDER THE ACT OF 1830.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said City, greeting:

WHEREAS, complaint and due proof was made on the [sixth] day of [May,] A. D. 1869, before [G. H.,] one of our aldermen for the said city, that [A. B.] demised to [C. D.] a certain tenement in the said city, [No. 356 Walnut street] the rent whereof "is in arrear

and unpaid; that there are not sufficient goods and chattels on the premises to pay or satisfy the said rent, except such as are by law exempt from levy or sale, and that the said lessee has, after being notified," according to law, "refused to remove and redeliver up possession of the premises," according to the act of assembly in such case made and provided; and whereon the said alderman, in consideration of the premises, did enter judgment against said lessee, that said premises should be delivered up to the lessor forthwith, and did also ascertain the rent in arrear to amount to the sum of [fifty-six] dollars and [twenty] cents. Therefore we command you, the said constable, judgment having been entered by our said alderman against the said [C. D.,] "forthwith to deliver actual possession of the said premises to [A. B.,] the lessor," and we also command you that you levy the costs, indorsed hereon, of the goods and chattels of the said [C. D.] And hereof fail not; and of your proceedings herein, together with this writ, make return to our said alderman, "within ten days," to wit, on or before the [26th] day of [May,] A. D. 1869. Witness our said alderman, at Philadelphia, who hath hereunto set his hand and seal, this [sixteenth] day of [May,] A. D. 1869.

G. H., Alderman. [SEAL.]

The tenant, however, may, at any time before he is ousted from his possession, by payment of the rent due and in arrear (the amount of which the magistrate ascertains on the trial, and indorses upon the writ of possession, together with the costs) suspend further proceedings; or, if he be dissatisfied and consider himself aggrieved by the decision of the magistrate, he is entitled to an appeal to the court of common pleas, in like manner as other appeals, upon his entering *absolute* surety for the amount which may be adjudged against him. This security is for absolute payment, and not, as in ordinary cases, only for payment of the costs which may accrue. If the amount be not fully paid by the debtor, the surety is absolutely bound for its payment: the same as the bail provided by law for stay of execution.

DOCKET ENTRY UNDER THE ACT OF 1830.

A. B.
vs.
C. D.

COSTS.

Justice.	
Complaint	25
Oath	10
Receipt	25
Return, &c.	35
Trial	50
Oath	10
Witness	25
Record	50
Writ of possession	50
Constable.	
Service	1.00
Mileage	.20
Executing writ of possession	2.00
Mileage	.20
	<hr/> \$6.20

LANDLORD AND TENANT CASE. May 6th 1869, the plaintiff appears and complains, on oath, that he demised to the defendant a tenement, No. 356 Walnut street, in the city of Philadelphia, reserving rent; that the rent thereof is due and unpaid; that there are not on the said premises sufficient goods, &c., exempted from levy; and that the said defendant has, after being notified according to law, neglected or refused to deliver up said premises. Same day, summons issued, returnable the 10th inst., at 9 to 10 A. M. J. W., constable. Returned, on oath, "served by delivering a true copy to the defendant, personally, upon the premises, 6th May." May 10th 1869, parties appear. A. C. sworn for plaintiff. Whereupon, on hearing, it appearing that the above complaint is in all particulars just and true, judgment is entered against the said defendant, that he deliver actual possession of the premises to the plaintiff; and it is ascertained that the rent due to the plaintiff by the defendant is \$56.20. May 16th, writ of possession issued. Returnable the 26th. Possession given May 18th.

J. W., Constable.

If the defendant desire to appeal, security may be taken in the following form:

May 14th 1869. Defendant appeals. Affidavit filed. I am held in \$500, as absolute security, conditioned for the payment of all costs that have or may accrue in case this judgment shall be affirmed; and also for the payment of all rent that has accrued, or may accrue up to the time of final judgment.

(Signed,) T. G.

May 20th, Transcript for the defendant.

The regularity and legal correctness of these proceedings may be inquired into under a writ of *certiorari*. This writ brings the record to the presence of the court, and the proceedings are sustained or reversed upon the legality or illegality, as it may appear upon the transcript of the proceedings. If the proceedings be affirmed on *certiorari*, a writ of possession may issue from the common pleas. 1 C. 350.

In the case of *Clark v. Everly*, 8 W. & S. 226, the following construction of this statute was fixed by the court of common pleas of the county of Philadelphia (and although their judgment was subsequently reversed by the supreme court, it was for a cause entirely distinct from the construction of the act adopted by them

on the following points): 1. That the heir, devisee, or assignee of the lessor is entitled to the remedy given by the act. (9 Barr 213.) "It will not be pretended that he (the heir) could not maintain an action of debt or covenant for the rent, or issue his warrant of distress; and upon what principle is he authorized to assert those rights? Purely because *the relation of landlord and tenant exists*, or, to use the language of this act, that of *lessor and lessee*. Now if this relationship is created by the death of the ancestor, the lessor, and all his rights descend to the heir, most assuredly he is clothed with all the authority which belonged to the ancestor, and consequently he may use all the remedies for enforcing these rights given by the law, which the original lessor had. The right and the remedy must attend each other." 2. The lessor must accompany his notice to quit, with a demand for the amount of rent claimed, when given to the lessee. "This right given to the lessor to give a notice, and then commence these proceedings, is only another means of enforcing the payment of the rent, and that too in a way much more summary than by the warrant of distress; and no principle is better settled, than that a distress-warrant must set forth a sum certain, which is due for the rent, in order that the bailiff may know what amount of goods to distrain, and to inform the tenant what sum of money he must tender, in order to relieve his property from the seizure; and all the forms prescribed by the act of 1772, are based upon the supposition that a sum certain is demanded in the warrant of the bailiff. If, then, this is only a means to compel the payment of rent, should not the tenant be apprised of the sum claimed? The latter part of the act also provides that on the payment of the amount due, at any time before he is dispossessed, he shall be entitled to retain the possession; clearly showing that the amount of rent due is all that the lessor can demand. Now a tenant may be willing to pay all which is due; and suppose that he has paid all which has accrued, and if informed of any default, would instantly discharge that sum. But if the landlord has only to give a notice to quit, he compels the lessee to become a party to a lawsuit, against his will, no matter how desirous he may be to pay the rent." 3. The lessor must *prove* that there were not sufficient goods on the premises to pay the rent; and if there were two or more premises included in the lease, he must *prove* there was not sufficient on either of them. 1 How. 217-18. 4. The notice to quit must be served on the individual residing on the premises. "The landlord was bound to serve the notice of the non-payment of rent, upon the tenant in the actual possession at the time, in order to deprive him of his estate. If he was a sub-lessee, he cannot be turned out of his possession without notice; for he may be willing to pay the rent demanded, rather than to be turned with his family into the street. From analogy to all judicial proceedings for the recovery of the possession of real estate, the tenant in possession must be served with process, or he is not affected by the judgment of the tribunal that is to deprive him of his possession." 5. In the same case, the supreme court decided that the act does not apply to the case of a landlord and tenant where the tenant refuses to pay rent, under a claim of right to the reversion. If the title to the lands be in dispute, the justice cannot proceed under this act. But the defendant's affidavit that the title to the land will come in question, will not oust the jurisdiction; it must be shown in evidence. 1 C. 350. Nor will the affidavit of a third person, stating that he claims the reversion, be enough for that purpose; as between the landlord and a party holding under him, no other title can come in question, upon a proceeding to recover the rent, or, in case of non-payment of rent, to obtain possession. 4 Phila. 350. If, however, an assertion that the title will come in question be sustained by evidence, it will defeat the jurisdiction, though not supported by affidavit. 24 Leg. Int. 212. And see 11 P. F. Sm. 497.

Process cannot issue until the expiration of the notice to quit. 2 Lux. Leg. Obs. 196. Where the landlord's petition sets out the facts necessary to give the magistrate jurisdiction, and his inquest recites that he found these facts to be true, it is sufficient though the facts found be not otherwise stated in the inquest. 9 Barr 213. It is a sufficient defence, on appeal, that the landlord has aliened the premises since the commencement of the proceedings. 2 Brewst. 357.

The justice cannot enter judgment for the rent in arrear. 10 W. 395. Or issue execution for it. 1 Ash. 230. His judgment must be that the landlord recover

the possession; and not, in the alternative, for an amount of rent, or possession. 2 Phila. 370. And see 3 Ibid. 257. It seems, however, that the judgment of the justice, finding that no rent is due to the landlord, is conclusive upon him, and that he cannot subsequently distrain for rent alleged to be in arrear. 6 N. Y. 137, 140. It is error, for the justice to calculate the rent in arrear up to a day subsequent to the notice to quit. 4 Phila. 381.

In a proceeding under the act 3 April 1830, the justice adjudged that the premises should be given up to the landlord, and also found certain arrears of rent due. The tenant appealed and gave bail, conditioned, in the words of the act, that if the judgment should be affirmed they would pay all costs, and all rent which had or might accrue, up to final judgment. The landlord afterwards took a confession of judgment from the tenant, for a certain sum, not embracing the rent accruing after suit brought; and judgment was entered on the appeal, as if a verdict had been rendered for that sum, and the tenant was suffered to retain possession: *held*, that this was not such an affirmance of the judgment as rendered the bail responsible on the recognisance. 10 W. 393. See 10 H. 33, as to the form of the recognisance.

If the lease provide that in case the rent become in arrear, then, upon five days' notice to quit, the landlord may dispossess the tenant, the landlord cannot, by giving five days' notice, recover possession under this act. 3 Phila. 304. The jurisdiction in such cases is conferred by the statute, and in order that it may attach, it is necessary that the statutory notice be previously given; jurisdiction in such cases cannot be conferred by the consent of the parties. 9 N. Y. 36-7. But see 1 J. 472. 22 Leg. Int. 356.

A *certiorari* taken under the act of 1830, does not operate as a supersedeas; 3 Leg. & Ins. Rep. 59: except in the city of Philadelphia, by virtue of the act 24 March 1865. It is sufficient that an appeal be filed in the prothonotary's office on the first day of the next term. 8 Leg. & Ins. Rep. 205.

Such is the remedy provided by law in cases where the tenant remains in possession, and neglects or refuses to pay his rent, and there is no property on the premises out of which the landlord can compel its payment. The provisions of the law are plain and intelligible. It prescribes clearly under what state of facts the remedy may be invoked; what character of *prima facie* proof must be adduced before process can be obtained; what full proof must be given; the manner of enforcing judgment, and the terms upon which the judgment may be suspended; all these are detailed and described so clearly, that no misunderstanding or difficulty can well arise, and the law should never be invoked except in cases where there is exhibited a clear right to claim it.

Cases of gross violation of the terms of the lease often occur, where the landlord is remediless under these statutes. For instance, A. lets his house to B., with an express stipulation against underletting any part of it, or conducting any manufacturing business, or having any deleterious occupation carried on in it. B. does both, and being unable to answer in damages, an action against him would be unavailing. Can A. obtain repossession under the foregoing provisions? Such questions occur daily with landlords, and are as often answered in the negative. It was A.'s inadvertence, neglect or folly, to accept an irresponsible or knavish tenant, without, at all events, inserting a clause in the lease, giving him a recourse to these laws in the event of such a breach. Without it, A. appears to have no means of redress under the acts just cited.

IV. PROCEEDINGS IN CASE OF A FRAUDULENT REMOVAL OF GOODS.

Another wrongful act frequently perpetrated by tenants, is the fraudulent removal of their goods from the demised premises, before the rent becomes due, with intent to deprive the landlord of his remedy by distress. For this a remedy is provided by the act 25 March 1825; the provisions of which, however, are restricted in their operation to the cities of Philadelphia, Pittsburgh and Allegheny. That act provides as follows:

ACT 25 MARCH 1825. Purd. 611.

SECT. 1. In case any lessee for life or lives, term of years, at will, or otherwise, of

any messuages, lands or tenements, situate in the city or county of Philadelphia, (a) upon the demise whereof any rents are or shall be reserved and made payable, shall, from and after the first day of August next, before such rents as aforesaid shall become due and payable, fraudulently convey away or carry off from such demised premises, his goods and chattels, with intent to defraud the landlord or lessor of his remedy by distress, it shall and may be lawful to and for such landlord or lessee, to consider his rent so reserved as aforesaid, as apportioned up to the time of such conveying away or carrying off, and for him, or any other person or persons by him for that purpose lawfully authorized, within the space of thirty days next ensuing such conveying away or carrying off such goods and chattels as aforesaid, to take and seize such goods and chattels, wherever the same may be found, as a distress for such rents so apportioned as aforesaid, and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had been distrained by such lessor or landlord, in and upon such demised premises for rents actually due, agreeably to the existing laws: *Provided*, That such landlord or lessor, before any such goods or chattels are seized as aforesaid, shall make oath or affirmation before some judge, alderman or justice of the peace, that he verily believes that said goods or chattels were carried away for the purpose of defrauding as aforesaid: *And provided*, That nothing herein contained shall extend, or be deemed or construed to extend, to empower such lessor or landlord to take or seize any goods or chattels, as a distress for such rents so apportioned as aforesaid, which shall be *bonâ fide*, and for a valuable consideration, sold, before such seizing made, to any person or persons not privy to such fraud as aforesaid, anything herein to the contrary notwithstanding: *And provided also*, That nothing herein contained shall be construed to apply to contracts made before the passage of this act.

SECT. 2. If any lessee for a term of years, in the city and county aforesaid, shall remove from such demised premises without leaving sufficient property thereon to secure the payment of at least three months' rent, or shall refuse to give security for the payment thereof, in five days after demand of the same, and shall refuse to deliver up possession of such premises, it shall and may be lawful for the landlord or lessor to apply to any two aldermen or justices of the peace, within the city or county of Philadelphia, and make an affidavit or affirmation of the facts, and thereupon the said aldermen or justices of the peace shall forthwith issue their precept to any constable of the proper city or county, commanding him to summon such lessee before such aldermen or justices, on a day certain, not exceeding eight, nor less than five days, to answer such complaint; and the said aldermen or justices shall, on the day appointed, proceed to hear the case, and if it shall appear that the lessee has removed from the premises without leaving sufficient goods and chattels, or giving security for the payment of the rent as aforesaid, and has refused to deliver up possession of the demised premises, they shall enter judgment against such lessee, that said premises shall be delivered up to the lessor or landlord forthwith; and shall, on the request of the said lessor or landlord, issue a writ of possession, directed to the said constable, commanding him forthwith to deliver possession of the premises to the landlord or lessor, and also to levy the costs on the defendant, in the same manner that executions issued by justices of the peace are directed by law.

It would seem that the provisions of the first section of this act, as to the nature and effect of the oath or affirmation of the landlord or lessor, are not so well and generally understood as it is desirable they should be. By many, it is supposed that the complaint of the landlord, before the magistrate, can be made the subject of denial or examination, and also that it is necessary the magistrate shall issue process, upon the complaint so made, to entitle the landlord to levy on the goods removed. Neither of these positions is correct. The test is the conscience of the complainant, and the duty of the magistrate is ministerial; he is merely to administer the oath, and if the oath be made in obedience to the requirements of the law, whether true or not, is not to be inquired into by the magistrate. He attests it as made, and hands the affidavit to the party making it, and therein his ministerial duty ends.

No process is issued by the landlord; the complainant, in this case, proceeds, issues his warrant, and seizes, as if upon a distress for rent actually due, which

(a) This section is extended to the cities of Pittsburgh and Allegheny, by act 29 March 1870 Purd. 1612.

distress, *at common law*, must be made *upon the premises*. The oath which the landlord has made, is the justification of himself or agent in making the seizure, and the truth or falsehood of the matter complained of, under oath, cannot in any manner, in this proceeding, be made the subject of investigation.

If the tenant has been wronged, he has his right of action against the wrongdoer for damages; and in that action all irregularities, untruths or oppressions can be made the legitimate objects of investigation.

But while the act gives to landlords a beneficial protection, unknown to the common law, it protects carefully the rights of third persons, and declares that if, at any time *before actual seizure* by the landlord, even after the fraudulent removal by the tenant, the goods shall have been, *bonâ fide*, and for a valuable consideration, sold to any person not privy to the fraud, then the innocent purchaser shall be entitled to retain the goods unembarrassed by any seizure of the landlord. The justice and policy of such a provision and limitation are manifest; there is more reason that the landlord should be watchful, and immediately follow the goods, than that a stranger should be put to make inquiries, and thereby give birth to suspicions of fraud, contrary to the maxim of law, that "*everything is presumed to be rightly done until the contrary is shown.*"

The second section of the same act is meant to remedy another evil somewhat similar to that provided against in the first section. If a tenant remove from the premises during the term of demise, and at the same time retain possession, it seems but justice that the landlord should have some security that his rent, when due, shall be paid. The ordinary security of the law, the remedy by distress, he is here deprived of, and therefore it is that the legislature adopted the provisions of the 2d section.

The notice required by the second section must be given by the landlord or his agent; proceedings cannot be had under this act by an adverse claimant of the premises. 2 Phila. 42. The landlord's affidavit must set forth the demise. 2 Phila. 41. And the record must show that the tenant was a lessee for a term of years. 1 Phila. 17. The proceedings must show a compliance with the essential requirements of the law. 23 Leg. Int. 133. A tender of security after the expiration of the five days, is too late. 10 Barr 98. A sub-tenant has a right to tender security for the rent, and the original lessee cannot waive that right to his prejudice. 23 Leg. Int. 29.

COMPLAINT UNDER THE ACT OF 1825.

CITY OF PHILADELPHIA, ss.

ON the ninth day of May, A. D. 1870, personally appeared [A. B.] before the subscribers, two of the aldermen in and for the said city, who being duly sworn, [or affirmed,] doth depose and say, that he demised the premises situated in the said city, in [Walnut] street, No. 356, [by the quarter,] to a certain [C. D.,] who has removed therefrom; that there are not goods enough on the premises to pay a quarter's rent; that he refuses to give up possession or security for three months' rent, the same having been demanded more than five days previous to the date of this deposition.

(Signed,) A. B.
G. H., Alderman.
H. J., Alderman.

Sworn and subscribed, May 9th, A. D. 1870, before

PRECEPT UNDER THE ACT OF 1825.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said City, greeting:

WHEREAS, complaint on oath hath been made before [G. H. and H. J.,] two of our aldermen of said city, by [A. B.,] that on the [third] day of [July,] in the year 1869, he demised a tenement situated in said city, in [Walnut street, No. 356,] [by the quarter,] to [C. D.,] who has removed therefrom; that there are not goods enough on the premises to pay a quarter's rent; and that the said [C. D.] refuses to give up possession or security for three months' rent, the same having been demanded five days previous to the date hereof. You are, therefore, commanded to summon the said [C. D.] to be and appear before our said aldermen, at the office of [G. H., No. 20 North Fourth street,] on the [fourteenth] day of [May,] A. D. 1870, between the hours of [four and five] o'clock, P. M., to answer the complaint of said [A. B.] In witness whereof, the said aldermen have hereunto set their hands and seals, the [ninth] day of [May,] A. D. 1870, at Philadelphia aforesaid.

G. H., Alderman. [SEAL.]
H. J., Alderman. [SEAL.]

WRIT OF POSSESSION UNDER THE ACT OF 1825.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said City, greeting :

WHEREAS, proof hath been made, on oath, before [G. H. and H. J.,] two of our aldermen of said city, that [A. B.] demised to [C. D.] a tenement situated in said city, [Walnut street, No. 356,] by the quarter; that there is not sufficient property on said premises to pay a quarter's rent; and that said [C. D.] has removed therefrom, and neglected and refused to give security for the payment of three months' rent, the same having been demanded the space of five days, agreeably to law; and also has refused to deliver up possession of said premises; and whereon the said aldermen, in consideration of the premises, did enter judgment against said lessee, that said premises should be delivered up to the lessor forthwith. Therefore we command you *forthwith* to deliver to the said [A. B.] full possession of the demised premises aforesaid. And we also command you that you levy the costs of the goods and chattels of the said [A. B.] And of your proceedings herein make return to the said aldermen, on or before the 8th of August, A. D. 1870. In witness whereof, the said aldermen have hereunto set their hands and seals, the [twentieth] day of [July, A. D. 1870,] at Philadelphia aforesaid.

G. H., Alderman. [SEAL.]

H. J., Alderman. [SEAL.]

DOCKET ENTRY UNDER THE ACT OF 1825.

A. B. } LANDLORD AND TENANT CASE, before aldermen G. H. and H. J. May 9th 1870,
vs. } plaintiff appears and makes complaint, on oath, that he demised the premises
C. D. } situate No. 356 Walnut street, in the said city, by the quarter, to the defendant,
who has removed therefrom; that there are not sufficient goods on the premises
to pay a quarter's rent; and that the defendant refuses to give up possession, or
security for three months' rent, which the plaintiff has demanded more than five
days previously. Same day, summons issued, returnable the 14th inst., at 4 to
5 P. M. S. S., constable, returned on oath, "served on defendant, by exhibiting
to him the original summons, and informing him of the contents thereof." May
14th 1870, parties appear. X. Y. sworn for plaintiff. After hearing, the said
aldermen find that the above complaint is in all respects just and true, and
enter judgment against the defendant, that he shall forthwith deliver up pos-
session of the said premises to the plaintiff. Same day, writ of possession
issued. S. S., constable, returned: "possession given to plaintiff."

These observations embrace all the provisions of the different acts of assembly of Pennsylvania, and exhibit the various alterations and additions which have been engrafted by our legislatures upon the common law. The common law gives to the landlord the right, when any rent is in arrear, to levy the same by sale of any goods found upon the premises, and which he is authorized to seize. This is a right known and practised, and which is not at all encroached upon by the acts of assembly, the provisions of which seem in aid and furtherance of this remedy by distress. [See "Distress for Rent."]

V. OF THE RIGHTS OF THE LANDLORD WHERE THE TENANT'S GOODS ARE SEIZED IN EXECUTION.

The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life, or years, or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: *Provided*, That such rent shall not exceed one year's rent. Act 16 June 1836, § 83. Purd. 438.

After the sale by the officer of any goods or chattels, as aforesaid, he shall first pay out of the proceeds of such sale, the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution: *Provided*, That if the proceeds of the sale shall not be sufficient to pay the landlord and the costs of the execution, the landlord shall be entitled to receive the proceeds, after deducting so much for costs as he would be liable to pay in case of a sale under distress. Ibid. § 84.

Whenever any goods and chattels, liable to the payment of rent, as aforesaid, shall be seized in execution, the proceedings upon such execution shall not be stayed by the plaintiff therein, without the consent of the person entitled to such rent, in writing, first had and obtained. Ibid. § 85.

These provisions were intended to make amends to the landlord for taking away his power of distress, by a judicial sale of the tenant's goods; but the act contemplates an existing tenancy at the time of sale; if there be no tenancy, there can be no right to distrain, and, consequently, no equivalent for it under this act: thus, a surrender of the tenancy after levy, but before sale, on an execution, deprives the landlord of his claim for rent out of the proceeds. 5 Barr 422. 25 Leg. Int. 229. So will a sheriff's sale of the landlord's interest in the land. 4 P. L. J. 282-3. 2 Am. L. J. 562. Or the death of the tenant before the right of distress accrued. 4 P. L. J. 284. 3 Ibid. 502. And if the landlord had previously distrained the property, and it had been replevied by the tenant, he can only claim such rent as accrued subsequently to the distress. 4 W. 39. See 1 W. & S. 416. 4 W. & S. 344. If a lease so mix the real and personal property together that it cannot be determined how much of what is called the rent is to be paid for the chattels, and how much is the profit of the land, there can be no distress for non-payment of it. 6 H. 447. And where a creditor whose judgment was founded on a debt contracted before the 4 July 1849, levied on and sold the goods of his debtor, exempted from execution for subsequent claims by the act 9 April 1849, and the money was brought into court for distribution, it was held that a landlord of the debtor whose rent accrued subsequently to 4 July 1849, had no right of distress in respect of the goods, and therefore no footing in court on the question of distribution. 2 Gr. 378. But wherever the landlord has power to distrain, he is entitled to be paid out of the proceeds of sale. 11 C. 162. 8 P. F. Sm. 501. If, however, he had not the power to distrain at the time of the levy, he can acquire no rights, as against the sheriff, by a subsequent change of relation with the defendant in the execution. 9 H. 274.

An execution levied by a constable is within the act. 2 J. 379. Although preceded by an attachment, under the act of 1842. 6 W. & S. 333. Rent due to the immediate landlord of the defendant is alone protected. 2 H. 400. Ground-rent is not within the act. 9 W. & S. 180. But rent due to a lessor by his lessee, is payable out of the proceeds of the goods of a sub-tenant. 7 Wr. 435.

The rent is to be apportioned to the date of the levy, but the landlord is not entitled to claim to the time of sale. 5 B. 506. 2 Y. 274. 6 W. & S. 335. 5 Barr 300. 3 H. 80. 3 Lux. Leg. Obs. 393. And where, by the terms of the lease, the taxes are to be paid by the tenant, the landlord cannot claim out of the proceeds any part of the sum due for taxes. 5 B. 506. 13 S. & R. 158. 2 P. L. J. 297. 3 H. 80. Where there is a sale under two levies made at different times, the landlord can claim for rent down to the date of the last levy. *Worley v. Merkle*, 1 T. & H. Pr. 925. 9 Leg. Int. 125.

The landlord is not confined, in his claim for rent, to the current year, so that no more than one year's rent be received. 4 Barr 471. 5 W. 140. 5 Barr 390. He is entitled to claim for rent payable in advance. 11 C. 83. But where rent is payable in advance, and that for the current quarter has been paid, the landlord cannot claim out of the proceeds of an execution an amount of rent proportioned to the part of the quarter which had expired. 11 H. 97.

The landlord is bound to give notice of his claim for rent, before the return of the execution. 13 S. & R. 295. 1 Ash. 184. It may be given at any time before the sheriff pays over the money to the execution creditor. 5 W. 134. The sheriff is bound to keep the proceeds a reasonable time to enable the landlord to make his claim. A payment to the execution creditor on the day after the sale, and ten days before the return day, is too soon, and will render the sheriff liable to the landlord. 2 Phila. 115. The practice is to take a rule on the sheriff to pay the amount of rent due, out of the proceeds. 2 Y. 274.

The preference given to rent over costs, is confined to the costs of the execution, and does not extend to those of the sheriff for executing it. 1 M. 269.

VI. RIGHTS OF A PURCHASER AT A SHERIFF'S SALE OF THE LANDLORD'S INTEREST IN THE PREMISES.

If any lands or tenements shall be sold upon execution as aforesaid, which, at the time of such sale, or afterwards, shall be held or possessed by a tenant or lessee, or person holding or claiming to hold the same, under the defendant in such execution, the purchaser of such lands or tenements shall, upon receiving

same, as aforesaid, be deemed the landlord of such tenant, lessee or other person, and shall have the like remedies to recover any rents or sums accruing subsequently to the acknowledgment of a deed to him, as aforesaid, whether such accruing rent may have been paid in advance or not, if paid after the rendition of the judgment on which sale was made, as such defendant might have had, if no such sale had been made. Act 16 June 1836, § 119. *Purd.* 451.

If, after notice shall be given of such sale, as aforesaid, such tenant, lessee or other person, shall pay any rent or sum accruing subsequently to the acknowledgment of such deed, [and] notice given him, as aforesaid, to such defendant; such tenant, lessee or other person so paying, shall nevertheless be liable to pay the purchaser. *Ibid.* § 120.

It is at the purchaser's option, either to disaffirm the lease, or to affirm it, an avail himself of the rights of the former owner to recover the rent. 5 W. & S. 433. If he choose to disaffirm it, which he does by giving the defendant notice to quit, he cannot claim anything under the terms of the lease. 9 W. 436. And in such case, the relation of landlord and tenant cannot be renewed by the tenant's remaining in possession, or any act short of a mutual contract for a new lease. 4 W. & S. 535. The lessee becomes a tenant at will of the sheriff's vendee, and as such, is entitled to the way-going crop. 5 C. 66. But he does not become such tenant at will, until after notice of the purchaser's election to determine the tenancy. 3 P. F. Sm. 81.

If, by the terms of the lease, the rent was payable in advance at the beginning of the year, a purchaser at sheriff's sale in the middle of the year, is not entitled to it. 9 W. 436. 2 J. 220. But where a lease contains a stipulation for a rent in kind, without specification of the day of payment, it is payable at the expiration of the year; and an assignment of the rent, by an order on the tenant, accepted by him, will not pass the right to it, as against a purchaser at sheriff's sale, under a judgment prior to the lease. 4 Barr 146. 5 W. & S. 432. 3 W. 400. And see 3 W. 401. 10 W. 862. 1 Wr. 134. The purchaser is not entitled to rent accruing between the day of sale, and the acknowledgment of the sheriff's deed. 7 Wr. 342. Wherever the owner could maintain an action for use and occupation the purchaser of his title can do the same. 1 P. F. Sm. 261.

Larceny and Receiving Stolen Goods.

I. Provisions of the Penal Code.

II. Judicial decisions and authorities.

I. ACT 31 MARCH 1860. *Purd.* 235.

SECT. 103. If any person shall be guilty of larceny, he shall, on conviction, be deemed guilty of felony, and be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 104. If any person shall steal any bank bill, note, draft or check, of, or on any bank, or any bill of exchange, order, warrant, draft, bill or promissory note, for the payment of money, or any certificate or security whatsoever, entitling or evidencing the title of any person or body corporate, to any share, portion or interest in any public debt or security, or fund, either of this commonwealth or of the United States, or of any of the states thereof, or of any foreign state, or to any interest in any stock, fund or debt of any body corporate, company or society, or to any deposit in any saving bank or company, being the property of another person, or any corporation, association or society, notwithstanding the said enumerated particulars are, or may be deemed in law, choses in action, such person shall be deemed guilty of larceny, and punished as is provided in the preceding section. And any person who shall steal any letters patent, charter, testament, will or deed,

whether indented or poll, covenant, assurance, lease, indenture, contract, letter of attorney, or other power or instrument of writing, respecting any property, real or personal, or any release, acquittance, voucher, receipt, receipt book, letter book, waste book, day book, journal, ledger or other book of accounts belonging to another, every person so offending shall, on conviction, be adjudged guilty of larceny, and be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment, by separate or solitary confinement, not exceeding two years, or either, or both, at the discretion of the court.

SECT. 105. If any person shall be guilty of horse-stealing, or as accessory thereto before the fact, or of having received or bought any horse, knowing the same to have been stolen, the person so offending shall be guilty of felony, and shall, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.

SECT. 106. If any person shall steal or rip, cut or break, with intent to steal, any glass or wood work belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square, street or other place dedicated to public use or ornament, every such offender shall be deemed guilty of larceny, and, being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 107. If any clerk, servant or other person in the employ of another, shall, by virtue of such employment, receive and take into his possession any chattel, money or valuable security, which is or may be made the subject of larceny, for or in the name, or on account of his master or employer, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant or other person in his employ, and shall be punished as is provided in cases of larceny of like property.

SECT. 108. If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any other person, except the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny, and punished as is provided in cases of larceny of like property.

SECT. 109. If any person shall buy or receive any goods, chattels, moneys or securities, or any other matter or thing, the stealing of which is made larceny by any law of this commonwealth, knowing the same to be stolen or feloniously taken, such person shall be guilty of felony, and, on conviction, suffer the like pains and penalties which are by law imposed upon the person who shall have actually stolen or feloniously carried away the same.

SECT. 110. It may and shall be lawful to prosecute and punish all buyers and receivers, as well before as after the principal felon shall be taken and convicted, and whether he be amenable to justice or otherwise; which prosecution, conviction and sentence of said receivers shall exempt them from being prosecuted as accessories after the fact, in case the principal felon shall be afterwards convicted.

SECT. 179. On all convictions for robbery, burglary or larceny of any goods, chattels or other property, made the subject of larceny by the laws of this commonwealth, or for otherwise unlawfully and fraudulently taking or obtaining the same, or of receiving such goods, chattels or other property, knowing the same to be stolen, the defendant shall, in addition to the punishment heretofore prescribed for such offences, be adjudged to restore to the owner the property taken, or to pay the value of the same, or so much thereof as may not be restored. And on all convictions on any indictment for forgery, for uttering, publishing or passing any forged or counterfeit coin, bank notes, check or writing, or any indictment for fraudulently, by means of false tokens or pretences, or otherwise, cheating and defrauding another of his goods, chattels or other property, the defendant, in addition to the punish-

ment hereinbefore prescribed for such offences, shall be adjudged to make similar restitution, or other compensation, as in case of larceny, to the person defrauded: *Provided*, That nothing herein shall be so construed as to prevent the party aggrieved, and to whom restitution is to be awarded, from being a competent witness on the trial of the offender.

ACT 22 APRIL 1863. Purd. 1296.

SECT. 2. If any person shall, in the daytime, break and enter any dwelling-house, shop, warehouse, store, mill, barn, stable, out-house or other building, or wilfully and maliciously, either by day or by night, with or without breaking, enter the same, with intent to commit any felony whatever therein, the person so offending shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding four years.

ACT 11 APRIL 1866. Purd. 1422.

SECT. 1. Any person, in Allegheny or Schuylkill county, receiving or buying from minors, or unknown and irresponsible parties, any scrap-iron, brass, lead, copper or other metal, shall be guilty of a misdemeanor, and on conviction thereof, in the court of quarter sessions in the proper county, shall be sentenced to pay a fine of not more than five hundred dollars, and to undergo an imprisonment of not more than one year, or both or either, at the discretion of the court.

ACT 24 APRIL 1869. Purd. 1547.

SECT. 1. Any person hereafter, in the counties of Lancaster and Philadelphia, buying or receiving from minors, knowing them to be such, or from persons unknown to such person buying or so receiving, or from persons pursuing no trade, labor or employment for a livelihood, any scrap-iron, brass, lead, copper or other metal, shall be guilty of a misdemeanor, and on conviction thereof in a court of quarter sessions of the proper county, shall be sentenced to pay a fine of not exceeding five hundred dollars, or to undergo an imprisonment in solitary confinement of not more than one year, or both, at the discretion of the court.

II. Larceny is "the felonious taking and carrying away of the personal goods of another." 4 Bl. Com. 229. The taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence or in a clandestine manner, or where possession is obtained either by force or surprise, or by any trick, device or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods, and when the taker intends in any such case fraudulently to deprive the owner of his entire interest in the property against his will.

The least removing of the thing taken from the place where it was before, though it be not quite carried off, is a sufficient taking and carrying away to constitute larceny, and upon this ground a guest who had taken the sheets from his bed, with an intent to steal them, and carried them into the hall, where he was apprehended, was adjudged guilty of larceny. Hale P. C. c. 1, b. 35, § 25. 3 Inst. 108. 2 East P. C. 355. 1 Leach 323. So, where a person takes a horse in a close with intent to steal him, and is apprehended before he can get him out of the close. 3 Inst. 109. The prisoner got into a wagon, and taking a parcel of goods which lay in the forepart, had removed it to near the tail of the wagon, when he was apprehended. The twelve judges were of opinion, unanimously, that as the prisoner had removed the property from the spot where it was originally placed, with an intent to steal, it was a sufficient *taking and carrying away* to constitute the offence. 1 Leach 236. 2 East P. C. 356.

According to the common law, personal goods only were the subjects of larceny; nothing, therefore, which was annexed or adhering to the land could be made the subject thereof. Thus, if a person cut down trees, pluck fruit, pull down the stones or bricks of a building or the fixtures of a house, and instantly carry them away,

he cannot be convicted of stealing, because the property is part and parcel of the freehold; but if once severed and allowed to lie on the ground for some period of time before being carried away, they then become personal goods, and the subsequent wrongfully carrying them away was larceny. So strict is the law relating to land, or realty (as it is called in the law), that it was held that larceny could not be committed of the title-deeds to the land, or the box in which they were contained. So, written documents, such as bonds, bills of exchange, promissory notes, &c., were not, as such, the subjects of larceny, on the supposed ground that, as they are mere evidences of debt, they were of no intrinsic value. In our large cities, thefts of the fixtures of dwelling-houses are a great evil. Such houses, when vacant, are entered by depredators, who not only injure the owner by taking away his gas or water fixtures, but subject him to loss and injury, consequent upon the flowing of the gas or water. This defect in the common law has been remedied by the 106th section of the Penal Code. Report on the Penal Code 28.

By the common law, it is not larceny in a servant or other employee to convert to his own use property received by him for the use of his master or employer, which has never otherwise been in the possession of such master or employer, and where such servant or employee has done no act to determine his original lawful and exclusive possession, as by depositing the goods in the master's house or the like. *Waite's Case*, 1 Leach 33; *Bull's Case*, 2 Leach 980; *Bazeley's Case*, 2 Leach 973, exemplify the operations of this doctrine. In the first, a cashier of the Bank of England had received in deposit certain East India bonds, which he did not carry to the usual place of deposit, but put them in his own desk, from whence he afterwards took and sold them; this was held not to be larceny, because the bank had never actual possession of the bonds, but the possession remained always in the prisoner. The second was a case in which a confectioner, suspecting a person in his employ of purloining money received at the counter, sent an individual, who made a purchase from the servant, and paid him with a marked piece of silver; the master immediately afterwards examined the till, and not finding the marked piece, caused the servant to be searched, and found it on his person; the servant was acquitted of larceny, on the ground that the money never had been in the possession of the master, *as against the prisoner*. The third case was that of a banker's clerk receiving a deposit in bank notes from a customer, part of which, instead of placing in the drawer, he kept, and appropriated to his own use; this, after much discussion, was ultimately held by nine of the twelve judges not to be felony, inasmuch as the note kept back never had been in the possession of the banker, distinct from the possession of the prisoner; but that it would have been otherwise, if the prisoner had deposited it in the drawer and had taken it afterwards. In neither of these cases did there exist any moral difference between the crimes of which the prisoners were actually guilty, and technical larcenies; a nice and highly artificial distinction between what was, and what was not, a sufficient possession in the master of the property purloined, enabled the offenders to escape with impunity. It is to obviate such results, which are really discreditable to criminal justice, and to protect masters and employers from the want of fidelity of those in whom they are compelled, from the exigencies of business, to confide, that the 107th section of the Code was passed. Report on the Penal Code 29.

By the common law, if a carrier was intrusted with the transportation of a package of goods or other property, and appropriated the whole to his own use, he was not criminally liable; but if he opened the package, and withdrew a portion of its contents, he was guilty of larceny. This distinction proceeded upon the ground, that the act of breaking the package was an act of trespass in the carrier, by which the privity of contract was determined; whereas, if there were no breaking of the package, no severance of part of the commodity from the rest by the carrier, but the whole were parted with by him in the state in which it was delivered into his hands, there was nothing which would amount to a trespass while the package remained in his possession. This has been remedied by the 108th section of the Code. Report on the Penal Code 30.

If one find goods in the highway, and convert the same to his own use, not knowing the owner, he is not guilty of larceny; *aliter*, if he know the owner, or have

the means of identifying him *instantly*, by marks which he understands. 5 Gilman 305. 13 Jur. 499. 3 Chit. C. L. 926. Whart. C. L. § 1794-5.

At common law, larceny cannot be committed of a dog. 8 S. & R. 571. So bees are *feræ naturæ*, and although confined in the top of a tree by the owner of the tree, yet while they remain in the tree, and are not secured in a hive, they are not the subject of a felony. 3 B. 546.

The 107th section of the act of 1860 includes the case of a conductor employed by a railroad company. 4 Luz. Leg. Obs. 58.

A bailee under the 108th section of the act is any one intrusted with the possession of property for a time; it is not confined to the case of a carrier. 14 Wr. 181. But a horse-dealer, to whom a horse is delivered for sale, is not a bailee within the meaning of this section. 11 Pitts. L. J. 313.

Where A. and B. brought stolen goods to C. for sale, C. knowing them to be stolen, and the parties were arrested whilst in the act of bargaining for the sale of the goods, it was held, that there was no such receiving on the part of C. proved as would warrant his conviction. 1 Eng. L. & Eq. 567.

In Pennsylvania, it is the settled practice, on the trial of an indictment for receiving stolen goods, knowing them to have been stolen, in order to prove the guilty knowledge, to admit evidence, that the prisoner had in his possession at the same time, other stolen goods belonging to a different owner. This practice, however, appears to be opposed both to reason and authority. The mere possession of stolen goods is not evidence that the prisoner received them with a guilty knowledge, the only presumption which the law draws from such a fact is, unless explained, that they were stolen by the prisoner. How then, can proof from which it might be presumed that the defendant had stolen certain other goods, be evidence of a guilty knowledge in the receiving of those described in the indictment? In *Regina v. Oddy*, 4 Eng. L. & Eq. 572, such evidence was held to be inadmissible; and Lord Chief Justice CAMPBELL said—"the law of England does not allow one crime to be proved in order to raise a probability that another has been committed by the perpetrator of the first. The evidence which was received in the case does not tend to show that the prisoner knew that these particular goods were stolen, at the time he received them. The rule which has prevailed in the case of indictments for uttering forged bank notes, of allowing evidence to be given of the uttering of other forged notes to different persons, has gone to great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of opinion that the evidence admitted in this case, with regard to the *scienter* was improperly admitted, as it afforded no ground for any legitimate inference in respect of it." 5 Cox C. C. 210, 215. These views were urged upon the court at quarter sessions of Philadelphia in 1853, in the case of *Commonwealth v. Kella* and the learned president judge whilst announcing his determination to adhere to the established practice, admitted that it had the support neither of reason nor authority. But see 16 Pet. 360. 4 Bos. & Pull. 92. 7 Bingh. 543. 2 H. F. 288. Whart. C. L. § 1803, note. Ibid. § 681-5. 1 Bald. 514, 519. 10 Pitts. L. J. 130.

A defendant cannot be convicted of the larceny of his own goods from his bailee. 2 Brewst. 570.

Law Forms, &c.

OR A SYSTEM OF POPULAR CONVEYANCING;

EMBRACING

ARTICLES OF AGREEMENT.
ARTICLES OF COPARTNERSHIP.
DEEDS AND LEASES.
DOWER, AND RELEASE OF.
WILLS.
POWERS OF ATTORNEY.
PETITIONS FOR ROADS, BRIDGES, ETC.

PROCEEDINGS, REPORT OF VIEWERS.
PROMISSORY NOTES.
ACKNOWLEDGMENTS AND PROOFS OF DEEDS.
BONDS AND MORTGAGES.
BILLS OF SALE.
DIVORCE, PETITIONS FOR.
DUE-BILLS, RECEIPTS, ETC.

And such other Forms as are most frequently required; selected from the best authorities, and of the most approved kind.

1. Definition of an affidavit.
2. Affidavit to an account.
3. Affidavit to the account of an executor, guardian or trustee.
4. General form of articles of agreement.
5. Agreement for the purchase of a reversion after a lease of years.
6. Covenants which may be inserted.
Not to commit waste, or grant new leases.
If counsel do not approve title, &c.
Not to be responsible for the arrears of former tenants.
7. Agreement for making a quantity of shoes.
8. Agreement to bear equal charges in a lawsuit to be brought for the recovery of an estate.
9. Agreement between several to pay their proportion of expenses of defending a lawsuit expected to be brought against them for the recovery of lands.
10. General form of articles of copartnership.
11. Additional articles which may be inserted, or rejected, as parties may agree.
Not to trust any one whom the copartner shall forbid.
Not to release any debt without consent.
Not to be bound, or indorse bills.
Neither party to assign his interest.
Parties to draw quarterly.
Principal clerk to receive, &c.
The voice of the majority of partners shall bind the whole.
12. Agreement to continue copartnership by indorsement.
13. Dissolution of partnership.
14. Notices of dissolution.
15. Certificate of limited partnership.
16. Notice of limited partnership.
17. General form of assignment.
18. Assignment.
19. A general form of assignment by indorsement on the back of any instrument, whether agreement, bond, bill of sale, &c.
20. Assignment of moneys due upon account.
21. Assignment of a note to a creditor, in satisfaction of his debt; but if more than the debt is received, the note being for more, the surplus to be returned to the assignor.
22. Bill of sale of chattels.
23. Common form of bill of sale.
24. Definition of a bond.
25. Common form of bond and warrant.
26. Bond to indemnify one who indorsed a promissory note for another.
27. Bond to save harmless from paying rent, where the title is in question.
28. Condition of a bond for paying an annuity during life.
29. Refunding bond.
30. To indemnify against a bastard child.
31. Bonds, how to be assigned.
32. Assignment of bond by indorsement.
33. Short form of the same.
34. Short form of assignment of a bond, where the assignor is liable.
35. Do. where the assignor is not liable.
36. Definition of deeds.
37. Common form of a deed.
38. Ground-rent deed.
39. Grant of right of way.
40. Grantee covenants to keep the way in repair.
41. Dower.
42. Release of dower.
43. Divorce.
44. Petitions for divorce from the bonds of matrimony.
" for desertion.
" for intolerable treatment.
" for adultery.
" for divorce from bed and board, and for alimony.
" for desertion.
" for intolerable treatment.
" for adultery.
45. Definition of a lease.
46. Common form of lease.
47. Lease made by tenants in common.

48. Lessor covenants to sell the inheritance to the lessee on request.
49. Special form, with authority in certain cases to enter judgment in ejectment.
50. Assignment of a lease.
51. Short form of do.
52. Letters of attorney.
53. General form of letter of attorney.
54. General letter of substitution.
55. To receive money on a bond.
56. To receive dividends on stock.
57. To convey lands.
58. To acknowledge a deed.
59. To acknowledge satisfaction on a mortgage.
60. To lease lands for terms not exceeding twenty years.
61. Revocation of a letter of attorney.
62. Powers of attorney to attorneys at law.
Power of attorney by defendant.
" " by plaintiff to institute suit.
" " by plaintiff to conduct suit already brought.
63. Petition for tavern license.
64. Lien.
65. Form of mechanics' lien.
66. Mortgage, definition of.
67. Form of a mortgage.
68. Assignment of a mortgage.
69. Roads.
70. Petition for a public road.
71. Order of court thereon.
72. Return of jury.
73. Petition for damages.
74. Order of court thereon.
75. Petition for private road.
76. Petition for gates on a private road.
77. Petition for vacating a road.
78. Report of viewers.
79. Order of court.
80. Petition for annulling proceedings had before the road is opened.
81. Report of viewers.
82. Petition to vacate a state road supplied by a turnpike.
83. Petition for a review.
84. Petition for a road on county line.
85. Report thereon.
86. Petition for a county bridge.
87. Report thereon.
88. Petition for bridge on county line.
89. Due-bill.
90. Promissory notes, various forms.
91. Receipts of different kinds.
92. Last will and testament, definition of, and who may make.
93. Forms of wills and testaments.
94. Preambles to wills.
95. Will, &c., appointing guardians for children.
96. Will ordering estates to be appraised and divided.

1. AN AFFIDAVIT

Is an oath in writing, sworn before some judge, or officer of a court, or other person who hath authority to administer such oaths, to evince the truth of certain facts therein contained. 3 Bl. Com. 304.

2. AFFIDAVIT TO AN ACCOUNT.

CITY OF PHILADELPHIA, ss.

A. B. personally appears before the subscriber, one of the aldermen of the said city, and being duly sworn [or affirmed] doth depose and say, that the above and foregoing account has been faithfully made out from the books of original entries of C. D.; which original entries were made by this deponent, at the time the goods therein charged were sold and delivered to E. F., which sale and delivery was made by this deponent; and deponent further saith, that the prices charged for the said goods are the prices for which they were sold, and which the said E. F. at the time agreed to pay; and that the said account is in all particulars just and correct, and the credits given to the said E. F. are to the best of deponent's knowledge and belief all the credits to which the said E. F. is entitled; and deponent truly believes that the balance stated, viz., \$412.25, is justly due from the said E. F. to the said C. D. (Signed,) A. B.

Sworn and subscribed July 4th 1860, before G. H., Alderman.

3. AFFIDAVIT TO THE ACCOUNT OF AN EXECUTOR, GUARDIAN OR TRUSTEE.

CITY OF PHILADELPHIA, ss.

A. B., the above-named accountant, being duly sworn [or affirmed] doth depose and say, that the foregoing account, as the same is above stated, is just and true, both as to the items of charge and discharge therein contained, to the best of his knowledge and belief. (Signed,) A. B.

Sworn and subscribed, this 5th day of July 1870, before C. G., Alderman.

4. A GENERAL FORM OF AN

ARTICLE OF AGREEMENT made the — day of —, in the year of our Lord one thousand eight hundred and —, between A. B., of the city of Philadelphia, machinist, of the one

part, and C. D., of the county of Montgomery, farmer, of the other part: Witness, that the said A. B., for the consideration hereinafter mentioned, hath agreed, and hereby doth for himself, his heirs, executors and administrators, covenant and agree, to and with the said C. D., his heirs and assigns, that he, the said A. B., will on or before the — day of —, A. D. 1860, at the proper cost and charges of the said A. B. [or C. D.] by good and lawful conveyance and assurance, grant, convey and assure unto the said C. D., his heirs and assigns, in fee-simple, with general (or special) warranty, all that messuage, &c., (here describe the property.) *In consideration whereof* the said C. D., for himself, his heirs, executors and administrators, doth hereby covenant and agree, to and with the said A. B., his heirs and assigns that he the said C. D. will, on the execution and delivery of the conveyance and assurance as aforesaid, well and truly pay, or cause to be paid, unto the said A. B., his executors, administrators or assigns, the sum of — dollars, in manner following; setting out the mode of payment.

[Insert if desired.] "To the true and faithful performance of the several covenants and agreements aforesaid, the parties aforesaid do hereby respectively bind themselves, their heirs, executors and administrators, each to the other, his executors, administrators and assigns, in the penal sum of — dollars." In witness whereof the said parties have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of us, }
G. H. and I. J.

A. B. [SEAL.]
C. D. [SEAL.]

5. AGREEMENT FOR THE PURCHASE OF A REVERSION AFTER A LEASE FOR YEARS.

ALL that, &c. — situated, &c. — now in the tenure or occupation of E. F., which he holds by lease from the said A. B. (determinable on the — day of —, &c., A. D. —,) and the reversion or reversions and remainders of all and singular the said premises and every part and parcel thereof, and all the rent or rents and other profits arising therefrom; and, also, all the estate, right, title, interest, inheritance, expectancy, use, property, claim and demand whatsoever of him the said A. B., of, in and to, the said premises and any part thereof, &c.

6. COVENANTS, &c., WHICH MAY BE INSERTED, NOT TO COMMIT WASTE OR GRANT NEW LEASES.

"THAT the said A. B. shall not, nor will not, in the mean time, cut down any timber or trees, or commit any waste or spoil whatsoever in, or upon, the premises or any part thereof, nor shall or will grant any new leases of the premises or any part thereof without the privy or consent of the said C. D. or his heirs or assignees."

If counsel do not approve title, &c.

"AND it is agreed that if the counsel of the said C. D. shall not approve of the title of the said A. B. to the said premises, this agreement shall be void."

Not responsible for the arrears of former tenant.

"AND it is agreed between the said parties that the said C. D. shall be let into possession of the premises on or before the — day of — next; but that all arrears of rent and other profits arising from the said premises, which shall at that time be due and payable, shall belong to the said A. B., his heirs or assigns, and that he shall have full liberty to receive the same."

7. AN AGREEMENT FOR MAKING A QUANTITY OF SHOES.

ARTICLES, &c. between A. B., of, &c., of the one part, and C. D., &c., of the other part. The said A. B. for the consideration hereinafter mentioned, doth covenant that he will, at his own charge, make for the said C. D. 1000 pairs of men's shoes of the same quality of leather and goodness as, and in all other respects according to, a pattern agreed between the said parties, and of a size from 10 to 13, and deliver the same to the said C. D., at —, within — months from the date hereof. And the said C. D. in consideration thereof doth covenant to pay to the said A. B. at the rate of — per pair, after — months from the delivery of the said shoes as aforesaid. And it is agreed that if any of the said shoes shall not be made agreeably to the said pattern, and for that reason shall be rejected by the said C. D., he, the said A. B., shall take back such as shall be so refused, and deliver the said C. D. the like quantity of the goodness and make according to the pattern aforesaid. In witness, &c.

[An agreement for any other work to be done, or services to be rendered, may be made by writing a similar agreement, varying the kind and quantity of work to be done and the nature of the services to be rendered.]

8. AN AGREEMENT TO BEAR EQUAL CHARGES IN A LAWSUIT TO BE BROUGHT FOR THE RECOVERY OF AN ESTATE.

ARTICLES, &c. between, &c. Whereas, [recite the grounds of the contemplated action or actions] by reason whereof a suit or suits is, or are, to be commenced. And whereas, it is agreed by the said parties that every of them shall pay his share of the costs and charges thereof. Now, these articles witness that the said A. B., C. D., &c., and every of them, covenant with each other, that they and every of them, their respective, &c., shall pay their respective equal shares of all the costs and damages of all and every such action and actions as are, or at any time hereafter shall or may be, brought by or against them, or any or either of them. In witness, &c.

9. AN AGREEMENT BETWEEN SEVERAL TO PAY THEIR PROPORTION OF THE EXPENSES OF DEFENDING A LAWSUIT EXPECTED TO BE BROUGHT AGAINST THEM FOR THE RECOVERY OF LANDS.

ARTICLES OF AGREEMENT between A. B. of, &c., of the first part, C. D. of, &c., of the second part, D. E., of, &c., of the third part. Whereas, L. M. and N. O. are possessed of a certain tract of land, situated in, &c., and pretend that the bounds thereof extend upon some of the respective lands of the said A. B., C. D., and E. F., by reason whereof a suit is likely to be commenced. Now, the said A. B., C. D., and E. F., and every of them, do hereby covenant with each other, that they, the said A. B., C. D., and E. F., and every of them and their assigns respectively, shall and will pay their respective equal shares of all costs and damages as shall arise by reason of any such suits as shall at any time hereafter be brought against them, or any or either of them. In witness, &c.

10. GENERAL FORM OF ARTICLES OF COPARTNERSHIP.

ARTICLES OF AGREEMENT, made and concluded on the first day of January, in the year of our Lord one thousand eight hundred and sixty-one, between A. B. of R—, in the county of Beaver and state of Pennsylvania, of the one part, and C. D., of the township of A—, in the county and state aforesaid, of the other part.

The said parties have agreed, and by these presents do agree to associate themselves in the art and trade of buying, selling, vending and retailing all sorts of wares, goods and commodities belonging to the trade or business of merchandise; which said copartnership shall continue from the date of these presents, for and during, and to the full end and term of ten years next ensuing.

And to that end and purpose, he, the said A. B., hath, the day of the date of these presents, delivered in, as stock, the sum of one thousand dollars, and the said C. D. the sum of one thousand dollars, to be used, laid out and employed in common, between them, for the management of the said business to their general advantage.

And it is hereby agreed between the said parties, each for himself respectively, and for his own particular part, and for his respective executors and administrators, doth covenant, promise and agree, each with the other of them, his respective executors and administrators, in manner and form following, that is to say:—that they shall not, nor will not, at any time hereafter, use, exercise or follow the said trade or any other, during the said term, to their private benefit and advantage; but shall and will, from time to time, and at all times, during the said term, (if they shall so long live,) do their best endeavors, to the utmost of their skill and ability, for their mutual advantage, with the stock, as aforesaid, and the increase thereof.

And, also, that they shall and will, during the said term, discharge equally between them the rent of the premises which they shall rent or hire for the managing of the trade or business aforesaid:

And that all such profit, gain and increase as shall arise, by reason of the said joint business, shall be equally and proportionably divided between them, share and share alike. And also that all losses that shall happen in the said business, by bad debts, ill commodities, or otherwise, shall be paid and borne equally between them.

And further, it is agreed between them, that there shall be kept, during the said term and joint business, perfect, just and true books of accounts, wherein each of the said copartners shall enter and set down, as well all the money by him received and expended, in and about the said business, as also all commodities, and merchandises by them bought and sold by reason and on account of the said copartnership, and all other matters and things in any wise belonging or appertaining thereto, so that either of them may, at any time, have free access thereto.

And also, that the said copartners, once in three months, or oftener if need shall require, upon the request of any one of them, shall make and render each to the other, or to the executors and administrators of each other, a true and perfect account of all profits and increase by them made, and of all losses sustained; and also of all payments, receipts, disbursements, and all other things, whatsoever, by them made, received and disbursed, acted, done and suffered in the said copartnership; and the accounts so made shall and

will clear, adjust, pay and deliver, each unto the other, at the time of making such account, their equal shares of the profits so made as aforesaid.

And, at the end of the said term of ten years, or other sooner determination of these presents, (be it by the death of one of the said parties or otherwise,) they, the said copartners, each to the other, or in case of the death of either of them, the surviving party to the executors or administrators of the party deceased, shall, and will, make a true and final account of all things, as aforesaid, and in all things well and truly adjust the same. And also, that upon the making of such accounts all and every, the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, shall be equally parted and divided between them, the said copartners, their executors or administrators, share and share alike.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year above written.

Sealed and delivered in }
the presence of }
E. F., G. H.

A. B. [SEAL.]
C. D. [SEAL.]

11 ADDITIONAL ARTICLES, WHICH MAY BE INSERTED, OR REJECTED, AS THE PARTIES MAY AGREE.

Not to trust any one whom the copartner shall forbid.

AND that neither of the said parties shall sell on credit any goods, wares or merchandise, belonging to the said joint trade, to any person or persons, after notice in writing from the other of the said parties, that such person or persons are not to be credited or trusted.

Not to release any debt without consent.

AND that neither of the said parties shall, without the consent of the other, release or compound any debt or demand, due or coming to them, on account of their said copartnership, except for so much as shall be actually received and brought into the stock or cash account of the said partnership.

Not to be bound or indorse bills.

AND that neither of the said parties shall, during this copartnership, without the consent of the other, enter into any deed, covenant, bond or judgment, or become bound as bail or surety, or give any note, or accept or indorse any bill of exchange, for himself and partner, with or for any person whatsoever, without the consent of the other first had and obtained.

Neither party to assign his interest.

AND it is agreed between the said parties, that neither of them shall, without the consent of the other, obtained in writing, sell or assign his share or interest in the said joint trade, to any person or persons whatsoever.

Parties to draw quarterly.

THAT it shall be lawful for each of them to take out of the cash of the joint stock, the sum of ——— quarterly, to his own use, the same to be charged on account; and neither of them shall take any further sum for his own separate use, without the consent of the other, in writing. And any such further sum, taken with such consent, shall draw interest after the rate of six per centum; and shall be payable, together with the interest due, within ——— days, after notice in writing given by the other of the said parties.

Principal clerk to be receiver-general, &c.

THAT the principal clerk, for the time being, shall be the general receiver of all the money belonging to the said joint trade, and shall thereout pay all demands ordered by the said parties; and shall, from time to time, pay the surplus cash to such banker as the said partners shall nominate.

That the voice of the majority of the partners shall bind the whole.

THAT in all matters respecting the general transactions of the partnership, and the management of the business, the wish and opinion of any three (the number making a majority) of the partners shall govern and be binding on the other partners.

12. AN AGREEMENT TO CONTINUE A PARTNERSHIP BY INDORSEMENT.

WE, the within-named A. B. and C. D., do by these presents indorse, declare, and mutually covenant and agree, unto and with each other, his and their executors and administrators, to continue the joint trade and partnership within mentioned, for the further term of ——— years, if both of us shall so long live, to be accounted from the

expiration of the — years within limited for the continuance of the same, with the joint stock, and under and subject to the several covenants and agreements within expressed and contained.

In witness, &c.

13. DISSOLUTION OF PARTNERSHIP.

WHEREAS, by agreement made the first day of January, A. D. 1856, A. B. and C. D. did enter into copartnership, for the purpose of carrying on the trade and business of merchandising for the term of ten years.

AND WHEREAS, the said C. D. wishing to discontinue and decline the joint partnership entered into as aforesaid, he, the said C. D., hath proposed to his said partner, A. B., a dissolution, to which proposition the said A. B. hath assented. The parties, therefore, mutually consent and agree by these presents, that the partnership heretofore existing between them, be this day dissolved, and it is accordingly dissolved. And it is further stipulated and agreed mutually between them, that A. B. do take the entire stock of goods and merchandise now on hand, belonging to the partnership, at a valuation to be set upon the same by three competent persons, mutually appointed to value the same. And that he also have power to collect the debts now due to the partnership, and to recover all, and any, part of the same in the name of the firm, by suits at law or otherwise. And that, finally, the said A. B. do pay over to the said C. D., or his legal representatives, the full share and profits which shall appear to be due to the said C. D. in six months from the date hereof.

Witness their hands and seals the — day of —, Anno Domini 1858.

Sealed and delivered in }
the presence of }
E. F.
G. H.

A. B. [SEAL]
C. D. [SEAL]

14. NOTICE OF DISSOLUTION.

Notice of dissolution should be published immediately after that event takes place, in the public papers, and *special notice* sent to every correspondent, and every other person who has had any dealings with the firm. If these precautions be neglected, one partner may be held liable for the acts of another, by those who have not had notice of a dissolution.

The following notices will answer the purpose :

Notice is hereby given, that the partnership lately subsisting between A. B. and C. D., of, &c., under the firm of B. & D., expired on the — day of —; [or was dissolved on the — day of — by mutual consent, according to circumstances.] All debts owing to the said partnership are to be received by the said A. B., and all demands on the said partnership are to be presented to him for payment; or, A. B. is authorized to settle all debts due to and by the company.

[A. B.]
[C. D.]

Where one of the partners only leaves the firm, &c. :

Notice is hereby given, that the partnership between A. B., C. D., and E. F., was dissolved on the — day of — so far as relates to the said E. F. All debts due to the said partnership are to be paid, and those due from the same discharged at — where the business will be continued by the said A. B. and C. D., under the firm of B. & D. [The last words may be varied according to circumstances.]

15. CERTIFICATE OF LIMITED PARTNERSHIP.

Limited Partnerships, for certain kinds of business, are allowed and regulated by an act of assembly passed 21st March 1836. Purd. 658.

This is to certify, to all to whom these presents shall come, that we whose names are hereto subscribed, to wit, A. B., of —, merchant, C. D., of —, engineer, &c., have entered into a limited partnership, for the business of mining and transporting of mineral coal within the state of Pennsylvania, under and by virtue of an act of the general assembly of the said commonwealth, passed the 21st March 1836, entitled "An act relative to limited partnerships," and all and singular the supplements thereto, upon the terms, conditions and liabilities hereinafter set forth, to wit :

1. The said partnership is to be conducted under the name or firm of A. B.

2. The general nature of the business intended to be transacted by the said firm or partnership, is the mining of mineral coal and transporting the same, &c., (describing the character of the projected business.)

3. The general partners in the said firm are A. B., residing in —, E. F., residing in —, &c., and the special partners are C. D., residing in —, G. H., residing in — &c.

4. Each of the special partners has contributed to the common stock of said firm the amount of \$——. G. H. has so contributed, &c.

5. The said partnership is to commence immediately at and after the making and signing of this certificate, and is to terminate on the —— day of ——, Anno Domini 18——.

COUNTY OF ——, ss.

Before me the subscriber, one of the justices of the peace in and for the said county, personally came and appeared, on this —— day of ——, Anno Domini 18——, the above-named A. B., C. D., &c., who severally, in due form of law, acknowledged the foregoing certificate as and for their and each of their act and deed, to the end that the same might as such be recorded. Witness my hand and seal, this —— day of ——, in the year of our Lord, &c.

X. Y. Z., Justice of the Peace. [SEAL.]

COUNTY OF ——, ss.

Before me the subscriber, one of the justices of the peace in and for the said county, personally came and appeared, on this —— day of ——, A. D. 18——, A. B. aforementioned, one of the general partners in the firm of ——, &c., referred to in the preceding certificate, and being duly sworn, he did depose and say that the several sums specified in the said certificate to have been contributed by each of the special partners therein named to the common stock, to wit, the said C. D. the sum of —— dollars, &c., have been so contributed and actually and in good faith paid in cash.

A. B.

J. S., Justice of the Peace. [SEAL.]

16. NOTICE OF LIMITED PARTNERSHIP.

We, the subscribers, have this day entered into a limited partnership, agreeably to the provisions of the act of assembly of the commonwealth of Pennsylvania, passed the twenty-first day of March 1836, entitled "An act relative to limited partnerships," and do hereby certify that the name of the firm under which said partnership is to be conducted is A. B., that the general nature of the business to be transacted is the mining of mineral coal, and transporting the same, &c. (describing the character of the projected business), and the same will be transacted within the state of Pennsylvania; that the names of the general partners of said firm are A. B., residing in ——, and E. F., residing in ——; and the special partners are C. D., residing in ——, and G. H., residing in ——; that the capital contributed by each of the special partners, is —— dollars, in cash; that the period at which the said partnership is to commence is the —— day of ——, one thousand eight hundred and ——, and that it will terminate on the —— day of ——, one thousand eight hundred and ——.

A. B.	} General Partners.
E. F.	
C. D.	} Special Partners.
G. H.	

CITY OF PHILADELPHIA, ss.

Before me, the subscriber, one of the aldermen in and for the said city, personally came and appeared, on this —— day of ——, one thousand eight hundred and ——, J. B., printer of the "Public Ledger," and being duly sworn [or affirmed], he did depose and say that the preceding advertisement of the terms of the limited partnership between the persons therein named, had been published in the "Public Ledger," a newspaper published in said city, for the term of six weeks, next and immediately after the day of the registry of the certificate.

J. B.

Subscribed and sworn before me, the day and year aforesaid.

J. T., Alderman. [SEAL.]

17. ASSIGNMENT.

An assignment is the transferring and setting over to another of some right, title or interest. 2 Bl. Com. 480.

An assignment in trust for the benefit of creditors must be recorded within thirty days after date; it must contain no reservation for the benefit of the debtor, nor any preference in favor of a particular creditor or set of creditors. 6 B. 338. 3 P. R. 91, 92. 3 W. 198. 2 Wh. 240. 3 Ibid. 347. 4 Ibid. 399.

18. A GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

THIS INDENTURE, made the [tenth] day of [March,] Anno Domini one thousand eight hundred and [sixty,] between [A. B., of the county of York, merchant,] of the first part, and [C. D., of the same place, blacksmith,] of the second part. Whereas, the said [A. B.]

is entitled to and possessed of certain estate, but owing to his misfortunes in business is unable to pay his various creditors, but is desirous of distributing said estate among them according to their several equities. Now this indenture witnesseth, that the said [A. B.] as well for and in consideration of the premises, as of the sum of one dollar to [him] in hand well and truly paid by the said [C. D.,] at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over, unto the said [C. D.,] his heirs, executors, administrators and assigns, all the estate, real and personal, of him, the said [A. B.,] and all his rights, credits and expectancies, of whatsoever nature or kind, and whether situate, lying and being due and owing in the state of Pennsylvania or elsewhere, to have and to hold the same, with the appurtenances, unto the said [C. D.,] his heirs, executors, administrators and assigns, [to and for] their only use and behoof for ever. In trust, nevertheless, and to, for and upon, the trusts, intents and purposes hereinafter set forth, to wit: that the said party of the second part shall, by public or private sale, at [his] discretion, and by collections, suits or compromises, likewise at [his] discretion, convert all the assigned property, as speedily as may be, into cash, and as the proceeds are, from time to time, realized, (after paying all the expenses of this trust, including the cost of this instrument,) pay the creditors of the said [A. B.] their respective demands. And should any part or portion of said trust, property or funds remain, after fully complying with the trusts aforesaid, then the said party of the second part shall deliver over and reconvey the same unto the said [A. B.,] his heirs, executors, administrators and assigns. And the more effectually to enable the said party of the second part to accomplish and perform the trust aforesaid, the said [A. B.] doth hereby nominate, constitute and appoint the said party of the second part his true and lawful attorney, for him, and in his name, to ask, demand, sue for, recover and receive all such sum and sums of money, debts, goods, wares, dues, accounts and other demands whatsoever, which are now due and payable to him, or which are now due and may hereafter become payable. Giving and granting unto his said attorney, by these presents, his full and entire power, strength and authority, in and about the premises, to have, use and take all lawful ways and means, for the purposes aforesaid, and upon the receipt of any such debts, dues and sums of money, acquittances and other sufficient discharges to make, seal and deliver. In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

[A. B.] [SEAL.]

Sealed and delivered in }
the presence of us, }

W. G.

H. L.

[I accept the trust. C. D.]

CITY OF PHILADELPHIA, ss.

This [tenth] day of [March,] A. D. [1860,] personally appeared before me, (one of the aldermen of the city of Philadelphia,) the within-named [A. B.,] and acknowledged the within-written indenture to be his act and deed, and desired that the same might be recorded as such. In testimony whereof, I have hereunto set my hand and seal, the day and year last above written.

J. B., Alderman. [SEAL.]

19. A GENERAL FORM OF ASSIGNMENT, BY INDORSEMENT, ON THE BACK OF ANY INSTRUMENT, WHETHER AGREEMENT, BOND, BILL OF SALE, &c., &c.

KNOW ALL MEN by these presents, that I, the within-named A. B., in consideration of five dollars to me paid by C. D., have assigned to the said C. D., and his assigns, all my interest in the within-written instrument, and every clause, article or thing therein contained: (this short power of attorney may be inserted where proper,) and I constitute the said C. D. my attorney in my name, but to his own use, to take all legal measures which may be proper for the complete recovery and enjoyment of the assigned premises, with power of substitution. Witness my hand and seal, this, &c.

20. OF MONEYS DUE UPON ACCOUNT.

KNOW ALL MEN by these presents, that I, A. B., of —, in consideration of the sum of —, to me in hand paid by C. D., of —, do hereby assign and set over unto the said C. D., to his own proper use, without any account to be given for the same, the sum of —, and all other sum and sums of money as are remaining due and payable upon, or by virtue of the annexed account, and all my right, title, interest and demand in and to the same: And do give and grant unto the said C. D., full power and authority to demand and receive the same to his own use, and, upon receipt thereof, to give discharges for the same or any part thereof: And I, the said A. B., do hereby covenant and agree to and with the said C. D., the said sum of — is justly due and owing, and that I have not received or discharged the same or any part thereof. In witness, &c.

21. AN ASSIGNMENT OF A NOTE TO A CREDITOR, IN SATISFACTION OF HIS DEBT; BUT IF MORE THAN THE DEBT IS RECEIVED—THE NOTE BEING FOR MORE—THE SURPLUS TO BE RETURNED TO THE ASSIGNOR.

AN INDENTURE, &c., between A. B., of —, of the one part, and C. D., of —, of the other part: *Whereas*, E. F., of &c., by his promissory note, under his hand, bearing date, &c., did promise to pay to the said A. B., by the name of F. A. B., or order, the sum of, &c., — months after date, for value received, as by the same note may appear; and whereas the said sum of — is still due and owing to the said A. B.: Now this indenture witnesseth, that the said A. B., for and in consideration of the sum of one dollar, to him in hand paid, &c., hath granted, &c., unto the said C. D., his, &c., the said note, and all the money now due thereupon, with all interest accrued and grown due, or which shall accrue, &c., thereupon; and all his the said A. B.'s right, &c., to have, &c., unto the said C. D., his, &c., to the uses, intents and purposes following, to wit: it is covenanted, granted and agreed, by and between the said parties to these presents, for themselves respectively, and for their several and respective executors and administrators, that out of the money to be recovered and received on the said note, the said C. D. shall and may retain, in his own hands, the sum of — which is now justly due and owing to him from the said A. B., if he shall recover and receive so much as, &c., (*the amount of the debt*.) of the said note, &c.; and if he shall not recover so much as, &c., then it shall and may be lawful for him to retain what sum he shall recover and receive less than, &c., in his own hands, towards satisfaction and payment of the said sum of — so above mentioned to be due from the said A. B. to the said C. D. And next after the said sum of — so due as aforesaid, shall be fully recovered and received by, and retained in the hands of, the said C. D., it shall be lawful for, and it is agreed by and between the said A. B. and C. D., that the said C. D. may retain in his hands the full charges and expenses which he, the said C. D., shall have been put to, in the recovery or receiving the said sum of — (*the amount due on the note*.) or such part thereof as he shall receive, and then return to the said A. B., his, &c., the residue of the said sum of — which he, the said C. D., shall receive over and above the amount of the said sum of — so due to the said C. D., and his charges as above. [*Add a letter of attorney and covenants that he has not released nor will release the note, nor discharge any action.*]

22. BILL OF SALE OF CHATTELS.

Possession is essential to a *lien* upon *corporeal* chattels. 5 B. 398.

Delivery may be made in a very slight manner, as where one buys goods in a room, the receipt of the key is sufficient. 1 Y. 529. 17 S. & R. 99.

An agreement to sell an unfinished chattel, to be delivered at a future time, does not pass a present property. 4 R. 260. 4 W. 121. 5 Ibid. 201.

23. COMMON FORM OF BILL OF SALE.

KNOW ALL MEN by these presents, that I, A. B., of —, merchant, for and in consideration of the sum of — dollars, to me in hand paid by C. D., of the same place, at and before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained, sold and delivered, and by these presents do bargain, sell and deliver, unto the said C. D. [here insert the goods sold.] To have and to hold the said [goods] unto the said C. D., his executors, administrators and assigns, to his and their own proper use, benefit and behoof for ever. And I, the said A. B., my heirs, executors and administrators, the bargained premises unto the said C. D., his executors, administrators and assigns, from and against all person and persons whomsoever, shall and will warrant and for ever defend by these presents. In witness whereof, &c.

24. DEFINITION OF A BOND.

A bond is a deed or obligatory instrument in writing, whereby one doth bind himself and his heirs, executors and administrators, to another to pay a sum of money, or to do some other act, as to make a release, surrender an estate for quiet enjoyment, to stand to an award, save harmless, perform a will, or the like. It contains an obligation with a penalty; and a condition which expressly mentions what money is to be paid or other things to be performed, and the limited time for the performance thereof; for which the obligation is personally binding. 2 Bl. Com. 339.

A bond may be executed with or without warrant to confess judgment.

25. COMMON FORM OF A BOND AND WARRANT.

KNOW ALL MEN by these presents, that [I, A. B., of the city of Philadelphia, merchant, am] held and firmly bound unto [C. D., of the city of Philadelphia] aforesaid,

grocer,] in the sum of [— dollars,] lawful money of the United States of America, to be paid to the said [C. D., his] certain attorney, executors, administrators or assigns. To which payment well and truly to be made, [I bind myself, my] heirs, executors and administrators, firmly by these presents. Sealed with [my] seal. Dated the — day of —, in the year of our Lord one thousand eight hundred and sixty.

THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above bounden [A. B., his] heirs, executors, administrators or any of them, shall and do well and truly pay, or cause to be paid unto the above-named [C. D., his] certain attorney, executors, administrators or assigns, the just sum of [— dollars, such as aforesaid, within one year from the date hereof, with lawful interest for the same,] without any fraud or further delay, then the above obligation to be void, or else to be and remain in full force and virtue.

Sealed and delivered in }
the presence of }
[E. F.]
[G. H.]

[A. B.] [SEAL]

To [E. F.,] Esquire, attorney of the Court of Common Pleas at [Philadelphia,] in the county of [Philadelphia,] in the state of [Pennsylvania,] or to any other attorney of the said court, or of any other court there or elsewhere.

WHEREAS, [I, A. B., of the city of Philadelphia, merchant,] in and by a certain obligation bearing even date herewith, do stand bound unto [C. D., of the said city, grocer,] in the sum of [— dollars] lawful money of the United States of America, conditioned for the payment of [— dollars, such as aforesaid, within one year from the date thereof, with lawful interest for the same.] These are to desire and authorize you, or any of you, to appear for [me, my] heirs, executors or administrators, in the said court or elsewhere, in an action of debt there or elsewhere brought, or to be brought, against [me, my] heirs, executors or administrators, at the suit of the said [C. D., his] executors, administrators or assigns, on the said obligation, as of any term or time past, present, or any other subsequent term or time, there or elsewhere to be held, and confess judgment thereupon against [me, my] heirs, executors or administrators, for the sum of [— dollars,] lawful money of the United States of America, debt, besides costs of suit, by *non sum informatus, nihil dixi*, or otherwise, as to you shall seem meet; and for your or any of your so doing, this shall be your sufficient warrant. And [I] do hereby, for [myself, my] heirs, executors and administrators, remise, release and for ever quit claim unto the said [C. D., his] certain attorney, executors, administrators and assigns, all and all manner of error and errors, misprisions, misentries, defects and imperfections whatever in the entering of the said judgment, or any process or proceedings thereon, or thereto, or any wise touching or concerning the same. In witness whereof, I have hereunto set my hand and seal the — day of —, in the year of our Lord one thousand eight hundred and sixty.

[A. B.] [SEAL]

Sealed and delivered in }
the presence of }
[E. F.]
[G. H.]

Bonds should be so written and executed that the warrant can be detached from the bond for the purpose of being filed in the proper office, when the obligee or assignee of the bond desires to enter judgment against the obligor.

26. A BOND TO INDEMNIFY ONE WHO INDORSED A PROMISSORY NOTE FOR ANOTHER.

KNOW ALL, &c. Whereas, the above-bounden A., by bill or note under his hand, dated the &c., hath promised to pay unto C., or order, six months after date, the sum of —, with interest thereon till paid: and whereas the above-named B., at the request, and for the only debt of the said A., hath indorsed the said recited bill or note, and is thereby become chargeable with and for payment of the said sum of — and interest, at the time therein mentioned, as by the said bill and the indorsement thereupon may appear: Now the condition, &c., that if the said A., his executors or administrators, do, and shall, well and truly pay the said sum of — for which the said note is so given, and the interest thereof, on the day of payment therein mentioned, and in full discharge thereof, and therefrom, and from all actions, suits, charges, payments and damages by reason thereof, shall and do, at all times, well and sufficiently, save harmless, and keep indemnified the said B., his heirs, executors and administrators, and every of them, then, &c.

27. A BOND TO SAVE HARMLESS FROM PAYING RENT WHERE THE TITLE IS IN QUESTION.

THE CONDITION, &c.: That whereas there is a suit depending between the above-bounden R. C., and others, touching the right and interest in the now dwelling-house of the above-named J. F., situate, &c.: and whereas the said J. F. hath agreed to pay a rent of the same house to the said R. C., which is to pay the sum of — yearly, as the same shall

grow due: if, therefore, the said R. C., his, &c., do, and shall well and truly pay, or cause to be paid, unto the said J. F., his executors, administrators or assigns, all such rent, sum and sums of money, charges and damages, whatsoever, as shall, by due proceedings in law, be adjudged or decreed against him, the said J. F., his, &c., and all other costs and damages whatsoever, which he, the said J. F., shall sustain, or be at, by reason of any action, suit or forfeiture whatsoever, which shall or may happen, or be to the said J. F., his executors, administrators or assigns, by reason of paying the said rent, or any part thereof, to the said R. C., his executors, administrators or assigns, then, &c.

28. THE CONDITION OF A BOND FOR THE PAYMENT OF AN ANNUITY DURING LIFE.

WHEREAS, the above-bounden T. T., on the day of the date of the above-written obligation, hath had and received to his own use, of and from the above-named J. P., the sum of —, the receipt whereof he doth hereby acknowledge, in consideration whereof he, the said T. T., hath agreed to pay unto the said J. P. one annuity, or clear yearly sum of — during his natural life, to be paid in manner hereinafter mentioned:—Now, the condition of this obligation is such, that if the above-bounden J. P., his heirs, executors or administrators, or any of them, do and shall yearly, and every year, during the natural life of the above-named J. P., well and truly pay, or cause to be paid, to him, the said J. P., or his assigns, the clear yearly sum of —, lawful money, by quarterly payments, on the days hereinafter limited and appointed therefor (that is to say), on the first day of, &c., in each year, by even and equal portions, the first payment thereof to begin and be made on — next ensuing, the date of the above-written obligation; then this obligation shall be void and of no effect: but if default shall appear to be made of, or in, any of the said quarterly payments, or any part thereof, on any or either of the said days on which the same ought to be paid as aforesaid, then the same shall stand and remain in full force and virtue.

29. REFUNDING BOND.

KNOW ALL MEN by these presents, that we, A. B., of —, legatee under the testament and last will of R. S., deceased, and C. D., of —, are held and firmly bound unto E. F. and G. H., executors of the said R. S., deceased, in the sum of — dollars, to be paid to the said E. F. and G. H., or to their certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves and each of us by himself, for and in the whole, our heirs, executors and administrators, and every of them, firmly by these presents. Sealed with our seals, and dated the —

Whereas, the said R. S., by his said last will and testament, bearing date the — day of — last past, did give and bequeath unto the said A. B., a certain legacy of — dollars, [or one equal — part of his personal estate after the payment of his debts(a)] as by the said in part recited will, duly proved and remaining in the register's office at — appears.

Now the condition of this obligation is such, that if any part or the whole of the said legacy shall, at any time after payment thereof to the said A. B., appear to be wanting to discharge any debt or debts, legacy or legacies, which the said executors shall not have other assets to pay, then and in such case if the said A. B., his heirs, executors and administrators, shall and do return the said legacy or such part thereof as shall be necessary for the payment of the said debts, or the payment of a proportional part of the said legacies, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Distributees and legatees are required to give security, to be approved of by the orphans' court having jurisdiction, before they are entitled to their distributive shares or legacies. Act of 1834, § 45, 52. Purd. 302-3.

30. TO THE COUNTY FOR A BASTARD CHILD.

KNOW ALL MEN by these presents, that we, A. B. and F. G., of the township of B —, in the county of Somerset, and state of Pennsylvania, are held and firmly bound unto L. M. and N. O., overseers of the poor of the county aforesaid, for the time being, in the just and full sum of three hundred dollars, lawful money of the United States, to be paid to the said overseers of the poor, or to either of them, or either of their certain attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves jointly and severally, our heirs, executors and administrators, and every of them, firmly by these presents. Sealed with our seals, and dated the — day of —, in the year, &c.

The condition of this obligation is such, that whereas M. W., of the township of T —, in the county aforesaid, single woman, is now pregnant with child, [or hath lately been

(a) In this latter case the bond must be given in double the sum which the person shall think himself entitled to.

delivered of a male bastard child, in the township aforesaid,] and hath charged the said A. B. with being the father thereof. *If therefore* the said A. B. shall and do, from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless, and indemnified, the said L. M. and N. O., and their successors, overseers of the poor of the said county for the time being, and also all the inhabitants thereof, of and from all expenses, costs, charges and damages whatsoever which shall, or may hereafter happen or accrue, for or by reason or means of the birth, maintenance, education or bringing up of the said child, [or of such child or children wherewith the said M. W. now goeth,] and of and from all actions, suits, troubles and demands whatsoever, touching or concerning the same, then this obligation to be void, or else to be and remain in full force and virtue.

31. BONDS, HOW TO BE ASSIGNED.

Bonds may be assigned; the assignment must be under seal, and in the presence of two or more witnesses. Assignee may sue in his own name. Assignor's power to release ceases after assignment. Act 28 May 1715. Purd. 112.

The assignee take the bond subject to every defalcation which the obligor had against the obligee at the time of the assignment, or notice of the assignment. 1 D. 23. 2 Ibid. 49. 2 Y. 23. 5 Binn. 232. 4 S. & R. 177. 1 R. 277. 5 W. 151.

The assignee should give notice of the assignment to the obligor. 2 D. 49, 50.

A lapse of twenty years creates a presumption of payment, if no interest has been paid in the mean time; but if the period be shorter than twenty years, the presumption must be supported by circumstances. 2 W. C. C. 323. 9 S. & R. 379. 1 Y. 344, 584.

32. ASSIGNMENT OF A BOND BY INDORSEMENT.

KNOW ALL MEN by these presents, that I, the within-named A. B., for and in consideration of the sum of — to me in hand paid by C. D., of —, at or before the sealing of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said C. D., his executors, administrators or assigns, the within-written bond or obligation, and the sum of — mentioned in the condition thereof, together with all interest due and to grow due for the same, and all my right, title, interest, claim and demand whatsoever, of, in and to the same. And I authorize the said C. D. in my name to demand, sue for, receive, have, hold and enjoy the said sum of — and interest, to his own use absolutely forever. In witness, &c.

A. B. [SEAL]

33. A SHORT FORM FOR THE SAME.

I, A. B., do hereby assign and set over all my right, title, claim, interest, property and demand whatsoever, in and to the within bond [or bill] unto C. D., for value received. Witness my hand and seal, the — day of —.

A. B. [SEAL]

34. SHORT FORM WHERE THE ASSIGNOR IS LIABLE.

FOR VALUE RECEIVED, I do assign and set over the within obligation, and all moneys due thereon, unto A. B., his executors, administrators or assigns, hereby guarantying the payment thereof, in case of default being made by the within-named C. D. Witness my hand and seal, &c.

35. WHERE THE ASSIGNOR IS NOT LIABLE.

FOR VALUE RECEIVED, I do assign and set over the within obligation, and all moneys due thereon, unto A. B., his executors, administrators or assigns, not holding myself liable for the payment of the same; the losses, if any, and the recovery thereof, to be wholly at the risk of the said A. B. Witness my hand and seal, &c.

[There must be two *subscribing witnesses* to either of the foregoing assignments, to authorize the assignee to bring suit in his own name: if the bond be not assigned in the presence of two subscribing witnesses, as prescribed by the act of assembly, suit must be brought in the name of the original obligee, for the use of the assignee.]

36. DEFINITION OF DEEDS.

A deed is an instrument in writing on parchment, or paper, *and under seal*, containing some conveyance, contract, bargain or agreement between the parties thereto; and it consists of three principal points, *writing, sealing and delivering*. 2 Bl. Com. 295.

It should be recorded within six months. Act 18 March 1775. Purd. 321. 2 B. 497. 4 B. 140.

37. COMMON FORM OF A DEED.

THIS INDENTURE, made the — day of —, in the year of our Lord one thousand eight hundred and —, between J. D., of the city of Philadelphia, grocer, and C., his wife, of the one part, and E. F., of the said city, turner, of the other part, witnesseth, that the said J. D., and C., his wife, for and in consideration of the sum of — dollars, lawful money of the United States of America, unto them well and truly paid by the said E. F., at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release and confirm, unto the said E. F., and to his heirs and assigns, all that certain two-story brick messuage or tenement, and lot or piece of ground thereunto belonging, situate on the — side of — street, in the said city of Philadelphia, beginning at the distance of — feet from the — side of — street, and extending thence — in front or breadth on — street — feet, and continuing of that breadth in length or depth — feet, bounded on the — by ground now or late of A. B., on the — by a lot late of the said A. B., on the — by a certain small lot, and on the — by the said — street; being the same premises which S. R., of the said city, grocer, and W., his wife, by indenture bearing date the — day of —, Anno Domini one thousand eight hundred and —; intended to be recorded, (or, recorded in the office for recording deeds, &c., for the city and county of Philadelphia, in deed book —, No. —, page —, &c., as the case may be,) granted and conveyed to the said J. D., in fee, subject to the payment of a yearly rent, charge or sum of — Spanish silver milled dollars, in half-yearly payments, without deduction for taxes, &c., as by the said recited indenture fully appears; together with all and singular the improvements, ways, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever of them the said J. D., and W. his wife, in law, equity or otherwise howsoever, of, in and to the same and every part thereof; to have and to hold the said two-story brick messuage or tenement, and lot of ground above described, hereditaments and premises hereby granted or mentioned, and intended so to be, with the appurtenances, unto the said E. F., his heirs and assigns, to and for the only proper use and behoof of the said E. F., his heirs and assigns, forever; under and subject to the payment of the aforesaid yearly rent-charge, or sum of — dollars, in half-yearly payments, as the same shall hereafter grow due and payable, clear of taxes, &c. And the said J. D., for himself, his heirs, executors and administrators, doth by these presents covenant and agree to and with the said E. F., his heirs and assigns, that the he said J. D., and his heirs, all and singular, the hereditaments and premises hereby granted with the appurtenances unto the said E. F., his heirs and assigns, against him the said J. D., and his heirs, and against all and every other person or persons whomsoever lawfully claiming, or to claim the same by, from or under him, them or any of them, shall and will, subject as aforesaid, warrant, and forever defend, by these presents. In witness whereof, the said parties have hereunto interchangeably set their hands and seals, dated the day and year first above written.

38. GROUND-RENT DEED.

THIS INDENTURE, made the [sixth] day of [June], in the year of our Lord one thousand eight hundred and [sixty], between [A. B., of the county of Bucks, state of Pennsylvania, farmer,] of the one part, and [C. D., of the county of Dauphin, of the same state, tanner,] of the other part, witnesseth, that the said [A. B.,] as well for and in consideration of the sum of one dollar, lawful money, unto [him,] at or before the sealing and delivery hereof, by the said [C. D.] well and truly paid, the receipt whereof is hereby acknowledged, as of the payment of the yearly rent and taxes, and performance of the covenants and agreements hereinafter mentioned, which, on the part of the said [C. D.,] his heirs and assigns, is and are to be paid and performed, [have] granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents [do] grant, bargain, sell, alien, enfeoff, release and confirm, unto the said [C. D.,] all that certain lot or piece of ground [Here describe correctly the property.] Together with all and singular the [improvements,] ways, streets, alleys, passages, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances whatsoever unto the said hereby granted premises belonging, or in anywise appertaining, and the reversions and remainders thereof: to have and to hold the said described lot or piece of ground, hereditaments and premises, hereby granted, with the appurtenances, unto the said [C. D.,] his heirs and assigns, to the only proper use and behoof of the said [C. D.,] his heirs and assigns, forever: yielding and paying therefor and thereout, unto the said [A. B.,] his heirs and assigns, the yearly rent or sum of [twenty dollars,]

lawful money of the United States of America, in [half] yearly payments, on the [first] day of [January and July,] in every year hereafter, forever, without any deduction, defalcation or abatement for any taxes, charges or assessments whatsoever, to be assessed, as well on the said hereby granted lot as on the said yearly rent, hereby and thereout reserved, the first [half] yearly payment thereof to be made on the [first] day of [January,] one thousand eight hundred and [sixty.] And on default of paying the said yearly rent, on the days and times and in manner aforesaid, it shall and may be lawful for the said [A. B.,] his heirs and assigns, to enter into and upon the said hereby granted premises, or any part thereof, and into the buildings thereon [erected or] to be erected, and to distrain for the said yearly rent so in arrear and unpaid, and to proceed with and sell such distrained goods and effects, according to the usual course of distresses for rent-charges. But if sufficient distress cannot be found upon the said hereby granted premises, to satisfy the said yearly rent in arrear, and the charges of levying the same, then and in such case, it shall and may be lawful for the said [A. B.,] his heirs and assigns, into and upon the said hereby granted lot, and all improvements, wholly to re-enter, and the same to have again, repossess and enjoy, as in his and their first and former estate, and title in the same, and as though this indenture had never been made. And the said [C. D.,] for himself, his heirs, executors, administrators and assigns, doth covenant, promise and agree, to and with the said [A. B.,] his heirs and assigns, by these presents, that he, the said [C. D.,] his heirs and assigns, shall and will well and truly pay, or cause to be paid to the said [A. B.,] his heirs and assigns, the aforesaid yearly rent, or sum of [twenty dollars,] lawful silver money aforesaid, on the days and times hereinbefore mentioned and appointed for payment thereof, without any deduction, defalcation or abatement for any taxes, charges or assessments whatsoever; it being the express agreement of the said parties, that the said [C. D.,] his heirs and assigns, shall pay all taxes whatsoever, that shall hereafter be laid, levied or assessed, by virtue of any laws whatever, as well on the said hereby granted lot and buildings thereon [erected or] to be erected, as on the said yearly rent now charged thereon. Also, that the said [C. D.,] his heirs or assigns, shall and will, within [two years] from the date hereof, erect and build on the said hereby granted lot, [a good three-story brick house,] of sufficient value to secure the said yearly rent hereby reserved. [And further the said [C. D.,] doth hereby for himself, his heirs, executors, administrators and assigns, expressly waive, relinquish and dispense unto the said [A. B.,] his heirs, executors, administrators and assigns, all and every provisions and provision in the act of assembly of the commonwealth of Pennsylvania, passed on the ninth day of April, A. D. 1849, entitled "an act to exempt property to the value of three hundred dollars from levy and sale on execution and distress for rent," so far as the same may exempt the said hereby granted lot, and any part thereof, from levy and sale, by virtue of any writ of execution that may be issued upon any judgment that may be obtained or entered in any action for the recovery of the rent hereby reserved, or hereby covenanted to be paid, and of any arrears thereof, and of the costs of such action and execution; so that it shall be lawful for the said [A. B.,] his heirs, executors, administrators or assigns, to proceed by execution, to levy upon and sell the said hereby granted lot of ground, and every part thereof, with the buildings and improvements as aforesaid, in the same manner and to the same extent, and to the same effect, to all intents and purposes, as if the said act of assembly had not been passed.] *Provided always,* nevertheless, that if the said [C. D.,] his heirs or assigns, shall and do at any time, pay or cause to be paid to the said [A. B.,] his heirs or assigns, the sum of [four hundred dollars,] lawful money as aforesaid, and the arrearages of the said yearly rent, to the time of such payment, then the same shall forever thereafter cease and be extinguished, and the covenant for payment thereof shall become void; and then he, the said [A. B.,] his heirs or assigns, shall and will, at the proper costs and charges in the law of the said grantee, [his] heirs or assigns, seal and execute a sufficient release and discharge of the said yearly rent, hereby reserved to the said [A. B.,] his heirs and assigns, forever, anything hereinbefore contained to the contrary thereof notwithstanding. And the said [A. B.,] for himself, his heirs, executors and administrators, doth covenant, promise and agree, to and with the said [C. D.,] his heirs and assigns, by these presents, that he, the said [C. D.,] his heirs and assigns, paying the said yearly rent, or extinguishing the same, and taxes, and performing the covenants and agreements aforesaid, shall and may, at all times hereafter forever, freely, peaceably and quietly, have, hold and enjoy, all and singular the premises hereby granted, with the appurtenances, and receive and take the rents and profits thereof, without any molestation, interruption or eviction, of [him,] the said [A. B.,] or his heirs, or of any other person or persons whomsoever, lawfully claiming or to claim, by, from or under, [him,] them or any of them, or by or with [his,] their or any of their act, means, consent or procurement. In witness whereof, the said parties have interchangeably set their hands and seals hereunto. Dated the day and year first above written.

Sealed and delivered in }
the presence of us, }

E. F. G. H.

A. B. [SEAL.]
C. D. [SEAL.]

39. GRANT OF A RIGHT OF WAY.

THIS INDENTURE, made, &c., between A. B., of, &c., [the grantor,] of the one part, and C. D., of, &c., [the grantee,] of the other part, witnesseth, that in consideration of \$—— paid to the said A. B. by the said C. D., the receipt whereof is acknowledged by these presents, the said A. B., for himself, his heirs and assigns, covenants and grants, with and to the said C. D., his heirs and assigns, that it shall be lawful for the said C. D., his heirs and assigns, and their agents and servants, and the tenants and occupiers for the time being, of the messuage and farm of the said C. D., called, &c., hereinafter mentioned, and all and every other person and persons for his and their respective benefit and advantage, from time to time, and at all times forever hereafter, at his and their respective will and pleasure, by night and by day, and for all purposes, to go, return, pass and repass, with horses, carts, wagons and other carriages, laden or unladen, and also to drive cattle and other beasts on, through, along and over a certain road or way, lately formed and fenced off by the said A. B., out of, and from and intersecting certain closes or fields, called, &c. —, in M——, in the county of —, belonging to him, the said A. B., and which said road or way is the width of fourteen feet or thereabouts, and leads from the turnpike-road or public highway, opposite or adjacent to the said messuage and farm of the said C. D., called, &c., in the town of — aforesaid, unto and towards a certain road or lane communicating with the farm and lands of the said C. D., called, &c., in the town of —, in the same county of, &c., which same road or way, the right or liberty of passing over which is hereby granted, and the course and direction thereof, are more particularly described in a map or plan indorsed on these presents; and that it shall be lawful for the said C. D., his heirs and assigns, to make and lay causeways, or otherwise to repair and amend the same as there shall be occasion.

40. GRANTEE COVENANTS TO KEEP THE WAY IN REPAIR, &c.

AND the said C. D., for himself, his heirs and assigns, hereby covenants with the said A. B., his heirs and assigns, that he, the said C. D., his heirs and assigns, will, from time to time, and at all times hereafter, at his or their own cost and expense, repair and amend, and keep repaired and amended, in a proper, substantial and workmanlike manner, the said road or way, the right of passing in and over which is hereby granted, and also the gate erected by the said A. B. across the said road, at the northern end or extremity thereof, and the lock and fastening belonging thereto, and will, from time to time, and at all times hereafter, at the like cost and expense of the said C. D., his heirs or assigns, *repair and renew the quickest hedge and fence lately planted by the said A. B. on both sides of the said road or way*; and also that he, the said C. D., his heirs or assigns, and his and their agents and servants, and the tenants and occupiers for the time being of the said messuage and farm called, &c., using the said road or way, will, from time to time, and at all times, immediately after he or they shall have used and passed through the said gate, shut and lock the same. In witness, &c.

41. DEFINITION OF DOWER.

Dower is the widow's right in an estate of inheritance of her husband after his death. It consists of one-third part of all the lands and tenements whereof the husband was seized at any time during the coverture, to hold to herself for the term of her natural life. 2 Bl. Com. 129. Widow's share of the intestate's estate is in lieu of dower. Act 8 April 1833, § 16. Purd. 362.

A devise or bequest, by a husband to his wife, of any portion of his estate or property, is in lieu and bar of her dower. Act 8 April 1833, § 11. Purd. 362. But she may *elect* to take her dower in his real estate, and her share of his personality under the intestate laws. Purd. 362. Widow is compelled to accept such devise or bequest in lieu of dower, or to waive such devise or bequest and take her dower. Act 29 March 1832, § 35. Purd. 362.

42. RELEASE OF DOWER.

To all to whom these presents shall come, A., of, &c., relict of B., late, &c., sends, greeting: Know ye, that the said A., as well for and in consideration of the sum of — to her in hand, at or before the sealing and delivering of these presents, by her son A. B., of, &c., well and truly paid, the receipt whereof the said A. doth hereby acknowledge, and thereof doth acquit and discharge the said A. B., his heirs, executors and assigns, forever; and for the love and affection she hath to her said son, and for other good causes and considerations, her thereunto especially moving, she, the said A., hath granted, remised, released and forever quit-claimed, and by these presents doth fully and absolutely grant, remise, release and forever quit-claim, unto the said A. B., his heirs and assigns, forever, all the dower and thirds, right and title of dower and thirds, and all other right,

title, interest, claim and demand whatsoever, in law and equity, of her, the said A., of, in, and to, [a certain parcel of land, &c., with the parcels, and how it descended to A. and B.,] so that neither she, the said A., her heirs, executors or administrators, nor any other person or persons for her, them or any of them, shall have, claim, challenge or demand, or pretend to have, claim, challenge or demand, any dower or thirds, or any other right, title, claim or demand, of, in or to the said premises, but thereof and therefrom shall be utterly debarred and excluded forever by these presents.

Signed,

A. [SEAL]

In witness, &c.

D. E.

G. H.

43. DIVORCE.

Divorces are of two kinds, one total, the other partial; the one *a vinculo matrimonii* [from the bond of matrimony]; the other *a mensa et thoro* [from bed and board]. 1 Bl. Com. 440. Purd. 345.

The causes of divorce from the bond of matrimony, are,—1. Impotency at the time of the contract: 2. Knowingly entering into a second marriage: 3. Adultery: 4. Wilful and malicious desertion and absence from the habitation of the other, without a reasonable cause, for and during the space of two years: 5. Cruel and barbarous treatment, endangering the wife's life: 6. Indignities offered to her person, so as to render her condition intolerable, and life burdensome, and thereby force her to withdraw from her house and family: (a) 7. Where the marriage was procured by fraud, force or coercion, and has not been subsequently confirmed by the injured party: 8. Where either of the parties has been convicted of felony, and sentenced to an imprisonment for a term exceeding two years: 9. Cruel and barbarous treatment by the wife, rendering the husband's condition intolerable and life burdensome: 10. Personal abuse, or such conduct on the part of either husband and wife, as to render the condition of the other party intolerable and life burdensome.

The acts of 1817 and 1862 (Purd. 349, 1273), also allow a divorce from bed and board, for the 3d, 5th and 6th causes, and allow the wife such alimony as her husband's circumstances will admit of. 1 W. 263. *Alimony*, at common law, is that allowance which is made to a woman for her support out of her husband's estate, in case of divorce from bed and board. 1 Bl. Com. 441.

Marriages within the prohibited degrees are void, and the courts are authorised to decree such marriages to be null and void, in the same mode, and after the same proceedings as for a divorce. Purd. 346-7.

44. PETITION OR LIBEL FOR DIVORCE, ON THE GROUND OF DESERTION.

To the Honorable, &c.

THE libel of A. B., or A. B. by her next friend, C. D., respectfully sheweth: That your libellant, [petitioner,] on the — day of —, 1856, was contracted in matrimony, and married to a certain C. D., and from that time until the — day of —, 1860, lived and cohabited with the said C. D., as —, and as such was owned and acknowledged by him,

(a) A wife's absence with her husband's previous consent, or subsequent approval, is not a malicious and wilful desertion; but such consent or approval is revocable, and the parties, by such revocation, are placed in the same position which they occupied at the time it was given: the party continuing such absence, will then be guilty of desertion, unless there be *reasonable cause* to justify it; which must be such as would itself be a sufficient ground of divorce. 1 Am. L. J. 389. 1 P. 78. The *cruelty*, within the Pennsylvania statute, which entitles a wife to a divorce from her husband, is actual personal violence, or the reasonable apprehension of it; or such a course of treatment as endangers her *life or health*, and renders cohabitation unsafe. Ibid. 9 Barr 167. 2 Am. L. J. 198. A wife's insanity is not a bar to a divorce for adultery,

committed by her when she was insane. 6 Barr 332. The refusal of a foreigner who arrives and becomes domiciled here, to receive his wife who follows him hither, is a virtual turning her out of doors, and the court of common pleas may, on her petition, decree her alimony. 8 W. & S. 251. The removal and domicile of husband and wife in another state, is no bar to proceedings for divorce on the part of the wife, for causes occurring in this state, prior to the removal, if she has returned and resided in this state one year previous to the filing of the libel. 6 Barr 449. And by act of 26th April 1860, the jurisdiction of the courts is extended to all cases of divorce for desertion or adultery, notwithstanding the parties were, at the time of the occurrence of said causes, domiciled in another state. Purd. 346.

and so deemed and reputed by her neighbors and acquaintances: and although by the laws of God, as well as by their mutual vows and faith plighted to each other, they were bound to that uniform constancy and regard which ought to be inseparable from the marriage state, yet, so it is, that the said C. D., from the — day of —, 1860, hath wilfully and maliciously deserted and absented himself from the habitation of this libellant, [petitioner,] without any just or reasonable cause, and such desertion hath persisted in for the term of two years and upwards, and yet doth continue to absent himself from the said libellant. Wherefore, your libellant further showing that — is a citizen of the state of Pennsylvania, and has resided therein for upwards of one whole year previous to the filing of this — libel, prays your honors that a subpoena may issue forth, to summon the said C. D. to appear in this honorable court, at — term next, to answer the complaint aforesaid: And also that a decree of this honorable court may be made for the divorcing of him, the said C. D., from the society, fellowship and company, of this libellant, in all time to come, and — this libellant from the marriage bond aforesaid, as if — had never been married, or as if the said C. D. were naturally dead. And, &c.

A. B., by her next friend, C. D.

The above-named A. B. being duly sworn, says the facts contained in the above libel are true to the best of — knowledge and belief; and that the said complaint is not made out of levity and collusion between — and — said — and for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the said libel.

(Signed,) A. B.

Sworn before me, this — day of —, 1860.

C. D., Justice of the Peace.

From the bond of matrimony—on the ground of intolerable treatment.

To the Honorable, &c.

THE petition of A. C., or A. B., by her next friend C. D., respectfully sheweth: That your petitioner, on the — day of —, 1850, was lawfully joined in marriage with C. D., and from that time until the — day of —, 1861, lived and cohabited with — the said C. D., as — and was owned and acknowledged by him, and so deemed and reputed by her neighbors and acquaintances; and although by the laws of God, as well as by their mutual vows, they then were reciprocally bound to that uniform regard which ought to be inseparable from the marriage state, yet so it is, that the said C. D. has offered such indignities to the person of your petitioner, as to render — condition intolerable, and — life burdensome, and thereby forced — to withdraw from — house and company. Wherefore, your libellant [petitioner] further showing that — is a citizen of the state of Pennsylvania, and has resided therein for upwards of one whole year previous to the filing of — libel, prays your honors that a subpoena may issue forth, to summon the said C. D. to appear in this honorable court, at — term next, to answer the complaint aforesaid; and also, that a decree of this honorable court may be made for the divorcing of him, the said C. D., from the society, fellowship and company, of this libellant, in all time to come, and — the libellant from the marriage bond aforesaid, as if — had never been married, or as if C. D. were naturally dead. And this libellant, &c.

A. B., by her next friend, C. D.

(Here add the usual affidavit.)

From the bond of matrimony—on the ground of adultery.

To the Honorable, &c.

THE petition of A. C. by — next friend, C. D., respectfully sheweth: That your petitioner, on the — day of —, in the year of our Lord one thousand eight hundred and fifty, was lawfully joined in marriage with E. F., — and from that time hath lived and in all respects demeaned herself as a kind and loving wife. And although by the laws of God, as well as by the natural vows plighted to each other, they were bound to that chastity which ought to be inseparable from the marriage state, yet the said E. F., in violation of his marriage vow, hath, for a considerable time past, given himself up to adulterous practices, and been guilty of adultery with a certain G. H., and divers other persons to your petitioner unknown. Wherefore, your libellant [petitioner] further showing that she is a citizen of the state of Pennsylvania, and has resided therein for upwards of one whole year previous to the filing of this her libel, [petition,] prays your honors that a subpoena may issue forth, to summon the said C. D. to appear in this honorable court, at — term next, to answer the complaint aforesaid. And also that a decree of this honorable court may be made for the divorcing of him the said C. D., from the society, fellowship and company, of this libellant, [petitioner,] for all time to come; and

her, this libellant, from the marriage bond aforesaid, as if she had never been married or as if the said C. D. were naturally dead. And this libellant, &c.

(Signed,) A. B., by her next friend, C. D.
(Here add the usual affidavit.)

From bed and board, and for alimony—on the ground of desertion.

To the Honorable, &c.

THE petition of A. B., by her next friend C. D., respectfully sheweth, that your libellant [petitioner] on the — day of —, in the year of our Lord 1852, was contracted in matrimony and married to a certain C. D., and from that time until the — day of —, in the year of our Lord 1860, lived and cohabited with him as his wife, and as such was owned and acknowledged by him, and so deemed and reputed by all her neighbors and acquaintances, and although by the laws of God, as well as by their mutual vows and faith plighted to each other, they were reciprocally bound to that kindness and uniform regard which ought to be inseparable from the marriage state, yet, so it is, that the said C. D. from the said — day of —, in the year of our Lord 1860, hath wilfully and maliciously absented himself from the habitation of this libellant [petitioner] without just or reasonable cause; and such desertion has persisted in for the term of two years and upwards, and yet doth continue to absent himself, from the said libellant. Wherefore, your libellant, further showing that she is a citizen of this state, and hath resided therein for one whole year and more previous to the filing of this petition, prays your honors that a subpoena may issue from the said court, directed to the said C. D., commanding him to appear at the next — term of the said court to answer this petition, and also that a decree of the said court may be given, granting this libellant a divorce from bed and board, and, also, allowing her such alimony as the said C. D.'s circumstances will admit of, so as the same do not exceed the third part of the annual profit or income of his estate or his occupation and labor. And the said libellant as in duty bound will ever pray, and so forth.

(Signed,) A. B., by her next friend, C. D.
(Here add the usual affidavit.)

From bed and board, and for alimony—on the ground of intolerable treatment.

To the Honorable, &c.

THE petition of A. B., by her next friend C. D., respectfully sheweth, that your libellant on the — day of —, in the year of our Lord 1857, was contracted in matrimony and married to a certain E. F., and from that time until the — day of —, in the year of our Lord 1862, lived and cohabited with him as his wife, and as such was owned and acknowledged by him, and so deemed and reputed by all her neighbors and acquaintances, and although by the laws of God as well as by their mutual vows and faith plighted to each other, they were reciprocally bound to that kindness and uniform regard which ought to be inseparable from the marriage state, yet, so it is, that the said E. F. did, prior to the said — day of —, offer such indignities to her person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and family. Wherefore, your libellant [petitioner] further showing that she is a citizen of this state, and hath resided therein for one whole year and more previous to the filing of this petition, prays your honors, that a subpoena may issue from the said court, directed to the said E. F., commanding him to appear at the next — term of the said court to answer this petition, and, also, that a decree of the said court may be given granting this libellant a divorce from bed and board, and also allowing such alimony as the said E. F.'s circumstances will admit of, so as the same do not exceed the third part of the annual profit or income of his estate or of his occupation and labor. And the said libellant as in duty bound will ever pray, and so forth.

(Signed,) A. B., by her next friend, C. D.
(Here add the usual affidavit.)

From bed and board, and for alimony—on the ground of adultery.

To the Honorable, &c.

THE petition of A. B., by her next friend, C. D., respectfully sheweth; That your libellant [petitioner] on the — day of —, in the year of our Lord 1858, was contracted in matrimony, and married, to a certain C. D., and from that time until the — day of —, in the year of our Lord 1861, lived and cohabited with him as his wife, and as such was owned and acknowledged by him, and so deemed and reputed by all her neighbors and acquaintances, and although by the laws of God, as well as by their mutual vows and faith plighted to each other, they were reciprocally bound to that kindness and uniform regard which ought to be inseparable from the marriage state, yet so it is, that the said C. D., in violation of his marriage vow, hath, for a considerable time past, to wit, from the — day of —, in the year of our Lord 1861, given himself up to adulterous

practices, and has been guilty of adultery with a certain G. H. and divers other persons to your libellant unknown. Wherefore, your libellant further showing that she is a citizen of this state, and has resided therein for one whole year and more previous to the filing this petition, prays your honors that a subpoena may issue from the said court, directed to the said C. D., commanding him to appear at the next — term of the said court, to answer this petition, and also that a decree of the said court may be given granting this libellant a divorce from bed and board, and also allowing her such alimony as the said C. D.'s circumstances will admit of, so as the same do not exceed the third part of the annual profit or income of his estate or his occupation and labor. [And also that the said C. D. may be decreed to pay to your libellant one-half the value of all money and property, which he received by, through, or from your libellant, as her individual money and property.] And the said libellant as in duty bound will ever pray, and so forth, &c.

Signed, A. B. by her next friend, C. D.

(Here add the usual affidavit.)

45. DEFINITION OF A LEASE.

A lease is a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, years or at will, but always for a less time than the lessor hath in the premises. 2 Bl. Com. 317.

Leases for a time exceeding three years, unless put in writing and signed by the parties, have the force and effect of leases at will only. Act 21 March 1772. Purd. 497.

A lease for no determinate period of time is a lease from year to year so long as both parties please. 4 R. 123.

Covenants to repair, pay rent, &c., run with the land. 1 D. 210. 1 W. C. C. 375. 1 Br. 221. 2 Y. 74.

He who lets is called the landlord or the *lessor*; he who takes the premises is called the tenant or the *lessee*.

46. COMMON FORM OF A LEASE.

THIS INDENTURE, made the — day of —, between H. P., —, of —, tailor, of the one part, and J. C., of —, tinner, of the other part, witnesseth: that the said H. P., for and in consideration of the yearly rent and covenants hereinafter mentioned, and reserved on the part and behalf of the said J. C., his executors, administrators and assigns, to be paid, kept and performed, hath demised, set and to farm let, and by these presents doth demise, set and to farm let, unto the said J. C., his executors, administrators and assigns, all that messuage and tract of land situate, &c., together with all and singular the buildings, improvements, rights, members and appurtenances, whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof: to have and to hold the said messuage and tract of land, and all and singular the premises hereby demised, with the appurtenances, unto the said J. C., his executors, administrators and assigns, from the — day of — next ensuing the date hereof, for and during the term of — years thence next ensuing and fully to be complete and ended, yielding and paying for the same unto the said H. P., his executors, administrators and assigns, the yearly rent or sum of — dollars, in four quarterly payments of — dollars each, on the first day of April, first day of July, first day of October and first day of January, in each and every year. And the said J. C., for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said H. P., his heirs, executors, administrators and assigns, by these presents, that the said J. C., his heirs, executors and administrators, or some of them, shall and will well and truly pay or cause to be paid unto the said H. P., his heirs, executors, administrators or assigns, the said yearly rent of — dollars, hereby reserved, on the several days and times hereinafter mentioned and appointed for payment thereof, according to the true intent and meaning of these presents. And the said H. P., for himself, his heirs, executors and administrators, doth covenant, promise, grant and agree to and with the said J. C., his executors, administrators and assigns, by these presents, that he the said J. C., his executors, administrators and assigns, (paying the rent and performing the covenants aforesaid,) shall, and lawfully may, peaceably and quietly have, hold, use, occupy, possess and enjoy the said demised premises, with the appurtenances, during the term aforesaid, without the lawful let, suit, trouble, eviction, molestation or interruption of the said H. P., his heirs or assigns, or of any other person or persons whatsoever. In witness, &c.

47. A LEASE MADE BY TENANTS IN COMMON.

THIS INDENTURE, made, &c., between A. B., &c., of the first part, C. D., &c., of the second part, and E. F., &c., of the third part, witnesseth: that for and in consideration

of the rents, covenants and agreements hereinafter reserved and contained, and which, by and on the part and behalf of the said E. F., his, &c., are to be paid, done and performed, he the said A. B., as to one undivided moiety or half part, the whole into two equal parts to be divided, of all that messuage or tenement with the appurtenances hereinafter particularly mentioned and described, and the said C. D., as to one undivided moiety or half part, the whole into two equal parts to be divided of all that said, &c., have, and each of them hath, (according to their several and respective shares and proportions aforesaid,) demised, leased, set and to farm let, and by these presents do and each of them doth demise, lease, set and to farm let unto the said E. F., his, &c., all that, &c. (Describe the parcels and insert the usual covenants, and then the following:) (*A covenant by one of the lessors for quiet enjoyment of one undivided moiety.*)

And the said A. B., for himself, his heirs, executors and administrators, doth covenant, &c., to and with the said E. F., his executors, administrators and assigns, in manner following: (that is to say) that he the said E. F., his executors, administrators or assigns, paying the rent hereby reserved and performing the covenants and agreements hereinbefore mentioned and contained, and which, on his and their parts, are or ought to be paid and performed, shall and may peaceably and quietly have, hold, use, occupy, possess and enjoy the said messuage, &c., with the appurtenances hereby demised as to one undivided moiety or half part thereof only, for and during the said term hereby granted, without the let, suit, trouble, molestation or interruption of him the said A. B., his heirs, executors or administrators, or any other person or persons, lawfully claiming or to claim, by, from or under him, them or any of them. (Add the like covenant from C. D. as to one undivided moiety only.)

48. THE LESSOR COVENANTS TO SELL THE INHERITANCE TO THE LESSEE ON REQUEST.

AND in case the said C. D., (the lessees) his heirs, executors or administrators or assigns, shall, during the said term, be desirous to purchase the inheritance of the premises hereby demised, and shall give notice of such intention or desire in writing, during the same term, unto the said A. B., (the lessor,) his heirs or assigns, at his or their usual place of abode, then he, the said A. B., his heirs and assigns, shall and will, at any time during the said term, at the charges in the law of the said C. D., his heirs, executors and administrators or assigns, convey and assure the inheritance of the said hereby demised premises unto the said C. D., his heirs, executors, administrators or assigns, and to the heirs and assigns of him or them, or as he or they shall direct, he, the said C. D., his heirs, executors, &c., paying unto the said A. B., his heirs or assigns, the sum of — as the consideration of such purchase, and also paying to him or them all arrears of rent which shall be then due, &c.

49. SPECIAL FORM OF A LEASE WITH AUTHORITY, IN CERTAIN CASES, TO ENTER JUDGMENT IN EJECTMENT.

MEMORANDUM. [That A. B.,] hath demised to [C. D.,] a messuage or tenement [situate on the north side of Cedar street, No. 389, between Third and Fourth streets] for the term of [ten] years from the date hereof, at a yearly rent of [four hundred] dollars, payable quarterly, the first payment to be made on the [tenth] day of [June] next; and if the rent shall remain unpaid on any day on which the same ought to be paid, then the lessor may enter on the premises, and proceed by distress and sale of the goods there found, to levy the rent and all costs. The lessee covenants with the lessor to pay the rent punctually as above provided for, and during the term to keep, and at the end thereof peaceably deliver up, the premises in good order and repair, reasonable wear and tear and damage by accidental fire excepted, and not assign this lease, nor underlet the premises or any part thereof: and if the lessee shall in any particular violate any one of his said covenants, then the lessor may cause a notice to be left on the premises of his intention to determine this lease, and at the expiration of [thirty] days from the time of so leaving such notice, this lease shall absolutely determine: and upon the expiration or other determination of this lease, any attorney may immediately thereafter, as attorney for the lessee, sign an agreement for entering in any competent court an amicable action and judgment in ejectment (without any stay of execution) against the lessee and all persons claiming under him, for the recovering, by the lessor, of possession of the hereby demised premises, for which this shall be a sufficient warrant; and the lessee hereby releases to the lessor all errors and defects whatsoever, in entering such action or judgment, or in any proceeding thereon, or concerning the same. No such determination of this lease, nor taking or recovering possession of the premises, shall deprive the lessor of any action against the lessee for the rent or for damages. All rights and liabilities herein given to or imposed upon either of the parties hereto, shall extend to the heirs, executors, administrators and assigns of such party.

In witness whereof the said parties have hereunto set their hands and seals. Dated the first day of June, A. D. 1860.

Signed, A. B. [SEAL.]
C. D. [SEAL.]
in the presence of
E. F., G. H.

50. ASSIGNMENT OF A LEASE.

KNOW ALL MEN by these presents, that I, the within-named E. D., for and in consideration of the sum of one hundred dollars, to me in hand paid by E. F., of, &c., at and before the en sealing and delivering hereof, the receipt whereof I do hereby acknowledge, have granted, assigned and set over, and by these presents do grant, assign and set over, unto the said E. F., his executors, administrators and assigns, the within indenture of lease, and all that messuage, &c., thereby demised, with the appurtenances: *And also*, all my estate, right, title, term of years yet to come, claim and demand whatsoever, of, in, to or out of the same;—*To have and to hold* the said messuage, &c., unto the said E. F., his executors, administrators and assigns, for the residue of the term within mentioned, under the yearly rent and covenants within reserved and contained, on my part and behalf to be done, kept and performed. In witness whereof, &c.

51. A SHORTER FORM.

MEMORANDUM. This 1st day of January 1860, the within-named E. D. hath this day assigned and made over unto the undersigned E. F., of, &c., all and singular the hereditaments and premises in the within-written lease described and granted, with the whole of his estate and interest. As witness his hand, &c.

52. LETTERS OF ATTORNEY.

A letter of attorney is an instrument of writing authorizing a person who is called the attorney of the person appointing him, to do any lawful act in the place or stead of him who appoints, as to make a deed, collect and receive debts, &c. If proved by two or more of the witnesses thereunto, before any alderman or justice of the peace, mayor or chief magistrate or officer of any city, town or place, where made and certified under the common or public seal of such city, town or place, is sufficient in law. Act of 1705. Purd. 67. Such powers are in force until the agent or attorney has due notice of a countermand, revocation or the death of the constituent or person granting the power.

A letter of attorney may also be *acknowledged* before the same authorities. 1 Pet. C. C. 433. Powers, authorities and directions, in a will, not given to any person by name or description, are deemed to have been given to the executors thereof. Act 24 February 1834, § 12. Purd. 282.

If the power be *special*, everything not in strict conformity thereto is void. 1 W. C. C. 174. 2 D. 246. 2 Y. 38. 1 Y. 200. 5 B. 613. 14 S. & R. 331. 6 S. & R. 90, 149. 10 S. & R. 251. 1 R. 341.

Minors and married women cannot make attorneys; but infants, if of sufficient discretion, and married women, may be attorneys. An attorney cannot substitute but by express power. One is bound by every act of his *general* agent or attorney, even if he exceeds his authority, unless there is notice. On the death of the constituent, the power of attorney ceases, and all subsequent acts under it are void.

53. GENERAL FORM OF A LETTER OF ATTORNEY.

KNOW ALL MEN by these presents, that [I, A. B.,] have constituted, made and appointed, and by these presents do constitute, make and appoint, [C. D. my] lawful attorney, for [me,] and in [my] name and stead, and to [my] use, to ask, demand, sue for, levy, recover and receive, all such sum and sums of money, debts, rents, goods, wares, dues, accounts and other demands whatsoever, which are or shall be due, owing, payable and belonging to [me,] or detained from [me] in any manner of ways or means whatsoever, especially, &c., [here state particularly what the attorney is required to execute,] giving and granting unto [my] said attorney, by these presents, [my] full and entire power and authority, in and about the premises, to have, use and take, all lawful ways and means, in [my] name, for the recovery thereof; and upon the receipt of any such debts, dues or sums of money aforesaid, acquittances or other sufficient discharges, for [me] and in [my] name to make, seal and deliver, and generally all and every other act and acts, thing and things, device and devices, in the law, whatsoever, needful and necessary to be done in and about the premises, for [me] and in [my] name to do, execute and perform, as fully, largely and

amply, to all intents and purposes, as [I] might or could do, if [I were] personally present, or as if the matter required more special authority than is herein given; and attorneys one or more under [him] for the purpose aforesaid to make and constitute, and again at pleasure to revoke; ratifying, allowing and holding for firm and effectual, all and whatsoever [my] said attorney or [his] substitute shall lawfully do in and about the premises, by virtue hereof.

In witness whereof, [I] have hereunto set [my] hand and seal, the [tenth] day of [May,] in the year of our Lord one thousand eight hundred and [sixty.]

Signed, sealed and delivered, }
in the presence of }
G. H., E. F.

(Signed,) [A. B.] [SEAL.]

COUNTY OF —.

THIS [tenth] day of [May,] A. D. [1860,] personally appeared before me, the subscriber, one of the justices of the peace in and for the said county of —, the above named [A. B.,] and acknowledged the foregoing power of attorney to be [his] act and deed, and desired the same might be recorded as such, according to law.

Witness my hand and seal, this [tenth] day of [May,] A. D. [1860.]

[E. F.,] Justice of the Peace. [SEAL.]

54. GENERAL LETTER OF SUBSTITUTION.

TO ALL PEOPLE to whom these presents shall come, C. D., of the city of Philadelphia, and state of Pennsylvania, merchant, sends greeting: Whereas A. B., of the city of Philadelphia, and state aforesaid, merchant, in and by a certain instrument of writing, or letter of attorney, bearing date the tenth day of January one thousand eight hundred and thirty-nine, did make, constitute and appoint the said C. D. to, &c., [as in the original power,] as in and by the said letter of attorney, [recorded, or intended to be recorded, &c.,] relation being thereunto had, appears. Now know ye, that the said C. D. hath made, appointed and substituted, and by these presents, by virtue of the power and authority given to him by the said recited letter of attorney, doth make, appoint and substitute E. F., &c., to be the true and lawful attorney of the said A. B., the constituent in the foregoing letter of attorney named, to do, execute and perform, all such acts, deeds, matters and things, as shall and may be requisite and necessary to be done and performed for effecting the purposes and object in the said letter of attorney contained, as fully and effectually, in all respects, and to all intents and purposes, as I myself might or could do, in virtue of the power and authority aforesaid, if personally present, hereby ratifying and confirming all and whatsoever my said substitute may lawfully do in virtue hereof. In witness, &c.

55. TO RECEIVE MONEY ON A BOND.

KNOW ALL MEN by these presents, that I, A. B., of the borough of R—, and state of Pennsylvania, hatter, do make, constitute and appoint C. D., of the city of Baltimore, in the state of Maryland, my true and lawful attorney, for me and in my name, to ask, demand and receive from E. F., of the city of Baltimore aforesaid, the sum of three hundred dollars, due unto me in and by a certain bond or obligation, bearing date the — day of —, and upon non-payment thereof, to have, use and take, all lawful ways and means, in my name, or otherwise, for the recovery of the same, with the interest thereon, if any be due, by attachment, bill, plaint, arrest or otherwise. In witness whereof, &c.

56. TO RECEIVE DIVIDENDS ON STOCK.

KNOW ALL MEN, by these presents, that I, A. B., of the city of L—, and state of Pennsylvania, brewer, do make, constitute and appoint C. D., of the city of W—, esquire, my true and lawful attorney, for me and in my name, to receive the dividends which are, or shall be payable, according to law, on all the stock standing in my name in the books of the treasury of the United States, [or in the books of the loan office, or bank of, &c., as the case may be,] with the power also to make and substitute an attorney or attorneys under him, for that purpose, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that my said attorney or his substitutes shall lawfully do by virtue hereof. In witness, &c.

57. TO CONVEY LANDS. (a)

KNOW ALL MEN by these presents, that I, A. B., of, &c., have made, constituted and appointed, and by these presents do make, constitute and appoint, and in my place and stead, put and depute C. D., of, &c., my true and lawful attorney, for me and in my name, place and stead, to grant, bargain and sell, all that messuage, &c., [here describe the

(a) Powers relating to lands should be recorded in the county where the lands lie.

premises,] with the appurtenances, and all my estate, right, title and interest therein, unto such person or persons, and for such price or prices, as he shall think proper; and also for me, and in my name, place and stead, and as my proper act and deed, to sign, seal, deliver and acknowledge, all such deed or deeds of conveyance as shall be necessary for the absolute granting and assuring of the premises unto the purchaser or purchasers, in fee-simple. Giving, &c.

58. ACKNOWLEDGMENT OF A DEED.

KNOW ALL MEN by these presents, that I, the within named A. B., do hereby nominate and appoint C. D., E. F., and G. H., all of W—— county, in the state of Vermont, or any one of them, my true and lawful attorneys for me, and in my name, to acknowledge the within deed, and the lands and tenements therein mentioned, to be the estate and property of the within named J. K. In witness, &c.

59. TO ACKNOWLEDGE SATISFACTION ON A MORTGAGE.

TO ALL PEOPLE to whom these presents shall come, E. D., of the city of Philadelphia, merchant, sendeth greeting:

WHEREAS A. B., of, &c., by indenture of mortgage under his hand and seal, bearing date the — day of —, 18—, for the better securing the payment of the sum of three hundred dollars, with its interest, which he was justly indebted to the said C. D., on a certain obligation therein mentioned, did grant, bargain, sell, release and confirm, unto the said C. D., and to his heirs and assigns, the premises in the said indenture particularly described. To hold the same until due satisfaction should be made for the said debt and interest, then the said indenture of mortgage to be null and void, as by the said recited indenture, recorded in the office for recording of deeds at R——, in and for the county of Butler, in mortgage book A., No. 2, page —, relation being thereunto had, appears. And whereas the said A. B. hath fully satisfied and paid the said debt and interest: Therefore know ye, the said C. D. hath made, constituted and appointed, and by these presents doth make, constitute and appoint E. F., of, &c., his true and lawful attorney, for him, and in his name, to appear in the office aforesaid, and there acknowledge and enter satisfaction in the margin of the record aforesaid, for the said debt and interest, in full discharge of the said mortgage, and of the obligation therein recited, and for his so doing this shall be his sufficient warrant. In witness whereof, &c.

60. A POWER OF ATTORNEY TO LEASE LANDS NOT EXCEEDING TWENTY YEARS.

KNOW ALL MEN, &c., — and by these presents do give unto the said C. D. full power and authority, for me, and in my name, by writing indented, or by several writings indented, to demise, grant and to farm let, all those my messuages, &c., situate, lying or being, in the county of —, or any of the premises, as to the said C. D. shall seem meet and convenient, to such person or persons; and during such term of years, (so that the said lease or leases do not exceed the number of twenty years,) with such reservation of rents, covenants, grants, agreements and conditions, to be contained in the said several writings indented, as to the said C. D. shall seem expedient; and also, in my name, to seal and deliver such writing or writings indented, as my deed or deeds, and the one part of all and every such writing or writings indented, as to the said C. D., in my name, shall be in form before rehearsed, to and for my use with him to retain and keep. And I, the said A. B., and my heirs, shall and will, at all times hereafter, ratify and confirm all and every act and acts, thing and things, which he, the said C. D., in my name, shall lawfully do, by virtue hereof, in the premises. In witness, &c.

61. A REVOCATION OF A POWER OF ATTORNEY.

To all persons to whom these presents shall come, A. B., &c., sendeth greeting

WHEREAS I, the said A. B., by my letter of attorney bearing date —, did constitute, &c., C. D., &c., my attorney for certain purposes, and with certain powers, in the said letter of attorney contained, as therein at large appeareth: Know ye, that I, the said A. B., for divers considerations me thereunto moving, have made void, countermanded and revoked, and do hereby make void, countermand and revoke, the said letter of attorney, and all and singular the powers, &c., given by virtue thereof. In witness, &c.

62. POWERS OF ATTORNEY TO ATTORNEYS AT LAW.

POWER OF ATTORNEY BY DEFENDANT.

KNOW ALL MEN by these presents, that I, A. B., of the city of Lancaster, do hereby make, appoint and constitute, C. D., esquire, of the borough of R——, my good and lawful attorney in law, and in fact, to appear for me in a certain plea, pending in the

court of common pleas, wherein E. F. is plaintiff, and I, the said A. B., am defendant; and take defence, and use all lawful ways and means, in my name therein, in as full and effectual a manner as I could do, if personally present in the said court; hereby confirming and sanctioning whatsoever my said attorney, in the said plea, touching the defence thereof, may do according to law, in the premises. Witness my hand and seal this — day of —, one thousand eight hundred and sixty. (Signed,) A. B. [SEAL]

Witnesses.

C. D., E. F.

BY PLAINTIFF TO INSTITUTE SUIT.

KNOW ALL MEN, &c. [as above.] To institute for me, and in my name, a plea of — against a certain E. F., in a proper and convenient court of law; and the same to conduct to trial and judgment in as speedy a manner as the said C. D. reasonably can; and to conduct the prosecution of the said suit or action, so to be brought, and use all lawful ways and means, in my name therein, in as full and effectual a manner as I, the said A. B., could do, if personally present; hereby confirming and sanctioning whatsoever my said attorney in the said plea, touching the prosecution thereof, may do, according to law, in the premises. Witness, &c. [as above.]

BY PLAINTIFF TO CONDUCT SUIT ALREADY BROUGHT.

KNOW ALL MEN, &c. [as above.] To appear for me, in a certain plea or action, commenced and pending in the Butler county court of common pleas, wherein I, the said A. B., am plaintiff, and a certain E. F. is defendant; and to conduct the prosecution of the said plea or action, so as aforesaid brought, and use all lawful ways and means, in my name therein, in as full and effectual a manner as I could do if personally present; hereby confirming and sanctioning whatsoever my said attorney in the said plea, touching the prosecution thereof, may do, according to law, in the premises. Witness, &c. [as above.]

63. PETITION FOR A TAVERN LICENSE.

To the Honorable the Judges of the Court of Quarter Sessions for the County of Montgomery.

THE petition of [A. B.] respectfully sheweth:—That your petitioner is a citizen of the United States, and occupies a [three] story [brick] house with the appurtenances, of which [C. L.] is the owner, situate in [Egypt] street, between Third and Fourth streets, in the borough of Norristown; containing in front or breadth [twenty] feet, and in length or depth [eighty] feet. The lot on which the same is erected is [twenty-eight] feet front, and [one hundred] feet deep. Has in all [twenty] rooms. The nearest tavern [is distant half a square.] Which said house is well calculated for a public house of entertainment, and from its neighborhood and situation, is suitable for the accommodation of inhabitants, strangers and travellers.

That your petitioner *bonâ fide* means to appropriate [seventeen] rooms in the house for the purposes of such tavern, and for the use and accommodation of his guests.

And your petitioner hereby promises, that if he removes from the said premises before the expiration of his license, he will leave notice in writing, of such removal, at the office of the clerk of this court.

He therefore humbly prays the court to grant him a license to keep a public house there. And your petitioner will ever pray, &c. (Signed,) [A. B.]

We, the subscribers, citizens of, and residing within the bounds of [the borough of Norristown,] do hereby certify that we are personally and well acquainted with [A. B.] the within-named petitioner. That he is, and we know him to be, of good repute for honesty and temperance, and is well provided with house-room and conveniences for the lodging and accommodation of inhabitants, strangers and travellers. And we do further certify, that we know the house for which the license is prayed, and from its neighborhood and situation, believe it to be suitable for a tavern, and necessary to accommodate the public, and entertain strangers and travellers.

(Each person who signs this recommendation is requested to write his residence after his name.)

NAMES.

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RESIDENCE.

COUNTY OF MONTGOMERY, ss.

BE IT REMEMBERED, That on the [tenth] day of [May,] Anno Domini on thousand eight hundred and [sixty,] before me, the subscriber, clerk of the court of quarter sessions, for the county of Montgomery, personally appeared [A. B.] the petitioner, who being duly

[sworn] according to law, doth depose and say, that the facts set forth and contained in this petition are just and true, according to the best of his knowledge and belief.

[Sworn] and subscribed, the } (Signed,) [A. B.]
day and year aforesaid. }

[E. F., Clerk.]

64. LIENS.

The benefit of the act of 16th June 1836 (Purd. 708), is extended to wharf-builders (Purd. 710, Dunl. 770), to paper-hangers (Purd. 710), to plumbers, gas-fitters and persons furnishing and erecting grates and furnaces (Purd. 710), and to persons erecting buildings by contract. Purd. 714. Materials *furnished* for, though *not used* in the erection of a building, constitute a lien. 2 S. & R. 17. 12 Ibid. 303. If not *furnished* for, although used in the building, no lien is acquired. 16 S. & R. 56. Lien binds no greater estate in the ground, than that of the person in possession, at whose instance the building is erected. Purd. 714.

65. FORM OF A MECHANIC'S LIEN.

In the [District Court] for the city and county of Philadelphia: [A. B. and C. D.] claim a lien for [two hundred] dollars, against all that certain [three-story brick house,] together with the lot whereon the same is erected, situate in the [city] of Philadelphia, [in Buttonwood street, north side, No. 1005, three doors above Tenth street,] belonging or said to belong to [J. K.] [If for work and labor, say for work and labor,] viz. — done and performed in the erection and construction of said — by the said — as a — employed in the erection and construction of the said — within six months last past; (for materials, viz. — found and provided for the erection and construction of said [house] by [us,] the said [A. B. and C. D.,] as a builder employed in furnishing the materials for the said —, within six months last past.) A bill, or more particular statement of the materials, so found and provided, is hereto annexed.

[A. B.] therefore requires the prothonotary of the said court to enter the same as a lien against the premises aforesaid, agreeably to the provisions of the act of assembly in such case made and provided.

To [H. M.,] Esquire, prothonotary of said court.

Philadelphia, A. D. 1860.

66. MORTGAGE.

A modern mortgage may be described to be a conveyance of lands by a debtor to his creditor, as a pledge and security for the repayment of a sum of money borrowed, with a proviso, that such conveyance shall be void on payment of the money and interest on a certain day; and, in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the land becomes absolute at law, yet the mortgagor has still an equity of redemption, that is a right in equity on payment of the principal, interest and costs, within a reasonable time, to call for a reconveyance of the lands, 1 Powell on Mortgages 4.

He who gives the mortgage is called the *mortgagor*, he who takes it the *mortgagee*.

Proceedings for recovery of money on mortgage in Pennsylvania, are by *scire facias*. Act of 1705, § 6. Purd. 328. Mortgage to be recorded within six months. Act of 28 May 1715, § 8. Purd. 324. The lien of mortgages is according to *priority* of record, except mortgages for purchase-money, which take effect from date, if recorded within sixty days. Act of 28 March 1820, § 1. Purd. 324.

67. FORM OF A MORTGAGE.

THIS INDENTURE, made the [tenth] day of [May,] in the year of our Lord one thousand eight hundred and [sixty,] between [A. B., of the city of Pittsburgh, county of Allegheny, state of Pennsylvania, carrier,] of the one part, and [C. D. of the same place, carter,] of the other part. Whereas, the said [A. B.] in and by a [certain] obligation or writing obligatory under [his] hand and seal, duly executed, bearing even date herewith, stands bound unto the said [C. D.] in the sum of [two thousand dollars] conditioned for the payment of the just sum of [one thousand dollars] in five years from the date thereof, with lawful interest, payable half-yearly for the same, without any fraud or further delay. [Provided, however, and it is hereby expressly agreed that if at any time, default shall be made in the payment of interest on said principal sum for the space of thirty days after any one payment thereof shall fall due, then and in such case the whole principal debt aforesaid shall, at the option of the said C. D., his executors, administrators or assigns,

become due and payable immediately and payment of said principal sum of [one thousand and dollars] and all interest thereon may be enforced and recovered at once, anything therein contained to the contrary thereof notwithstanding,] as in and by the said [certain] recited obligation and condition thereof, relation being thereunto had may more fully and at large appear. Now, this indenture witnesseth, that the said [A. B.] as well for and in consideration of the aforesaid debt or [certain] sum of [one thousand dollars,] and for the better securing the payment of the same with interest unto the said [C. D.,] his executors, administrators and assigns, in discharge of the said recited obligation, as for and in consideration of the further sum of one dollar unto [him] in hand well and truly paid by the said [C. D.] at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, [hath] granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents [doth] grant, bargain, sell, alien, enfeoff, release and confirm unto the said [C. D.,] his heirs and assigns, [here describe particularly the property] together with all and singular the ways, waters, water-courses, rights, liberties, privileges, improvements, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof: to have and to hold the said hereditaments and premises hereby granted or mentioned or intended so to be, with the appurtenances unto the said [C. D.,] his heirs and assigns, to the only proper use and behoof of the said [C. D.,] his heirs and assigns for ever. *Provided always,* nevertheless, that if the said [A. B.,] his heirs, executors, administrators or assigns, do and shall well and truly pay, or cause to be paid unto the said [C. D.,] his executors, administrators or assigns, the aforesaid debt or sum of [one thousand dollars] on the day and time herein-before mentioned and appointed for payment of the same, together with lawful interest as aforesaid, without any fraud or further delay, and without any deduction, defalcation or abatement to be made of anything, for or in respect of any taxes, charges or assessments whatsoever, that then, and from thenceforth, as well this present indenture, and the estate hereby granted, as the said recited obligation, shall cease, determine and become void, anything herein-before contained to the contrary thereof, in any wise notwithstanding. [And provided, further that in case of default in the payment of the interest as aforesaid, or any part thereof, it shall thereupon be lawful for the said C. D., his executors, administrators or assigns to sue out forthwith a writ of *scire facias* upon this present indenture of mortgage, and to proceed at once to recover the principal money hereby secured, and all interest thereon, according to law, without further stay, any law or usage to the contrary notwithstanding.] In witness whereof, the said parties to these presents have interchangeably set their hands and seals thereunto. Dated the day and year first above written.

Sealed and delivered in }
the presence of }
[E. T.]
[R. S.]

Signed, [A. B.] [SEAL]

On the [tenth] day of [May] Anno Domini 1860, before me, [an alderman in and for the city of Philadelphia,] personally appeared the above named [A. B.,] and in due form of law acknowledged the above indenture of mortgage to be [his] act and deed, and desired the same might be recorded as such.

Witness my hand and seal, the day and year aforesaid.

[G. H., Alderman.] [SEAL]

68. ASSIGNMENT OF A MORTGAGE.

KNOW ALL MEN by these presents, that I, A. B., the mortgagee within named, for and in consideration of the sum of six hundred dollars to me in hand paid by C. D., of, &c., at and before the sealing and delivering hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned and set over, and by these presents do grant, bargain, sell, assign, and set over, unto the said C. D., his heirs and assigns, the within indenture of mortgage, and all that messuage, &c., therein mentioned and described. *Together* with the rights, members, and appurtenances thereunto belonging, and all my estate, right, title and interest therein: *To have and to hold* all and singular the premises hereby granted and assigned, or mentioned, or intended so to be, unto the said C. D., his heirs and assigns forever; subject, nevertheless, to the right and equity of redemption of the within named E. F., his heirs and assigns, (if any they have,) in the same. In witness whereof, &c.

[It should be acknowledged, or proved and recorded.]

69. ROADS.

The act of 1700, c. 57, was the first enactment in Pennsylvania, on the subject of erecting bridges and maintaining highways. It continued in force until the act

of 1802. The revised act 13 June 1836 (Purd. 871), supplies the place of both the above mentioned acts.

Roads are of three kinds in Pennsylvania, viz.: *Public roads*, called in the act of 1700, "the king's highways," laid out by order of the governor and council; the records of which are in the office of the secretary of the commonwealth. *Roads* or *cartways*, leading to such great provincial roads, laid out by order of court, on return of viewers. *Private roads*, likewise laid out by order of court on the application of any person for a road to be laid out to or from their plantations or dwelling-places, or to or from the highways. In all grants of land, either by the proprietaries or commonwealth, *six per cent.* has been added in quantity to every man's land, for the purpose of contributing to the establishing of roads or highways. The word *road*, unless where the word *private* is prefixed, is uniformly applied to *public roads*, and is synonymous with the term *highway*. 3 Y. 426. The word *street* is also considered equivalent to *highway*. 4 S. & R. 106.

The court of quarter sessions of every county (except Philadelphia), on being petitioned to grant a view of a road in their respective county, is required (Act 13 June 1836, § 1), to appoint, as often as may be needful, six discreet and respectable citizens, qualified to vote for members of the legislature (§ 51), but not residing on or owning land along the route of such road (§ 19), to view the ground proposed for such road, and make report of their proceedings to the next term. The viewers, if they agree that there is occasion for a road, are required to lay out the same (§ 2), having respect to the shortest distance and the best ground, and with the least injury to private property, and, as far as practicable, in conformity to the desire of the petitioners. To make a *valid view*, *five* of the six must view the ground, and *four* of the actual viewers concur in the report (§ 52).

The report of the viewers must be made to the next term of the court, and state particularly: 1. Who of them were present at the view: 2. Whether they were severally sworn or affirmed: 3. Whether the road be necessary for a public or private road; annex a plot or draft, stating the courses and distances, noting briefly improvements through which it may pass, and, whenever practicable, lay out the road at an elevation not exceeding five degrees, except at the crossing of ravines and streams, where, by moderate filling and bridging, the declination of the road may be preserved within that limit (§ 3).

The court are to direct of what width the road shall be (§ 4). Public roads must not exceed fifty, nor private roads twenty-five feet in width (§ 5). Damages are to be assessed by six disinterested persons, appointed by the court, on petition, who who are to report in writing, and after confirmation by the court, the amount of damages are to be paid by the county treasurer (§§ 7, 8).

In cases of private roads, swinging gates may be allowed by the court, after view and favorable report, and may be put up at the expense of the parties applying for the same, by petition, when the same may be done without much inconvenience to the persons using such road (§ 13). Private roads must be opened, fenced, and kept in repair, by the petitioners, their heirs and assigns (§ 15). The damages shall be paid by the same persons, and the road shall not be opened until they are fully paid (§ 16). Other persons than the petitioners may, afterwards, use a private road, after contributing to the expense such sum as the court may direct (§ 17).

This general system, however, established by the act of 1836, has been so frequently altered by special legislation, extending only to particular counties, that it is not safe to rely on it as of universal application. Parties concerned in road cases should always apply at once to experienced counsel, as there are no cases in the courts in which more oversights are committed than in those arising under the road laws, and none in which more vexatious delays may be interposed by those desirous of obstructing the proceedings. The various special acts will be found collected in Purdon's Digest, to which the inquirer is referred.

70. PETITION FOR A PUBLIC ROAD.

To the judges of the Court of Quarter Sessions of the Peace of the county of —:

THE petition of the subscribers respectfully sheweth: That they labor under great inconvenience for the want of a public road or highway, (or private road,) to lead from

— to —, in said county, [there must be no intermediate points made in the road prayed for ;] they therefore pray the court to appoint persons duly qualified to view the ground proposed for said road, and to lay out the same according to law.

71. ORDER OF COURT ON THE ABOVE PETITION.

At a Court of Quarter Sessions of the Peace of the county of —, held at —, in and for said county, on the — day of —, in the year one thousand eight hundred and —

On the petition of the subscribers thereto, setting forth that they labor under great inconvenience for the want of a public road or highway, (or private road,) to lead from — to —, in said county, and praying the court to appoint proper persons to view the ground for said road, and to lay out the same as aforesaid,—

Thereupon the court appoint A. B., &c., (who being first severally sworn or affirmed to perform their duties impartially and according to the best of their judgment,) to view the ground proposed for said road, and if they, or any five of them, view the same, and any four of the actual viewers agree that there is occasion for a road, to proceed to lay out the same, (having respect to the shortest distance and the best ground for a road,) in such a manner as to do the least injury to private property, as far as practicable, agreeably to the desire of the petitioners, and, if practicable, at an elevation not exceeding five degrees, except at the crossing of ravines and streams, where by moderate filling and bridging, the declination of the road may be preserved within that limit.

Ordered, that the viewers "report at the next term, stating particularly who of them were present at the view, whether the road desired be necessary for a public road, (omit if a private road,) annex and return a plot or draft thereof, stating the courses and distances, (in words at length,) and noting briefly the improvements through which it may pass."

In witness whereof, I have hereunto set my hand, and affixed the seal of the said court, this — day of —, Anno Domini one thousand eight hundred and —.

Clerk.

72. RETURN OF THE INQUEST.

To the judges of the Court of Quarter Sessions of the Peace, in the within or annexed order named :

We, the subscribers, the persons appointed by the said court, to view and lay out the road therein mentioned, report, that having been first severally sworn or affirmed, in the manner and form prescribed by the said order, that all of us (or five of us, naming them,) having viewed the ground for the proposed road, *and four of us concurring*, did lay out, and now return the same for a public (or private) road, beginning, &c., [here describe the courses and distances in words at length,] with reference to the improvements through which it passes, a plot or draft whereof is hereto annexed.

Witness our hands and seals the — day of —, Anno Domini one thousand eight hundred and —.

Or, having viewed, &c., the route of the proposed road as within directed, we (or, &c.) are of opinion that there is no occasion to lay out the same. Witness, &c.

73. A PETITION FOR DAMAGES.

THE petition of the subscribers respectfully represents: That a public road or highway [or private road] was lately laid out and opened by order of this court from —, &c., to —, &c., which road is laid out and opened through the land of your petitioners, and by which they have sustained injury. They therefore pray the court to appoint persons to view the premises, assess the damages sustained, and report the same to the court at the next term thereof.

74. ORDER OF COURT.

At a Court, &c.

On the petition of A. and B. setting forth that a public road or highway [or private road] has lately been laid out and opened by the order of the court, and praying the court to appoint persons to view and assess the damages they have sustained by reason of said road passing through their lands: thereupon the court appoint A. B., &c., six disinterested persons, none of whom reside on their own land along the route of said road, [who being first severally sworn or affirmed to perform the duties with impartiality, and to the best of their judgments,] to view the premises, and if any five of them view the said road, and any four agree that the petitioners or any of them have sustained damages by reason of the said road passing through their lands, then to proceed to assess the same to each of the said petitioners, taking into consideration the advantages they may severally derive from the said road passing through their lands. Ordered that the petitioners give notice to one or more of the commissioners of the county aforesaid, (or in case of a private road, to the parties interested.)

It is further ordered, that the viewers state in their report who of them were present at the view; whether they were severally sworn or affirmed, and that they report at the next term of this court. In witness, &c.

75. PRIVATE ROADS, PETITIONS, &c.

The form of the order and other proceedings on application for private roads will be the same as for public roads, except omitting in the order of the words, "stating particularly whether they judge the same necessary for a public or a private road."

76. PETITION FOR GATES ON A PRIVATE ROAD.

To the Judges, &c.

On the petition of A. B., C. D., setting forth that they labor under great inconvenience for want of hanging a swinging gate or gates on a private road leading from — to —, and praying the court for leave to hang and maintain, at their own expense, a gate or gates across said road.

Report.

We the subscribers appointed to view, &c., report that we, after being first severally sworn or affirmed, according to said order, viewed the said road as directed, and are of opinion that a gate may be hung upon the said road at —, according to the prayer of the petitioners, without much inconvenience to the persons using the said road.

Witness our hands and seals, &c.

77. PETITION FOR VACATING ROADS.

To the Judges, &c.

The petition of the subscribers respectfully represents: That a road was formerly laid out by order of the court from — to —, in said county, beginning, &c., (here set forth, in a clear and distinct manner, the situation and other circumstances of the road, and the parts which the applicants desire vacated,) which road your petitioners conceive has become useless, inconvenient and burdensome. Your petitioners therefore pray the court that the same road may be vacated.

78. REPORT OF VIEWERS.

We, the subscribers appointed to view the road therein mentioned, report that in pursuance of said order, (having been severally sworn or affirmed as herein directed,) we have viewed the said road, and are of opinion that the same is (*not*) in our opinion useless, inconvenient and burdensome, and ought (*not*) therefore to be vacated.

Witness our hands and seals this — day of —, A. D. —.

79. ORDER.

At a Court, &c.

The persons appointed at — sessions, A. D. —, to view a road leading from, &c. — to —, &c., and to judge whether the same has become useless, inconvenient and burdensome, having been severally sworn or affirmed, as within directed, report, that they have viewed the road therein mentioned, and are of opinion that it has become useless, inconvenient and burdensome, and ought to be vacated; whereupon the court confirm the said report and order that the said road may be vacated.

80. FOR ANNULLING PROCEEDINGS HAD BEFORE THE ROAD IS OPENED.

Petition.

The petition of the subscribers, being a majority of the original petitioners, respectfully represents: That a petition was presented to this court at — sessions last, signed by your petitioners, praying the court to appoint proper persons to view and lay out a road from — to —, which was accordingly done; and the said viewers so appointed did view, lay out and return for public (*or private*) use a road, beginning, &c., —, which was, on due consideration, approved of and confirmed by the court; that the said road not yet having been opened, and it appearing to your petitioners to be useless, and if opened would become burdensome—they therefore pray the court to appoint persons not residing on or owning land on the route of the said road, to view the same, and make report according to law.

81. REPORT OF VIEWERS.

We, the subscribers, appointed to view the road herein mentioned, do report: That, in pursuance of the said order, having been severally sworn or affirmed, we have viewed the

said road, and are of opinion, the same, if opened, will (*or will not*) be useless and burdensome.

82. PETITION TO VACATE A STATE ROAD, SUPPLIED BY A TURNPIKE.

To the judges, &c.

THE petition of the subscribers respectfully represents: That part of the road leading from — to —, in the township (*or townships*) of —, and county aforesaid, has been supplied and rendered useless by a substantial and permanent turnpike, made and completed agreeably to law, from — to —. They, therefore, pray the court to appoint persons to view the road, so supplied and rendered useless, and make report to the court according to law.

83. PETITION FOR A REVIEW.

To the Judges, &c.

THE petition of the subscribers respectfully sheweth:—That a road hath been lately laid out, by order of the court, from, &c. (*here set forth the road as reported by the original viewers,*) which road, if confirmed by the court, will be very injurious to your petitioners. They, therefore, pray the court to appoint proper persons to review the said road, &c., as in case of views.

84. PETITION FOR A ROAD ON A COUNTY LINE.

To the Judges, &c.

THE petition of the subscribers respectfully represents:—That your petitioners labor under great inconvenience for want of a public road or highway, to lead on the line which divides the said counties from — in — county to — in — county. Your petitioners therefore pray the court to appoint proper persons to view and lay out the same according to law.

85. REPORT THEREON.

WE the subscribers appointed within, and a similar order from the court of quarter sessions of — county, to view and lay out the road therein mentioned, report, that, in pursuance of said orders, having been severally sworn or affirmed, we have viewed and laid out, and do return, for public (*or private*) use, the following road, to wit: Beginning, &c. (*here describe the courses and distances in words at length, with references to the improvements through which it passes,*) or that there is no occasion to lay out the same.

86. PETITION FOR A COUNTY BRIDGE.

To the Judges, &c.

The petition of the subscribers respectfully sheweth: That a bridge is much wanted over — creek, at the place where the public highway to — crosses the said creek, in the township of —, in said county; and that the erection of said bridge will require more expense than it is reasonable one or two adjoining townships should bear. They, therefore, &c., (as in the case of public roads,) pray the court to appoint persons to view the premises.

87. REPORT THEREON.

WE, the subscribers, appointed to view the place proposed for a bridge, in the within order mentioned, after being severally sworn or affirmed, as within directed, report, that in our opinion, a bridge over — creek, at the place where the public highway to — crosses the said creek, is necessary, and that the erecting of such a bridge would be attended with more expense than it is reasonable the said township, or two adjoining townships, should bear.

(If the viewers are of opinion that a change or variation in the route of the said road is necessary, add the following:)

And we further report, that after examination, we are of opinion that a change or variation in the bed and route of the road would be an improvement, and saving of expense in the erection of said bridge, and, therefore, report, that the route of the road be changed in the following manner: (*here particularly describe the change proposed, together with a map or plot thereof.*) Witness our hands and seals, this — day of —, A. D. 1860.

88. PETITION FOR A BRIDGE ON A COUNTY LINE.

To the Judges of the Court, &c.

The petition of the subscribers — counties of — and — respectfully represent: That a bridge is much wanted over — creek, being the line of the place where the public highway to — crosses said creek, in the township of —, in — county, and in the township of —, in — county; and that the erection of such bridge will require

more expense than it is reasonable the said township should bear; your petitioners pray the court to appoint persons to view the premises, and take such order on the subject as is required and directed by the acts of assembly in such case made and provided.

89. DUE-BILL.

\$260.00

Lancaster, June 4th 1860.

I have this day made a full settlement of all accounts with A. B., and I acknowledge myself to be indebted to him in the sum of two hundred and sixty dollars.
(Signed,) C. D.

Such a due-bill may be assigned by C. D., thus:

"For a valuable consideration, I assign to E. F., all my right, title and interest in the above due-bill, without recourse to me."
(Signed,) A. B.
Witnesses at signing, G. H. and I. J.

Upon such a due-bill, or upon such an assignment of such a due-bill, suit may be brought by the holder of the bill.

90. PROMISSORY NOTES.

\$560.30

Pittsburgh, July 20th 1860.

Ninety days after date I promise to pay to the order of K. L., five hundred and sixty dollars and thirty cents, without defalcation, for value received. M. N.

ANOTHER FORM.

\$320.40

Harrisburg, July 20th 1860.

At the bank of Harrisburg, on the first day of October next, I promise to pay, or cause to be paid, to O. P., or order, three hundred and twenty dollars and forty cents, without defalcation, for value received. Q. R.

If either of the foregoing notes is passed away, it must be indorsed by the person in whose favor it is drawn; that is, he must write his name on the back of the note, and thus authorize the person to whom he thus assigns it, to receive the money, or bring suit for it if not paid at maturity.

ANOTHER FORM.

\$475.25

Northumberland, July 20th 1860.

Sixty days after date I promise to pay to S. T., four hundred and seventy-five dollars and twenty-five cents, for value received. V. W.

This note cannot be assigned, because the drawer of the note does not *promise* to pay to any person but S. T. the amount of the note. If V. W. were to indorse the above note, and give it to X. Y., and X. Y. were to bring suit in his own name, he could not recover, because the note is not payable *to order*.

JUDGMENT NOTE.

\$500.00

Philadelphia, May 23d 1860.

Thirty days after date I promise to pay to A. B., or his assigns, the sum of five hundred dollars, without defalcation, for value received: and I hereby authorize any attorney of any court of record in Pennsylvania, or any other state, to confess judgment against me for the said sum. J. B.

JUDGMENT NOTE WITH WAIVER OF EXEMPTION.

\$1000.00

Pittsburgh, April 2d 1861.

Nine months after date, I promise to pay to J. K., or his assigns, the sum of one thousand dollars, without defalcation, for value received: and I hereby authorize any attorney of any court of record in Pennsylvania, or any other state, to confess judgment against me for the said sum, with release of errors, &c.; and I hereby also waive all stay of execution from and after the maturity of the above note. And I do for myself and my legal representatives, hereby waive and relinquish unto the said J. K. and his legal representatives, all benefit that may accrue to me by virtue of any and every law

made or to be made, to exempt any of my property or estate from levy and sale under execution, or any part of the proceeds arising from the sale thereof, from the payment of the said moneys or any part thereof.

A. C.

91. RECEIPTS.

Bedford, July 10th 1860.

Received from A. B., the sum of two hundred and ten dollars in full for a horse and a pair of oxen, which I this day sold and deliver to him.

C. D.

\$210.00

A FORM FOR RENT.

Sunbury, July 10th 1860.

Received from E. F., one hundred and twenty dollars, being in full for one quarter's rent of a dwelling-house, No. 10, Smith's street, rented by me to him as per agreement, which payment pays his rent in full to this day.

G. H.

\$120.00

WHEN THE MONEY IS PAID BY A THIRD PERSON.

Greensburg, July 10th 1860.

Received from I. J., by K. L., the sum of three hundred and fifty dollars, for goods sold and delivered by me to said I. J., and which is in full of all accounts between us.

M. N.

\$350.00

A receipt *in full* does not foreclose all inquiry. If it can be shown that there was fraud, misrepresentation or mistake, by which more or less money was paid than ought to have been paid, an inquiry will be gone into, to the end that right and justice may be done.

WHEN THE MONEY IS FOR THE USE OF ANOTHER.

Downingtown, May 4th 1860.

Received from O. P., the sum of sixty dollars and ten cents, for work and labor done and services rendered by Q. R. for the said O. P.

S. T.

\$60.10

FOR INTEREST PAID ON A BOND.

York, May 20th 1860.

Received from U. W., the sum of thirty dollars, for one year's interest of \$500, due me the first day of May inst., on a bond which I hold of the said U. W.

X. Y.

\$30.00

FOR A PROMISSORY NOTE.

Reading, May 14th 1860.

Received from A. B., his promissory note, payable to myself or order, for five hundred dollars, for a quantity of lumber bought from me by the said A. B., which note, when paid, will be in full of all demands.

C. D.

\$500.00

FOR CATTLE, ETC., PUT OUT TO WINTER.

Tinicum, November 2d 1860.

Received this day from G. H., by E. F., six oxen and four cows, [or whatever other animals may be received,] which cattle I promise to keep through the winter, feeding them on good hay, &c., and to return them on the first day of April, A. D. 1861, he first paying me four dollars each for the keep of said cattle.

I. J.

When such receipt as the above is given, which partakes of the character of an agreement, the person who gives it should keep a copy, and have it compared and witnessed.

92. LAST WILL AND TESTAMENT.

Will and testament is a voluntary disposition of what a person wishes to be done respecting his estate, real and personal, after his decease. Every person capable of binding himself by contract, is capable of making a will; but no will is effectual

unless the testator were, at the time of making the same, of the age of twenty-one years, and upwards. *Purd.* 1016. By act 11 April 1848, a married woman may dispose by her last will, of her separate property, whether the same accrues to her before or during coverture, provided the said will be executed in the presence of two or more witnesses, neither of whom shall be her husband. *Purd.* 1016. Where a single woman makes a will, and afterwards marries, such marriage is a revocation of the will.

Wills and testaments are of two kinds, viz., *written* and *verbal*, or nuncupative, which is where a person being sick, and for fear lest death, want of sufficient speech or memory, should come so suddenly upon him that he should be prevented, if he waited, from writing his testaments, desires his friends to bear witness of his last will, and which must be in the presence of three persons, and then declare the same before them; such declaration being proved by two of the witnesses after his decease is reduced to writing by the ordinary register of wills, and is as valid as if it had been originally written by the testator, as far as relates to his personal property; but lands are only devisable by a will and testament, put in writing in the lifetime of the testator.

Every will must be in writing, and unless the person making the same be prevented by the extremity of his last sickness, must be signed by him at the end thereof, or by some person in his presence, and by his express direction; and in all cases, must be proved by the oaths or affirmations of two or more competent witnesses, otherwise it will be of no effect. *Purd.* 1016. The making of a mark or cross at the end of the will, is a sufficient signing. *Purd.* 1016. Where the testimony of the subscribing witnesses cannot be had, evidence of their handwriting will suffice. 6 Barr 409.

As to what is a sufficient signing at the end of a will, see 6 Barr 409. 3 H. 281. 7 C. 246. 4 N. Y. 140. 1 Eng. L. & Eq. 633-6. 9 Ibid. 573.

If two wills be found, and it do not appear which was the former, both will be void; but where there is any date, the latter revokes the former.

93. FORM OF WILLS AND TESTAMENTS.

In the name of God, amen. I, A. B., of —, in the — of —, merchant, being in good health of body, and of sound and disposing mind and memory, do make and declare this to be my will and testament, in manner following, that is to say, I order that all my just debts, funeral expenses and charges of proving this my will, be in the first place fully paid and satisfied, and after payment thereof and every part thereof I give and bequeath to — the sum of —; I give and bequeath unto — the sum of —, the same to be paid him on his attaining the age of twenty-one years; I give and bequeath unto — the sum of —, to be paid her at her attaining the age of twenty-one years or day of marriage, which shall first happen. And all the rest, residue and remainder of my goods, chattels, debts, ready money, effects and other my estate whatsoever and where-soever, both real and personal, I give and bequeath the same and every part and parcel thereof unto — executors, administrators and assigns. And I do hereby nominate, constitute and appoint — of — and — of —, executors of this my will, hereby revoking and making void all former and other wills by me at any time heretofore made, and declare this only to be my last will and testament. In witness whereof, I, the said testator, — have to this my last will and testament set my hand and seal, the — day of —, A. D. 1860. [SEAL.]

Signed, sealed, published and declared by the said testator — as and for his last will and testament, in the presence of us, who in his presence and at his request have subscribed our names as witnesses thereto. A. B., C. D.

94. PREAMBLES TO WILLS.

A preamble to a will of a person in health.

In the name of God, amen. I, A. B., of, &c., being in good health of body and of sound and disposing memory, (praised be God for the same,) and being desirous to settle my worldly affairs, while I have strength and capacity so to do, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made; and first and principally I commit my soul into the hands of my Creator who gave it, and my body to the earth, to be interred in the burying-ground of

B—, &c., at the discretion of my executors hereinafter named; and as to such worldly estates wherewith it hath pleased God to intrust me I dispose of the same as followeth: Imprimis, &c.

A preamble to the will of a person that is sick and weak.

In the name of God, amen. I, A. B., of, &c., being sick and weak in body, but of sound mind, memory and understanding, (praised be God for it,) considering the certainty of death and the uncertainty of the time thereof, and to the end I may be the better prepared to leave this world whenever it shall please God to call me hence, do therefore make and declare this my last will and testament in manner following, (that is to say:) first and principally I commend my soul into the hands of Almighty God my creator, and as to, &c.

Another preamble revoking all former wills.

THIS is the last will and testament of me, A. B., made the — day of —, in the year —. I do hereby revoke all former wills by me at any time heretofore made, &c.

95. WILL BEQUEATHING PORTIONS TO SEVERAL CHILDREN, AND CONTAINING AN APPOINTMENT OF GUARDIANSHIP.

In the name of God, amen. I, A. B., of, &c., do make this my last will and testament as follows, (that is to say:) my desire is to be buried with as little expense as decency will permit, and that all my debts and funeral expenses be paid as soon after my decease as conveniently may be. I give and bequeath all my message, lands, tenements and hereditaments whatsoever, situate, lying and being in the county of, &c., other than, and except all those three fields or closes of land, meadow or pasture lying and being, &c., which I purchased of S. B., with their appurtenances, unto my dear wife, J. B., for and during her life; and from and after her decease I give and devise the same to my eldest son W. B., and his heirs: And I give all the rents which shall be due and owing to me at my death, for the aforesaid message, lands, tenements and hereditaments, hereinbefore given to my said wife for life, and after her death to my son W. and his heirs, unto my said wife J. B., for her own use. I give and devise all and every one of my messages, lands, tenements and hereditaments whatsoever, which are situate, lying and being in —, in the said county of C., with their appurtenances, to my son T. B. and his heirs, charged and chargeable, nevertheless, with the annuity or yearly sum of —, to be issuing and payable out of the same messages, lands, tenements and hereditaments to my brother J. B., during his life, by two even and equal half-yearly payments, in every year, the first of the said half-yearly payments to be made at the end of six calendar months next after my decease. I give and bequeath to my said son T. all the rents that shall be due and owing to me for the said last-mentioned messages, lands, tenements and hereditaments at my decease. I give and devise all the aforesaid three fields or closes of land, meadow or pasture, which I purchased of the said S. B., to my son H. B. and his heirs. I also give to him, my said son H., all the rents which shall be due and owing to me for the same at my death. I give all my household goods and furniture, plate, china-ware, household linen, prints, pictures and household utensils in my house in — aforesaid, and my house in L. to my said wife for her own use. I also give to my said wife the sum of \$—, to be paid to her as soon as it can conveniently be raised out of my effects, and interest for the same; in the mean time, from the end of one calendar month next after my decease, at the rate of \$—, per cent. per annum. I give to my son W. B. the like sum of \$—, and interest for the same at the rate aforesaid, from the end of one calendar month next after my decease. I give to my daughter H. B., to be paid to her within two years next after my death, the like sum of \$—, and interest for the same in the mean time, at the rate aforesaid, from the end of one calendar month next after my decease. I give to my said son T. B., the sum of \$—, to be paid to him, when his present articles of apprenticeship expire. I give to my daughter D. B. the sum of \$—, to be paid to her within four years next after my death, and interest for the same, in the mean time, at the said rate of \$—, per cent. from the end of one calendar month next after my decease, to be paid to her guardian, during her infancy, and applied for her maintenance during her minority. I give to my daughter M. L. the like sum of \$—, to be paid to her when she attains the age of twenty-one years, and interest for the same, in the mean time, at the said rate of \$—, per cent. from the end of one calendar month next after my decease, to be paid to her guardian, and applied for her maintenance, during her minority. I give the sum of \$—, and interest for the same, at the said rate of \$—, per cent., from the end of one calendar month next after my decease, unto Mr. R. Y., of, &c., and Mr. T. C. T., of, &c., their executors, administrators and assigns, upon the trust, to pay the interest of the said sum of \$—, to my daughter J. L., for her sole and separate use during her life, exclusive of her husband,

and for which her receipt alone shall be a sufficient discharge, and from and after the decease of my said daughter J. L., then as to the said sum of —, in trust for her child or children, living at her death; if more than one, equally to be divided between or amongst them share and share alike. But if she shall not have a child living at her death, then my will is that the said sum of \$— shall sink into, and become, and be part of the residue of my personal estate. And as to all the rest and residue of my personal estate and effects whatsoever, which shall remain after payment of my debts and funeral expenses, and the aforesaid specific and pecuniary legacies and interest, I give and bequeath the same to my said son W. B., his executors and administrators. And I give the custody, tuition and guardianship of the persons of such of my children as shall be under the age of twenty-one years, at the time of my death, to my said wife J. B. during their respective minorities. And I nominate and appoint my said wife executrix of this my last will; and my will is, and I do hereby direct that all the rents of the messuages, lands, tenements and hereditaments which are hereinbefore given to my said sons T. B. and H. B., respectively, shall be paid to their guardians during their respective minorities, and applied for their maintenances and support. In witness, &c.

96. WILL WHEREBY THE TESTATOR ORDERS HIS PERSONAL ESTATE TO BE APPRAISED AND DIVIDED, &c., AFTER DEBTS, &c., PAID.

I will that all such just debts as shall be by me owing at my death, together with my funeral expenses, and all charges touching the proving of, or otherwise concerning this my will, shall, in the first place, out of my personal estate and effects, be fully paid and satisfied; and from and after payments thereof, and subject thereunto, then my will is, that all the residue of my goods, chattels, merchandises and household furniture shall be indifferently appraised, and after such appraisements made, that the same shall be divided into three equal parts, one equal third part whereof I give and bequeath unto my loving wife A. One other equal third part whereof I give and bequeath unto and amongst my children B., C. and D., to be equally parted and divided amongst them share and share alike, and to be paid and delivered unto my said sons at their several respective ages of twenty-one years, and to my said daughter at her age of twenty-one years, or day of marriage, which shall first happen. And my will and meaning is, that in case any of my said children shall depart this life before such time as the part or portion of him, her or them so dying shall become payable, then, and in such case, the part or portion of her or them, so dying, shall go and be equally divided amongst the survivor or survivors at the time aforesaid. And as to the remaining third part thereof, I will, give and bequeath the same as follows, viz.: I give and bequeath the same unto my sons the said —, equally to be divided amongst them share and share alike, to be paid, &c.; and I make and ordain E. T. and H. T. executors of this my last will and testament, &c.

Lewdness.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 224.

SECT. 40. If any person shall publish or sell any filthy and obscene libel, or shall expose to sale, or exhibit, or sell any indecent, lewd and obscene print, painting or statue; or if any person shall keep and maintain any house, room or gallery, for the purpose of exposing or exhibiting any lewd, indecent and obscene prints, pictures, paintings or statues, and shall be convicted thereof, such person shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year.

SECT. 44. If any person shall commit open lewdness, or any notorious act of public indecency, tending to debauch the morals or manners of the people, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one hundred dollars, or undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.

ACT 16 MARCH 1870. Purd. 1601.

SECT. 1. It shall not be lawful to print or publish advertisements of medicines, drugs, nostrums, or apparatus for the cure of secret or venereal diseases, or for the cure of those diseases peculiarly appertaining to females; and if any person shall print or publish, or procure to be printed or published, in any newspaper in this state, any advertisement of medicines, drugs, or nostrums, or apparatus for the cure of secret or venereal diseases, or for the cure of those diseases peculiarly appertaining to females, or shall, by printing or writing, or in any other way, publish an account or description of such medicines, drugs, nostrums or apparatus, or shall procure the same to be published or written, or in any other way published, or shall circulate or distribute any such newspaper advertisement, writing or publication, every such person so offending shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined in any sum not exceeding one thousand dollars, or be imprisoned in the county jail, not exceeding six months, or both, at the discretion of the court.

SECT. 2. If any person shall print or publish, or cause to be printed or published, in any newspaper in this state, any advertisement of any secret drug or nostrum purporting to be for the use of females; or if any druggist or other person shall sell or keep for sale, or shall give away any such secret drug or nostrum purporting to be for the use of females, or if any person shall, by printing or writing, or in any other way, publish an account or description of any drug, medicine, instrument or apparatus for the purpose of preventing conception, or of procuring abortion or miscarriage, or shall, by writing or printing, or any circular, newspaper, pamphlet or book, or in any other way, publish or circulate any obscene notice, or shall, within this state, keep for sale or gratuitous distribution, any secret drug, nostrum or medicine for the purpose of preventing conception, procuring abortion or miscarriage, such person or persons, so violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined in any sum not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding six months, or both, at the discretion of the court: *Provided*, That nothing in this act contained shall be construed to affect teaching in regular chartered medical colleges, or the publication of standard medical books.

II. Any offence which, in its nature, and by its example, tends to the corruption of morals, as the exhibition of an obscene picture, is indictable at common law. 2 S. & R. 91.

In an indictment for exhibiting an obscene picture, it need not be averred, that the exhibition was public; if it be stated, that the picture was shown to sundry persons for money, it is a sufficient averment of its publication. *Ibid*.

Nor is it necessary that the postures and attitudes of the figures should be minutely described; it is enough, if the picture be so described as to enable the jury to apply the evidence, and to judge whether or not it is an indecent picture. *Ibid*.

Nor is it necessary to lay the house, in which the picture is exhibited, to be a nuisance; the offence not being a nuisance, but one tending to the corruption of morals. *Ibid*.

If a man indecently expose his person to a woman, and solicit her to have sexual intercourse with him, and persist in doing so, notwithstanding her opposition and remonstrance, this is an act of open lewdness, for which an indictment will lie. 18 Verm. 574.

On the trial of an indictment for publishing an obscene libel, it does not matter whether the things published be true, and in conformity with nature, and the laws of our being, or not; if they are unfit to be published, and tend to inflame improper and lewd passions, the offence is committed. To justify such a publication, the jury must be satisfied, that it was made for a legitimate and useful purpose, and not from any motive of mere gain, or with a corrupt desire to debauch society. 27 Leg. Int. 29.

Libel.

- I. Constitutional provision respecting libels. III. Judicial authorities.
 II. Provisions of the Penal Code. IV. A warrant for a libel and proceedings.

I. "THE printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print, on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels the jury shall have a right to determine the law and the facts under the direction of the court as in other cases. Const. of Pennsylvania, Art. 9, § 7.

This important section, short as it is, may be divided into two parts—the first is declaratory, and the second, enactments founded on the rights previously declared. The enactment clauses refer wholly to *criminal* proceedings, and have no reference to or bearing upon *civil* actions brought for the recovery of damages. In such actions the defendant is always allowed to give the truth in evidence. In criminal cases every defendant, under this constitutional provision, who is charged with a libel for having published anything "investigating the official conduct" of men in public stations, or "where the matter published is proper for public information," has also a constitutional right to give the truth in evidence.

II. ACT 31 MARCH 1860. Purd. 221.

SECT. 24. If any person shall write, print, publish or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt or ridicule, such person shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, or undergo an imprisonment not exceeding twelve months, or both, or either, at the discretion of the court.

III. Libels, taken in their largest and most extensive sense, signify any writing, pictures or the like, of an immoral and illegal tendency. Libels on individuals are defined to be malicious defamations, expressed either in writing or by printed signs and pictures, tending to blacken the memory of one that is dead, or the reputation of one that is alive, and thereby exposing him to public hatred, contempt and ridicule. 4 Bl. Com. 150.

Any malicious printed slander which tends to expose a man to contempt, hatred or degradation of character, is a libel. To print and publish that A. had been deprived of a participation of the chief ordinances of the church to which he belonged, by reason of his infamous and scandalous assertions, is a libel. 5 B. 340.

The communication of a libel to any one person is a publication in the eye of the law, and, therefore, the sending an abusive private letter to a man is as much a libel as if it were publicly printed, for it equally tends to a breach of the peace. 4 Bl. Com. 150.

For the same reason it is immaterial, at *common law*, with respect to the essence of a libel, whether the matter be true or false, since the *provocation* and not the falsity is the thing to be punished *criminally*. Ibid. 151.

Christianity is part of the law of Pennsylvania, and maliciously to revile it is a criminal offence. It has long been firmly settled that blasphemy against the Deity generally, or an attack against the Christian religion indirectly, for the purpose of exposing its doctrines to ridicule or contempt, is indictable and punishable as a temporal offence. The principle is, that the publication, whether written or oral, must be malicious, and designed for that end and purpose. 11 S. & R. 394.

Where a man publishes a writing which, upon the face of it is libellous, the law presumes that he does so with that malicious intention which constitutes an offence, and it is unnecessary on the part of the prosecution to give evidence of any circumstance from which malice may be inferred. In such case, it is incumbent upon the defendant, if he seek to discharge himself from the consequences of the publication, to show that it was made under circumstances which justified it. *Ros. Crim. Law* 585.

IV. A WARRANT FOR PUBLISHING A LIBEL.

COUNTY OF WESTMORELAND, ss.

The Commonwealth of Pennsylvania,

To any constable of the said county, greeting:

YOU are hereby commanded to take the body of A. B., if he be found in the said county, and bring him before J. R., one of our justices of the peace in and for the said county, to answer the commonwealth upon a charge, founded on the oath of C. D. of having in a newspaper published in Greensburg, on the third of June inst., called the "Paul Pry," published a false, scandalous and malicious libel, of and concerning the said C. D., and further to be dealt with according to law. And for so doing this shall be your warrant. Witness the said J. R., at Greensburg, who has hereunto set his hand and seal, the eighth day of June, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL.]

If, on hearing, the justice shall be satisfied that a libel has been published, and published by the defendant, he should bind him over to appear at the next court of quarter Sessions of the said county, and in default of bail commit him to the county prison. The witnesses, as in all other cases where there is a binding over for trial, should be held in recognisance to testify.

Lien.

A LIEN is simply a right, at common law, to possess and retain property, until some charge attaching to it be paid or discharged. It generally exists in favor of artisans and others, who have bestowed labor and service on the property in its repair, improvement, and preservation. It has also an existence in many other cases, by the usages of trade. *Cross on Liens* 2.

There are two species of liens known to the law, namely, particular liens and general liens. Particular liens are where persons claim a right to retain goods in respect of labor and money expended upon them; and those liens are favored in law. General liens are claimed in respect of a general balance of accounts; and these are founded in custom only, and are therefore to be taken strictly. *Addison on Contracts* 1175.

It is not to be doubted that the law of particular or specified lien on goods in the hands of a tradesman or artificer for the work done on them, is a part of the common law of Pennsylvania. 2 W. & S. 395. 9 C. 151.

A miller has a lien upon the corn ground by him. 5 M. & S. 180. A shipwright upon a ship for repairs. (4 B. & A. 352.) A tailor on the cloth delivered to and made up by him. (3 M. & S. 169.) And, in general, where a person bestows his labor upon a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge.

A workman who bestows labor on a chattel for a stipulated sum, may detain the chattel till the price be paid, although it be delivered at different times, if the work to be done under the agreement be entire. (5 Moore & Scott 180.) *Secus*, as it seems, where the parties contract for a mode or time of payment inconsistent with the workmen's claim to the possession. *Ibid.* A party cannot set up a right of lien which is at variance with the terms or conditions, or implied understanding upon which he received the property. *Addison on Contracts* 1176.

One who has the exclusive custody of a stock of goods of another, for the purpose of carrying on the business of a retail store, and during its continuance becomes personally liable, and pays for goods purchased to replenish the stock, does

not thereby acquire a lien on the goods to secure him against such liabilities and advancements. 9 W. 512.

As an exclusive right to the possession of the thing is the basis of a lien, it exists not in favor of a journeyman or day-laborer. 2 W. & S. 895.

One having a lien may relinquish it by his conduct. 4 Y. 456.

Wharfingers have a lien on goods brought to their wharves for the balance of a general account. 1 Esp. 109.

An attorney has a lien for his fees upon the money and papers of his client, while they are in his hands. 7 H. 99. 2 Wr. 231.

The evidence to establish a right of lien is either of an *express agreement* between the parties in the particular instance, or is *presumptive*, being founded either upon the mode of dealing between the same parties in former instances or on the *general usage and custom* of the particular trade. Starkie Ev. 883.

Wherever the law has given a lien upon any goods or other things of value, then the retaining of them shall not subject the person to an action of trover. 4 B. 221.

If property be forcibly or clandestinely taken from the possession of one having a lien on it, he may reclaim it as his property in an action or replevin, or in any other proper form. 11 H. 193.

(For a lien of common carriers, see *Common Carriers*. Lien of innkeepers, &c., see *Inns and Taverns*. Lien of judgments, see *Judgment*. For liens of mechanics on buildings, see *Mechanics' Lien*.)

ACT 14 DECEMBER 1863. Purd. 1344.

SECT. 1. In all cases in which commission merchants, factors and all common carriers, or other persons, shall have a lien, under existing laws, upon any goods, wares, merchandise or other property, for or on account of the costs or expenses of carriage, storage or labor bestowed on such goods, wares, merchandise or other property, if the owner or consignee of the same shall fail or neglect or refuse to pay the amount of charges upon any such property, goods, wares or merchandise, within sixty days after demand thereof, made personally upon such owner or consignee, then and in such case, it shall and may be lawful for any such commission merchant, factor, common carrier or other person having such lien, as aforesaid, after the expiration of said period of sixty days, to expose such goods, wares, merchandise or other property to sale at public auction, and to sell the same, or so much thereof as shall be sufficient to discharge said lien, together with costs of sale and advertising: *Provided*, That notice of such sale, together with the name of the person or persons to whom such goods shall have been consigned, shall have been first published, for three successive weeks, in a newspaper published in the county, and by six written or printed handbills, put up in the most public and conspicuous places in the vicinity of the depot where the said goods may be.

SECT. 2. Upon the application of any of the persons or corporations having a lien upon goods, wares, merchandise or other property, as mentioned in the first section of this act, verified by affidavit, to any of the judges of the courts of common pleas of this commonwealth, setting forth that the places of residence of the owner and consignee of any such goods, wares, merchandise or other property are unknown, or that such goods, wares, merchandise or other property are of such perishable nature, or so damaged, or showing any other cause that shall render it impracticable to give the notice as provided for in the first section of this act, then and in such case, it shall and may be lawful for a judge of the city or county in which the goods may be, to make an order, to be by him signed, authorizing the sale of such goods, wares, merchandise or other property, upon such terms as to notice as the nature of the case may admit of, and to such judge shall seem meet: *Provided*, That in cases of perishable property, the affidavit and proceedings required by this section may be had before a justice of the peace.

SECT. 3. The residue of moneys, arising from any such sales, either under the first or second sections of this act, after deducting the amount of the lien, as aforesaid, together with costs of advertising and sales, shall be held subject to the order of the owner or owners of such property.

This act has altered the rule of the common law, which limited the lien of a bailee for service to the duration of his actual possession. 8 P. F. Sm. 414.

Limitation of Actions.

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| I. Limitation of personal actions. | III. What will remove the bar of the statute. |
| II. When the statute of limitations begins to run. | IV. Limitation of penal actions. |
| | V. Limitation of criminal prosecutions. |

I. LIMITATION OF PERSONAL ACTIONS.

LIMITATION is a certain time assigned by statute, within which an action must be brought. *Termes de la Ley* 417. Statutes of limitation are statutes of repose, and are often the only shield against a stale claim; and in this aspect, they are, in modern times, favored by the courts. The statutes, in such case, bar the remedy. Whether founded on presumption of payment, supposed loss of evidence, or the policy that would suppress litigation and promote repose, they are an express legislative offer to a defendant of the means, not to extinguish his debt, but to defeat any action for its recovery. 10 H. 810. The period of limitation within which a personal action may be brought varies according to the subject-matter. The following are the provisions of the Pennsylvania statutes:

All actions upon the case, other than for slander or libel; all actions for account, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants; all actions of debt grounded upon any lending or contract, without specialty; all actions of debt for arrearages of rent; all actions for trespass, detinue and replevin for goods and cattle, and actions of trespass *quare clausum fregit*; shall be brought within six years next after the cause of such actions or suits, and not after. *Purd.* 655.

All actions upon promissory notes shall be commenced within six years after the cause of action shall accrue, and not after. *Purd.* 656.

All actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within two years next after the cause of such actions or suit, and not after. *Purd.* 655.

All actions of slander or libel, for words, whether spoken, written or printed, within one year, and not after. *Purd.* 656.

The statutes also provide, that if the parties entitled to such actions, be, at the time the cause of action shall accrue, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond sea, they shall be at liberty to bring the said actions, within the same period after the removal of such disabilities. *Purd.* 656.

The statute of limitations does not run in favor of a defendant who is beyond sea, at the time the cause of action accrued, but suit must be brought within the time limited after the return of such defendant from beyond sea. *Purd.* 656. And no plaintiff can take advantage of this exception, except he be a citizen of the United States. *Ibid.*

It will be observed, that the limitation of six years is the only one that is applicable to suits of which a magistrate has jurisdiction; the cases enumerated in the other clauses of the statute are cognisable only in the common pleas, and with them a justice of the peace has no concern.

The limitation in actions of debt "grounded upon any lending or contract without specialty," is confined to contracts in fact, and does not extend to a case where the law gives an action of debt, though there be no contract between the parties. 13 S. & R. 399, 400. As debt on a foreign judgment. 13 S. & R. 395. Debt against a sheriff for an escape. *Ibid.* 400. Debt on an award. 2 W. & S. 56. Or on a devastavit. 7 *Ibid.* 359. It does not embrace a claim for a legacy. 2 W. 161. 5 W. 225. Or for a distributive share of an intestate's estate. 6 W. 379. Nor to a widow's claim for interest in one-third of the purchase-money of her husband's real estate, sold by an administrator. 4 W. 177. Nor to express, continuing, technical trusts, not cognisable at law. 14 S. & R. 394. 1 W. 271, 514. 1 W. & S. 118. 4 W. C. C. 631. Thus, a debt against the estate of a decedent is not barred by

the statute, where less than six years from the time it accrued had elapsed at the death of the debtor, but the six years expired before the settlement and distribution of the estate; for, in such case, the executor holds the estate as a trustee for the use of the creditors. 5 C. 360. 11 P. F. Sm. 9. But although he cannot plead the statute in a proceeding in the orphans' court for distribution, it is nevertheless a bar to a personal action for the recovery of the debt. 7 C. 455.

The statute is applicable between guardian and ward, after the latter comes of age. 4 W. & S. 457. To an action against a sheriff for moneys collected on an execution. 9 Barr 120. Or against an attorney from the time his client had notice of the receipt of his money; or a knowledge of his negligence, or breach of duty. 7 Barr 27. And an action of debt for a penalty due under a by-law, has been held to be within the act. 5 Eng. L. & Eq. 309.

It is the nature of the cause of action, and not the form of action, which determines the applicability of the statute of limitations. 7 P. F. Sm. 126.

The limitation in actions of debt for arrearages of rent does not apply to rent reserved by deed. 1 R. 135. But it is provided by the act of 1855, that where no payment, claim or demand shall be made on account of or for any ground-rent, annuity or other charge upon real estate for twenty-one years, and no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, a release or extinguishment thereof shall be presumed, and such ground-rent, annuity or charge shall thereafter be irrecoverable. *Purd.* 654.

The exception of merchants' accounts applies to actions of assumpsit, as well as actions of account. 1 Phila. 181. 5 Cr. 15. And it is not necessary in such case that any of the items should come within the six years. *Ibid.* To bring a case within this exception, there must be mutual accounts between the parties. 17 S. & R. 347. 2 W. & S. 137. 7 Barr 381. 5 H. 238. And they must be open, not stated accounts. 2 D. 264. 2 Y. 105. 6 W. & S. 238-9. 7 Barr 281. Accounts between merchant and factor are within the exception. 2 Y. 105. 5 P. F. Sm. 260. As to who are deemed merchants within the statute, see 1 W. & S. 469. 2 *Ibid.* 139.

The cases of what are termed *mutual accounts*, in which some of the items being within six years are held to save the bar of the statute, seem referable rather to the head of implied acknowledgment, than to the saving clause of merchants' accounts. 1 T. & H. Pr. 471. See 6 T. R. 189. *Ballantine on Limitations* 80-2.

The exception in favor of persons "beyond sea," embraces only such as are without the limits of the United States; a residence within another of the United States is not sufficient to entitle a party to the benefits of this proviso. 9 S. & R. 288. 2 D. 217. 1 Y. 329. 9 C. 360. The exceptions in the statute in favor of persons under disabilities, apply to actions of assumpsit on promissory notes and bills of exchange. 2 Wh. 152.

Although debts secured by instruments under seal are specially excepted from the operation of the statute of limitations, yet after a lapse of twenty years, a presumption of payment arises, which will bar a recovery, unless repelled by evidence. After the lapse of twenty years, bonds and other specialties, merchants' accounts, mortgages, judgments, and indeed, all evidences of debt excepted out of the statute, are presumed to be paid; and the computation runs from the period when the money was demandable. 2 W. 214. 1 P. R. 420. This presumption, however, may be rebutted by proof of a payment on account; of an acknowledgment of the existence of the debt; or of the positive continuing insolvency of the debtor during the whole period that has elapsed from the accruing of the plaintiff's cause of action. 2 Barr 225, 481.

By act of 25th April 1850, the statute of limitations does not run in favor of insolvent corporations. *Purd.* 656.

II. WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN.

The statute of limitations commences running only from the time the right of action accrues. 14 S. & R. 328, 3 Wr. 520. 1 P. F. Sm. 71. Thus, where the vendor of a house and lot which was subject to a ground-rent, left in the hands of

the vendees a portion of the purchase-money, to be applied to the payment of arrears of ground-rent, the vendees agreeing to pay them with it, and above sixteen years afterwards, the vendor was sued for such arrears and paid them, whereupon, within one year thereafter, he brought suit against the vendees to recover the same, it was held, that his action was not barred by the statute. 11 H. 88. And the statute will not be a bar to a recovery for work and labor done, if the contract under which it was performed was not at an end more than six years before the commencement of the action, although no actual labor was done within the statutory period. 4 C. 316.

In an action by an attorney for professional services in the collection of a debt, the statute begins to run from the time of its payment; 4 W. 334; if the relation of counsel and client be dissolved; but until then, the statute does not commence to run against an attorney's bill for fees. 5 P. F. Sm. 434. In an action against an attorney, from the time of his collection of the client's money; or of his negligence or breach of duty; unless the collection be fraudulently concealed. 12 H. 53-4. 2 Gr. 278. 12 Wr. 524. And so also, it is when a sheriff collects money; 9 Barr 120; or defectively executes a writ; 17 Mass. 60; and if he take insufficient bail, the statute runs from the time when the action would have accrued against the bail. 9 Met. 564. So, it runs in favor of officers, generally, from the breach of duty complained of; 6 Cow. 238; and in favor of agents, generally, from the collection of money, or breach of duty. 1 W. & S. 112. 12 H. 54.

In an action for money lent by a wife to her husband out of her separate estate, the statute commences running from the death of the husband. 15 S. & R. 84. 3 Wh. 48. 4 Wr. 90. For money paid on articles of agreement for the sale of land, from the refusal of the vendor to convey. 1 P. R. 492. 2 J. 238. And on a contract to complete certain work, from the time it was to have been completed. 3 P. R. 48.

Where an overpayment has been made by mistake, and, on a final settlement, the apparent balance is paid, the statute begins to run from the time of such final settlement. 10 Barr 455. On a parol guarantee of a mortgage, payable by instalments, from the time the last instalment becomes due. 14 S. & R. 311. In case of a continuing trust, from the time some one is entitled to claim its execution. 14 S. & R. 395. 12 Wr. 518. And in trover, from the time of conversion. A. 153-4. 1 P. R. 216. And see 3 R. 381. 3 P. R. 149.

The time is not enlarged by a transfer of the claim. 2 R. 211. And an agreement to extend the period of limitation for a certain time, will not operate as a waiver of the statute for another period of six years. 5 H. 244. But it is to be observed, that in case of fraud, the statute only runs from the time of its discovery. 4 Y. 109. 7 S. & R. 214, 235. 1 W. 110, 401. 8 W. 12. 2 J. 49. 2 Gr. 273.

If, after a recovery by the plaintiff, the judgment be arrested, or reversed on error, he may commence a new action, within one year thereafter. Purd. 656. An abatement of the first suit, by a plea of non-joinder of a partner, is within the equity of this proviso. 2 Barr 382-5. So, where the suit abates by the death or marriage of the plaintiff. Ibid. 385. And where a joint defendant dies, and the survivor is insolvent, the plaintiff has one year to bring a new action against the executors of the decedent. 5 W. & S. 339. But if the plaintiff be nonsuited after the expiration of the six years, the statute will bar another action for the same cause. 1 S. & R. 236.

If an act on the part of the creditor, such as demand, or notice, &c., be necessary to complete his cause of action, such act must be done within six years from the date of the contract, otherwise the plaintiff's action will be barred by the statute. 10 C. 12. Thus, the lapse of six years is a bar to an action by a railroad company for a subscription to its capital stock, if no call be made within that period. 8 C. 22, 25. 12 C. 77.

The statute begins to run against a note payable on demand, from its date, and no demand of payment is necessary before suit brought; but if a note be made payable at a certain number of days after demand, or after sight, a demand is necessary before suit brought, and the statute does not begin to run until the prescribed period after demand, has elapsed. 3 Gr. 138.

III. WHAT WILL REMOVE THE BAR OF THE STATUTE.

In order to take a case out of the purview of the statute of limitations, the plaintiff must show either an acknowledgment of the existence of the debt, or what is equivalent to it, a part payment. An acknowledgment of the claim within six years has always been held sufficient to take the case out of the statute. 9 S. & R. 181. 11 Ibid. 13. 14 Ibid. 197. But such acknowledgment must be clear, unambiguous and express; and so distinct and palpable in its extent and form as to preclude hesitation. 6 W. 220. 9 W. 381. 10 W. 172. 3 W. & S. 509. 6 W. & S. 217. 7 W. & S. 181. 9 Barr 258. 2 H. 275. 4 H. 210. 4 P. F. Sm. 152. It must specifically refer to the instrument on which the claim is founded, and to the amount of indebtedness. 7 H. 388. 10 H. 308. 11 H. 413. 11 C. 259. It must be the acknowledgment of a *still existing* indebtedness. 12 S. & R. 397. 10 W. 172. 9 P. F. Sm. 487. And it must be made to the plaintiff or his agent. 5 H. 286, 802. An acknowledgment, however, and offer to pay the principal of a debt, coupled with a refusal to pay the accrued interest, is sufficient to take the principal out of the statute. 5 C. 189. An acknowledgment before the limitation expires is sufficient. 5 Barr 225. 9 Ibid. 259.

An acknowledgment by an executor or administrator is not sufficient to remove the bar of the statute. 1 Wh. 66. 7 W. 420. 2 J. 64. 11 C. 259. 1 Gr. 268. Nor one by the defendant's attorney. 2 P. R. 262. 1 Phila. 220. Nor by one of several joint debtors, or by one of several partners, after the dissolution of the firm. 17 S. & R. 126. 1 P. R. 138. 2 Am. L. R. 572. A new promise by a joint debtor will affect no one but himself. 1 Gr. 268. 12 Wr. 248.

An indorsement of part payment, proved to have been made before the statute had completed its bar, is sufficient to take the case out of the statute. 1 W. & S. 243. 5 W. & S. 332. 6 Barr 267. 5 Wr. 51. The constructive acknowledgment of a debt arising from part payment within six years before suit brought, is sufficient from which to infer a promise to pay; but to have this effect the part payment must be clearly established. 2 C. 285. And part payment by a liquidating partner is evidence of a new promise by his late copartners. 3 W. & S. 345. 3 Gr. 302. But part payment by one of several joint debtors, not partners at the time, will not take the case out of the statute. 10 H. 156. 12 Wr. 248. And see 10 Wr. 310.

A direction in a will that all the testator's just debts be paid, will not revive a debt barred by the statute of limitations. 1 B. 209. Or stop the running of it. 1 Phila. R. 468. Nor will a statement of the debt in a petition for the benefit of the insolvent laws have that effect. 10 Barr 129. 2 M. 424. 1 Wh. 106.

It seems, that it is proper, in all cases, to sue on the original contract, and not on the subsequent acknowledgment as a new promise. Such acknowledgment is but a waiver of the statutory defence. 10 H. 310. To save the bar of the statute, the plaintiff may reply a writ issued within six years; but he must show that it has been continued down to the time of hearing. 6 W. 629. And it is sufficient if the alias be issued within six years after the original. 8 H. 293. 4 C. 261.

IV. LIMITATION OF PENAL ACTIONS.

The act 26 March 1785 provides that "All actions, suits, bills, indictments or informations, which shall be brought for any forfeiture upon any penal act of assembly made or to be made, whereby the forfeiture is or shall be limited to the commonwealth only, shall hereafter be brought within two years after the offence was committed, and at no time afterwards; and all actions, suits, bills or informations, which shall be brought for any forfeiture upon any penal act of assembly made or to be made, the benefit and suit whereof is or shall be by the said act limited to the commonwealth, and to any person or persons that shall prosecute in that behalf, shall be brought by any person or persons that may lawfully sue for the same, within one year next after the offence was committed; and in default of such pursuit, then the same shall be brought for the commonwealth, at any time within one year after that year ended; and if any action, suit, bill, indictment or information shall be brought after the time so limited, the same shall be void; and where a shorter time is limited by any act of assembly, the prosecution shall be within that time." Purd. 657.

By the act 21 April 1841, (Purd. 657,) the provisions of this section are extended to actions for the penalty for issuing small notes. By act 16 July 1841, (Purd. 657,) it is extended to actions for all fines, forfeitures and amercements, which, by law, are directed to be paid to the treasurers, or county commissioners of the respective counties, for the use of the counties; and by act 24 February 1845, (Purd. 657,) to all fines and forfeitures, payable either in whole or in part, to the use of the respective counties.

The twenty per cent. interest, imposed as a penalty for the issuing of notes of a less denomination than five dollars, by the act 12 April 1828 is not a forfeiture within the meaning of the act of 1785; nor are the damages on protested bills of exchange. 2 H. 86-7. But see 7 Leg. Int. 150, as to the effect of the act of 1841.

The act of 1785 is a defence to all penalties under the 47th section of the act 16 April 1850, relating to banks, which accrued more than two years before suit brought. 2 C. 451.

V. LIMITATION OF CRIMINAL PROSECUTIONS.

The 76th section of the revised Code of Criminal Procedure, passed the 31st March 1861, enacts that "All indictments which shall hereafter be brought or exhibited for any crime or misdemeanor, murder and voluntary manslaughter excepted, shall be brought or exhibited within the time and limitation hereafter expressed, and not after; that is to say, all indictments and prosecutions for treason, arson, sodomy, buggery, robbery, burglary, perjury, counterfeiting, forgery, uttering or publishing any bank note, check or draft, knowing the same to be counterfeited or forged, shall be brought or exhibited within five years next after the offence shall have been committed; and all indictments and prosecutions for other felonies not named or excepted heretofore in this section, and for all misdemeanors, perjury excepted, shall be brought or exhibited within two years next after such felony or misdemeanor shall have been committed: *Provided however*, That if the person against whom such indictment shall be brought or exhibited, shall not have been an inhabitant of this state, or usual resident therein, during the said respective terms for which he shall be subject and liable to prosecution as aforesaid, then such indictment shall or may be brought or exhibited against such person at any period within a similar space of time during which he shall be an inhabitant of, or usually resident within this state: *And provided also*, That indictments for misdemeanors committed by any officer of a bank or other corporation, may be commenced and prosecuted at any time within six years from the time the alleged offence shall have been committed." Purd. 658.

By the 80th section of this act it is expressly provided that this limitation shall apply to offences committed before its passage.

The limitation need not be specially pleaded; it may be taken advantage of on the general issue. 4 C. 259. See 3 Cranch C. C. 442. 5 Ibid. 38, 60, 368.

The finding of an informal presentment, is not sufficient to take the case out of the statute. 1 Cranch C. C. 485. Nor will a former indictment in which a *nolle prosequi* was entered. 3 McLean 469.

But it is not necessary that the case be prosecuted to judgment within the two years: it is sufficient if the indictment be *brought* into court and *exhibited* to the notice of the defendant. 1 Brewst. 329.

Lotteries.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. PURD. 227.

SECT. 52. All lotteries, whether public or private, for moneys, goods, wares or merchandise, chattels, lands, tenements, hereditaments or other matters or thing whatsoever, are hereby declared to be common nuisances; and every grant, bargain, sale, conveyance or transfer of any goods or chattels, lands, tenements or hereditaments which shall be made in pursuance of any such lottery, is hereby declared to be invalid and void.

SECT. 53. If any person shall, within this state, either publicly or privately, erect, set up, open, make or draw any such lottery as aforesaid, or be in any way concerned in the managing, conducting or carrying on the same, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding one year.

SECT. 54. If any person shall sell or expose to sale, or cause to be sold or exposed to sale, or shall barter or exchange, or cause or offer to be bartered or exchanged, or shall advertise, or cause to be advertised for sale, barter or exchange, any lottery ticket or share, or part thereof, or any lottery policy, or any writing, certificate, bill, token or other device, purporting or intending to entitle, or represented as entitling the holder or bearer, or any other person, to any prize to be drawn in any lottery, or any part of such prize, or any interest therein, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding two years, and to pay a fine not exceeding one thousand dollars. The purchaser of such ticket, policy or device, shall not be liable to any prosecution or penalty by virtue of this or any other law of the commonwealth, and shall, in all respects, be a competent witness to prove the offence. Any indictment under this act shall be deemed and adjudged good and sufficient, which describes the offence in the words of this law, although it does not set out the name or location of such lottery, nor set out in words and figures, the ticket, policy or device sold, bartered or exchanged, or offered or advertised to be sold, bartered or exchanged.

II. A plan or arrangement whereby *land* or *houses* divided into lots of unequal value is distributed by chance among the purchasers of tickets or certificates, such purchasers having had no previous interest in the lands or houses, it is a lottery, and prohibited by law. 4 S. & R. 151.

So also, an annual distribution, by lot, among the members of an art-union, of works of art purchased by their subscriptions, is a lottery. 7 N. Y. 228.

A lottery is a scheme for the distribution of prizes by chance. The mere determination of questions, by lot, where there is no distribution of prizes by chance, does not constitute a lottery within the meaning of the act. 27 Leg. Int. 86.

Lottery tickets come under the denomination of "goods, wares and merchandise," and the price or value of them, if not illegal, may be recovered in the common counts for goods sold and delivered. 2 Wh. 155.

But a contract of purchase of a prize lottery ticket, the sale of which was prohibited by law, cannot be enforced by action, nor will the purchaser be entitled to recover in an action for money had and received, upon proof that the seller of the ticket received the amount of the prize-money. 1 W. & S. 181. It is otherwise, where the ticket was purchased in another state, whose laws legalized the sale. 1 H. 328.

A witness may be compelled to answer whether he has purchased lottery tickets from the defendant. Bright. R. 109.

Malicious Mischief.

- I. Malicious mischief at common law.
- II. Provisions of the Penal Code.
- III. Warrant for destroying a sign.
- IV. Warrant for removing a landmark.

- V. Malicious mischief by bailees.
- VI. Malicious trespasses.
- VII. Acts relating to Philadelphia.

I. MALICIOUS mischief, in this country, as a common law offence, has received a far more extended interpretation than has been attached to it in England. In its general application, it may be defined to be any malicious or mischievous injury, either to the rights of another, or to those of the public in general. Thus it has been considered an offence at common law to destroy a horse belonging to another; or a cow; or any beast whatever which may be the property of another; to be guilty of wanton cruelty to animals in general; to cast the carcass of an animal in a well in daily use; to poison chickens; fraudulently tear up a promissory note; or maliciously break windows; to mischievously set fire to a number of barrels of tar belonging to another; to girdle or otherwise maliciously injure trees kept either for use or ornament; to put cow-itch on a towel, with intent to injure a person about to use it; to break up a boat; to cut off the hair of the tail or mane of a horse, when done maliciously; to discharge a gun, with the intention of annoying or injuring a sick person in the immediate vicinity; and to break into a room with violence, for the same purpose. Whart. C. L. § 2002.

II. ACT 31 MARCH 1860. Purd. 241.

SECT. 142. If any person shall wilfully and maliciously put, place, cast or throw upon or across any railroad, any wood, stone or other matter or thing; or shall wilfully and maliciously take up, remove or displace any rail, sleeper or other matter or thing belonging to any railroad; or shall wilfully and maliciously turn, move or divert any switch or other machinery belonging to any railroad; or shall wilfully and maliciously make or show, hide or remove any signal or light upon or near any railroad; or shall wilfully and maliciously do, or cause to be done, any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure or destroy any tender, carriage, car or truck used on such railroad, or to endanger the safety of any person travelling or being upon such railroad; every such offender shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding ten thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.

SECT. 143. If any person shall wilfully and maliciously cast, throw or cause to fall or strike against, into or upon any engine, tender, carriage, car or truck used upon any railroad, any wood or stone, or other matter or thing, with intent to endanger the safety of any person being in or upon such engine, tender, carriage, car or truck, every such offender shall be guilty of misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding three years.

SECT. 144. If any person shall wilfully and maliciously break, throw down, level or destroy the whole or any part of any lock, sluice, flood-gate, bank, waste-wier, dam, aqueduct, culvert, bridge, feeder, guard-wall, towing-path or berme-bank belonging to any artificial navigation, or stop up or obstruct any such feeder, waste-wier, aqueduct or culvert, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment, by separate or solitary confinement, or by simple imprisonment at labor, not exceeding three years.

SECT. 145. If any person shall wantonly open or shut, or cause to be opened or shut, any lock or safety-gate, or any wicket, paddle or culvert gate, or any waste, feeder or sluice gate, or drive any nails, spikes, pins or wedges into any such gate or fixtures thereof, or shall take any other means to prevent the perfect and free use of the same, or shall wantonly and maliciously break, throw down or destroy any fence, wall or timber work on any canal, pool, feeder or other part of any artificial navigation; or if any person shall wilfully obstruct the navigation of any canal

or pool, by throwing into the same, or sinking to the bottom thereof, any vessel, timber, stone, earth or other thing, or by placing anything whatever upon any towing-paths; such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding three calendar months.

SECT. 146. If any person shall unlawfully and maliciously break down or cut down the bank or wall of any river, canal or marsh, whereby any land shall be overflowed or damaged, or be in danger thereof, such person shall be guilty of a misdemeanor, and being thereof convicted, be sentenced to pay a fine not exceeding one hundred dollars, and to undergo an imprisonment not exceeding one year.

SECT. 147. If any person shall unlawfully and maliciously break, injure or otherwise destroy or damage any part of any locomotive or stationary engine, inclined plane, engine-house, station or depot, bridge, culvert, trussel work or other building or structure belonging to any railroad, or any other part of such railroad; or shall wantonly and maliciously derange or displace the fixtures or machinery of any locomotive or stationary engine used or employed on any railroad; or shall wilfully and maliciously destroy or injure any fence or wall, cross road passing over or under such railroad; or shall unlawfully and maliciously break, injure or otherwise destroy or damage any of the posts, wires or other materials or fixtures employed in the construction and use in any line of an electrical telegraph, or shall wilfully and maliciously interfere with such structure so erected, or in any way attempt to lead from its uses or make use of the electrical current, or any portion thereof, properly belonging to and in use, or in readiness to be made use of, for the purpose of communicating telegraphically from one station of a telegraph company to another established station of the same, or a connecting telegraph line; or shall unlawfully and maliciously break, injure or otherwise destroy or damage any bridge, river or meadow bank or mill-dam; or wilfully and maliciously take down, injure, remove or in any manner damage or destroy any flag, flag-staff, beacon, buoy or other way or water marks, which now are or hereafter may be put, erected or placed, by lawful authority, near or in any streams that are or may be declared public highways; or shall unlawfully and maliciously cut, break or otherwise destroy any lead, tin, copper or iron spout affixed to any house or other building, public or private; or shall unlawfully and maliciously daub, paint or otherwise deface any dwelling-house, such offender shall be guilty of a misdemeanor, and, upon conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding twelve months, or both, or either, at the discretion of the court.

SECT. 148. If any person shall wilfully and maliciously break, injure or destroy any window or door belonging to any dwelling-house or out-house, parcel thereof; or shall unlawfully and maliciously break or take off from the door any knocker or bell-pull, or plate inscribed with the name of the occupant or number of the house; or shall wilfully and maliciously destroy, take down, injure or deface any sign, put up by an inhabitant to denote the place of his abode, occupation, business or employment, such person shall be guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding one hundred dollars, or suffer an imprisonment not exceeding six months, or both, or either, at the discretion of the court.

SECT. 149. If any person shall wilfully and maliciously break down any tree or shrub growing on the public grounds as inclosed on capitol hill, or otherwise injure or destroy the same, or shall break or destroy the fence around such inclosure, or any part thereof, or shall maliciously and wilfully injure any part of the public grounds, or the building belonging to the state; or if any person shall wilfully or maliciously injure or destroy any fruit or ornamental trees, shrub, plant or grape-vines growing or cultivated in any orchard, garden or close, or upon any public street or square in this commonwealth; he shall be guilty of a misdemeanor, and, on conviction, be fined not exceeding one hundred dollars, and undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court.

SECT. 150. If any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up or obstruct any airway, waterway, drain, pit, level or shaft of or belong-

ing to any mine, such offender, his aiders and abettors, shall, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding two years.

SECT. 151. If any person shall wilfully and maliciously cut, injure or destroy, or deface any hose or engine, or any apparatus appertaining to the same, belonging to any fire engine or hose company, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 152. If any person shall cut down or fell any timber tree or trees, knowing the same to be growing or standing upon the lands of another person, without the consent of the owner; or if any person shall purchase or receive any timber tree or trees, knowing the same to have been cut or removed from the lands of another, without the consent of the owner thereof; or who shall purchase or receive any planks, boards, staves, shingles or other lumber, made from such timber tree or trees, so as aforesaid cut or removed, knowing the same to have been so made; the person so offending shall be guilty of a misdemeanor, and, being thereof convicted, shall be sentenced to pay such fine, not exceeding one thousand dollars, or to such imprisonment, not exceeding one year, as the court, in their discretion, may think proper to impose.

SECT. 153. If any person shall knowingly and maliciously cut, fell, alter or remove any certain bounded tree, or other allowed landmark, to the wrong of his neighbor or any other person, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding one year.

SECT. 154. Every person who shall wilfully and maliciously kill, maim or disfigure any horses, cattle or other domestic animals of another person, or shall wilfully and maliciously administer poison to any such beasts, or expose any poisonous substance, with intent that the same should be taken or swallowed by them, shall be guilty of a misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 155. If any person shall unlawfully and maliciously destroy or damage anything kept for the purpose of art, science or literature, or as an object of curiosity, in any museum, gallery, cabinet, library or other repository, which museum, gallery, cabinet, library or other repository, is either at all times, or from time to time, open for the admission of the public, or any considerable number of persons to view the same, either by the permission of the proprietor thereof or by payment of money for entering the same; or any picture, statue, monument or painted glass in any church, meeting-house or other place of religious worship, or any statue or monument exposed to public view; such person shall be guilty of a misdemeanor, and, being convicted thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding six months.

ACT 23 MARCH 1865. Purd. 1887.

SECT. 1. If any person or persons shall maliciously or wantonly break or throw down any post and rail, or other fence, erected for the inclosure of land, or shall carry away, break or destroy any post, rail or other material, of which such fence was built, inclosing any lots or fields within the commonwealth, such person or persons so offending shall be guilty of a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding fifty dollars, one half thereof to be paid to the informer, on conviction of the offender or offenders, the other half to the support of the poor of such county, township, borough or ward where the offence has been committed, with costs of prosecution, or to undergo an imprisonment not exceeding six months, or both or either, at the discretion of the court. •

ACT 12 FEBRUARY 1870. Purd. 1600.

SECT. 1. Any baggage master, express agent, stage driver, hackman or other

person, whose duty it is to handle, remove or take care of the baggage of passengers, who shall wilfully or recklessly injure or destroy any trunk, valise, box, package or parcel, while loading, transporting, unloading, delivering or storing the same, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not exceeding one hundred dollars: *Provided*, That the provisions of this act shall not be so construed as to release railroad or other transportation companies from their liabilities under existing laws.

III. WARRANT FOR DESTROYING A SIGN.

CITY OF PITTSBURGH, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said City, greeting:

You are hereby commanded to take the body of A. B., if he be found in the said city, and bring him before J. R., one of our aldermen in and for the said city, to answer the commonwealth upon a charge, founded on the oath of C. D., of having, on the night of the 8th of May 1869, taken down, broken and destroyed, a wooden sign, which had been put up by the said C. D., to denote his place of abode and his business as an innkeeper, contrary to the act of assembly in such case made and provided, and further to be dealt with according to law. And for so doing, this shall be your warrant. Witness the said J. R., at Pittsburgh, who hath hereunto set his hand and seal, the ninth day of May 1869.

J. R., Alderman. [SEAL.]

IV. WARRANT FOR REMOVING A LANDMARK.

DAUPHIN COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Dauphin, greeting:

WHEREAS, J. L., of the township of S—, in the county of Dauphin, yeoman, hath this day made oath before J. P., Esquire, one of our justices of the peace in and for said county, that J. D., of the said township, tailor, did cut down and remove a certain black-oak tree, [or “did remove a certain heap of stones,” as the case may be,] being an allowed landmark between the land of the said J. L. and the land of the said J. D. These are therefore to require you to take the said J. D., and bring him before the said J. P. forthwith, to answer the complaint. Witness the said J. P. at S— township aforesaid, the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-nine.

J. P., Justice of the Peace. [SEAL.]

V. ACT 1 APRIL 1863. Purd. 1296.

SECT. 1. Any damages wilfully done to the property of any livery-stable keeper in the county of Allegheny, (a) while in the custody or possession of any bailee or bailees to whom the same may have been hired, shall be taken and deemed to be a misdemeanor, punishable by fine, at the discretion of the court of quarter sessions, or by imprisonment in the common jail of said county, for a period not exceeding thirty days.

ACT 23 AUGUST 1865. Purd. 1458.

SECT. 1. Any damage or damages done to the property of any livery-stable keeper, in the counties of Allegheny, Berks and Westmoreland, (b) by careless driving or improper conduct, while in the custody or possession of any bailee or bailees to whom the same may have been hired, shall be taken and deemed to be a misdemeanor, punishable by fine, at the discretion of the court of quarter sessions, or by imprisonment in the common jail of said county for a period not exceeding thirty days, and shall be liable to pay said livery-stable keeper all damages which he may sustain thereby.

(a) Extended to the counties of Armstrong, Butler, Indiana and Fayette, by act 18 March 1868. P. L. 358.

(b) Extended to Washington county, by act 7 March 1868, P. L. 285; to Lawrence and Clearfield, by act 18 February 1869, P. L. 212; to Venango, by act 12 April 1869, P. L. 871; to Beaver county, by act 5 April

1870, P. L. 933; and to Armstrong county, by act 13 April 1870, P. L. 1151. See act 5 April 1867, for a similar provision as to Mercer county. P. L. 840. Act 13 April 1868, as to Indiana county, P. L. 876; extended to Jefferson county, by act 26 February 1870, P. L. 258. And act 18 March 1869, as to Crawford and Chester counties. P. L. 416.

VI. ACT 30 MARCH 1860. Purd. 687

SECT. 1. The wilful taking and carrying away of fruit, vegetables, plants, fruit or ornamental trees, vines or shrubs, in the counties of Huntingdon, Washington, Allegheny, Berks, Lancaster, Lycoming and Delaware, whether attached to the soil or not, shall be deemed, and the same is hereby declared, a misdemeanor, and may be prosecuted and punished as such, under the laws of this commonwealth, and, on conviction thereof, in the court of quarter sessions of said county, shall be fined, not exceeding fifty dollars, and imprisoned, not exceeding sixty days; such fine or penalty to be appropriated as provided in the second section of this act.

SECT. 2. Any person or persons who shall wilfully enter or break down, through or over any orchard, garden or yard-fence, hot-bed or green-house; or who shall wrongfully club, stone, cut, break, bark or otherwise mutilate or damage any nut, fruit or ornamental tree, shrub, bush, plant or vine, trellis, arbor, hot-bed, hot or green-house, or who shall wilfully trespass upon, walk over, beat down, trample or in anywise injure any grain, grass, vines, vegetables or other growing crop; shall and may, on conviction thereof before any alderman or justice of the peace, or in any court of law in said counties, have judgment against him, her or them, in a sum not less than five, nor more than one hundred dollars, with costs of suit; one half the damage or penalty to go to the use of the informer, the other half of the damage or penalty to the occupant or owner of the premises on which the said trespass shall or may be committed; and in default of payment of said fine or judgment, with costs of suit, the party convicted may and shall be committed to the jail of said county, for not less than twenty, nor more than sixty days; said complaint or action to be in the name of the commonwealth, and the testimony of the owner or occupant of the premises shall be admitted as evidence to prove the trespass and damage sustained: *Provided*, That when the owner of the premises shall become the informant, then one-half of the penalty shall be appropriated to the school fund of the district in which the trespass was committed.

NOTE.—This act was extended throughout the commonwealth, by act 17 April 1861. P. L. 332.

ACT 1 MAY 1861. Purd. 687.

SECT. 2. The provisions of the first section of said act (a) are hereby extended for the protection of graperies, statuary, vases, fountains and all other useful and ornamental erections in public and private gardens, yards, grounds, parks, streets and squares, the wilful trespass upon, or injury to which is hereby declared a misdemeanor, which may be prosecuted and punished as such, as directed for the prosecution and punishment of the offences named in said act.

ACT 8 APRIL 1867. Purd. 1515.

SECT. 1. The wrongful taking and carrying away of fruit, vegetables, plants, fruit, ornamental or other trees, vines or shrubs, in the counties of Clinton, Centre, Butler, Lawrence and Mercer, whether attached to the soil or not, shall be deemed, and the same is hereby declared a misdemeanor, and may be prosecuted and punished as such, under the laws of this commonwealth.

SECT. 2. Any person or persons who shall wilfully and maliciously, in said counties, enter or break down, through, or over [any] field, orchard, garden or yard, fence, hot-bed, hot or green house, and who shall wilfully and maliciously club, stone, cut, bark, break or otherwise mutilate or damage any fruit, ornamental or other tree, shrub, bush, plant or vine, trellis, arbor, hot-bed, hot or green house; or who shall wilfully and maliciously trespass upon, walk over, beat down, trample or in any wise injure any grain, grass, vines, vegetables or other growing crop, in the said counties of Clinton, Centre, Butler, Lawrence and Mercer, shall, on conviction thereof in an action of trespass, before any mayor, burgess, alderman or justice of the peace, or in any court of law of said counties, have judgment against him, her or them, for

(a) The 1st section of this act extends the provisions of the act 30 March 1860 to various counties; having been passed apparently in ignorance of the fact that the act of 1860 had been already extended throughout the state, by act 17 April 1861.

double the amount of damage proved to have been done, together with costs of suit; one-half of said damage or penalty to go to the use of the poor of the district wherein the premises lie; and in default of payment of said fine, the party convicted may and shall be committed to jail for not less than one nor more than twenty days; said action to be brought in the name of the commonwealth, and the testimony of the owner or occupant of the premises shall be admitted as evidence to establish the trespass.

SECT. 3. Any person in the counties of Clinton, Centre, Butler, Lawrence and Mercer, who shall cut, break or girdle, or otherwise injure any fruit, ornamental or other tree, vine or shrub, or who shall enter any field, orchard, garden or close, without the consent of the owner or owners thereof, with intent to take, injure or destroy any fruit or vegetables therein growing or being, without the consent of the owner or owners as aforesaid, or who shall wilfully deface, injure, break or destroy any fence, wall or gate surrounding any orchard, garden or close as aforesaid, shall be guilty of a misdemeanor, and upon conviction thereof, before any justice of the peace, shall forfeit and pay a fine not less than five nor more than fifty dollars, or suffer imprisonment in the county jail for not less than ten nor more than sixty days: *Provided*, That nothing herein contained shall prevent the injured party from pursuing any civil remedy authorized by law.

VII. ACT 8 APRIL 1867. Purd. 1489.

SECT. 1. It shall not be lawful for any person or persons, occupying any house or houses, in the city of Philadelphia, at rent or otherwise, and not being the owner, to deposit any ashes, rubbish, bricks, stones or cinders, in any privy-well attached to such premises; any person or persons convicted in the court of quarter sessions of the county of Philadelphia, for any violation of the provisions of this act, shall be punished by a fine not exceeding five hundred dollars, or imprisonment for a period not exceeding two years, in the discretion of the court.

ACT 2 APRIL 1869. Purd. 1547.

SECT. 1. Any person found guilty of mutilating, destroying, tearing down or removing any show-bill, placard, programme, poster or other advertisement posted up on any wall, fence, bill-board or other structure in or located on any public highway in the city of Philadelphia, and county of Centre, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five nor more than one hundred dollars for the first offence; upon a conviction for a second offence the penalty shall be imprisonment in the county jail for a period of not less than three nor more than six months: *Provided*, The penalties of this act shall not apply to those tearing down or removing show-bills, play-bills, posters, programmes, &c., after the performance therein advertised, or to the owner or tenant of any building, fence or other structure upon which the said show-bills, play-bills, programmes, &c., may be posted against his or their wishes, save and except such owner or tenant be the bill-poster putting up or employed to put up said show-bills, play-bills, posters, programmes, &c.; in such case the penalty shall be as in the first and second offences. All fines collected under and by virtue of this act shall be paid into the state treasury.

Malicious Prosecution.

AN action of malicious prosecution will lie where a criminal prosecution was commenced, although no indictment was preferred to the grand jury. 4 Y. 507.

Demanding excessive bail, although the plaintiff has a well-founded cause of action, or holding to bail when the plaintiff has no cause of action, if done for the purpose of vexation, entitles the party aggrieved to an action for a malicious prosecution. 1 Peters' C. C. 210. 1 P. R. 232.

In order to support this action, an injury and damage to the plaintiff must be proved, and it must be proved that the injury and damage were occasioned by some malicious act of the defendant, and the malice may be inferred from the circumstances. 4 S. & R. 19-23.

To support an action for a malicious prosecution, both *malice* and the want of *probable cause* must be established against the defendant. 3 W. C. C. 21.

In a civil suit, the existence of a cause of action is not a defence to a suit for an excessive abuse of process. But in criminal proceedings, want of probable cause must be combined with malice. 8 W. 240.

Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged. 2 H. 369.

The question of *malice* is to be decided by the jury. *Probable cause* is a mixed question of law and fact; what circumstances are sufficient to prove probable cause, is to be judged by the court; whether the circumstances which amount to probable cause are proved, is a question for the jury. Bright. R. 494.

In an action for a malicious prosecution, the question of probable cause should be submitted to the jury, not upon the fact of the guilt or innocence of the plaintiff, but upon the defendant's belief of his guilt or innocence. 5 W. & S. 438.

If the prosecution, though without probable cause, was instituted under an error of judgment, and without malice, the action cannot be sustained. Bright. R. 494. And if the party had probable cause, it fully justifies him, however malicious his motives may have been. 4 W. & S. 517. 1 Barr 234.

If two or more persons conspire to prosecute an innocent man, upon a criminal charge, it becomes an offence against the Penal Code, punishable with fine and imprisonment. Purd. 238. And although the conspirators may succeed in procuring the conviction of the accused, before a competent tribunal, this but aggravates the offence, and is no bar to an indictment against those who by such combination have procured the conviction. The judgment of a court obtained by corrupt testimony, may be controverted in a proceeding against those who have been guilty of a fraudulent combination to produce it. 2 P. 367. Fost. Cr. L. 130-1.

To bring a civil action, though groundless, is not actionable; 1 Pet. C. C. 210; but if one abuse the process of the law, as by maliciously holding to bail, an action lies: so, wantonly to levy a second execution, after a former levy, or for a larger sum than is due, or after the debt has been paid, have been held actionable; for all these are illegal, and damage is thereby sustained. 10 W. 118. 4 S. & R. 19. 12 H. 112. 6 C. 69.

The fact that the prosecutor acted under the advice of counsel, is sufficient proof of probable cause, unless it be shown that he made the resort to counsel a mere cloak for his malice. 9 C. 501. So, if he acted *bonâ fide*, under the advice of a justice of the peace, after a fair and full disclosure of all the circumstances.

For causing a person to be arrested on a criminal warrant, charging an act which is not a crime, the proper remedy is an action of trespass; for such arrest is not an abuse of lawful process; it is an act committed under a void and irregular writ, every step of which is unlawful. 6 C. 344. And all concerned in such arrest are, in law, trespassers. 8 C. 169. See 1 P. F. Sm. 158.

Markets.

[See ADULTERATION AND SALE OF UNWHOLESOME PROVISIONS.]

I. Statutes.

II. Judicial decisions.

I. ACT 18 MARCH 1775. Purd. 696.

SECT. 8. It shall and may be lawful to and for the clerk of the market of any city, borough or town, within this province, to weigh all butter brought into the same to be sold by weight, which, if found deficient, the said clerk shall forthwith, in the presence of two reputable freeholders, weigh again, and if it appears to the said freeholders that the said butter is under weight, the same shall be seizable; one-third part thereof for the use of the said clerk, and the other two-thirds for the use of the poor of the place where seized; and in case any owner or owners of butter so seized shall conceive him, her or themselves, aggrieved by such seizure, he, she or they, may appeal to any magistrate or justice of the city, borough or place where such seizure is made, who shall hear, try and determine the same.

NOTE.—It may be useful to remark, that it is indispensable that the butter shall be weighed in the presence of two reputable freeholders, and if it shall appear to *them* that the said butter is under weight, it shall be seizable. Under no other circumstances is it seizable, and even then, if the owner shall consider himself aggrieved, he may appeal to any justice of the peace having jurisdiction in the district where the seizure was made.

ACT 7 MAY 1855. Purd. 697. ●

SECT. 1. It shall not be lawful for any butcher or other person to expose for sale any tainted or unwholesome meat or fish, or any veal less than three weeks old when killed, in any of the market-houses or other places for vending meat in any of the cities or boroughs in the several counties of this commonwealth, under a penalty of ten dollars for each offence, to be recovered as other penalties are recoverable, before any alderman or justice of the peace, one-half of said penalty to go to the informer, and the other half for the benefit of the poor: all laws inconsistent with the above are hereby repealed.

NOTE.—This act is not entirely supplied by the 69th section of the revised Penal Code, for which see tit. "Adulteration and Sale of Unwholesome Provisions."

II. Every municipal corporation which has power to make by-laws and establish ordinances to promote the general welfare and preserve the peace of a town or city, may fix the times and places of holding public markets for the sale of food, and make such other regulations concerning them, as may conduce to the public interest. 9 C. 202.

A market, when established, may imply a license to any one to enter as a buyer, but not necessarily as a seller. 1 Phila. R. 388.

There is no market overt in Pennsylvania, and the owner of goods, horses, &c., stolen from him, or obtained by fraud, may recover on replevin, the value of the horse or other chattel stolen, as it was at the time it came to the defendant's possession. 2 Y. 347. 1 Y. 478.

Marriage.

I. Acts of assembly.
 II. Judicial decisions on the subject of marriage and its effects.

III. A marriage ceremony and certificate.

I. Act of 1701. Purd. 697.

SECT. 1. All marriages not forbidden by the law of God, shall be encouraged; but the parents or guardians shall, if conveniently they can, be first consulted with, and the parties' clearness of all engagements signified by a certificate from some credible person where they have lived or do live, produced to such religious society to which they relate, or to some justice of the peace of the county in which they live, and by their affixing their intentions of marriage on the court-house or meeting-house doors in each respective county where the parties do reside or dwell, one month before solemnization thereof; the which said publication, before it be so affixed as aforesaid, shall be brought before one or more justices of the peace, in the respective counties to which they respectively belong; which justice shall subscribe the said publication, witnessing the time of such declaration, and date of the said publication, so to be affixed as aforesaid. And all marriages shall be solemnized by taking each other for husband and wife, before twelve sufficient witnesses; and the certificate of their marriage, under the hands of the parties and witnesses, at least twelve, and one of them a justice of the peace, shall be brought to the register of the county where they are married, and registered in his office. And if any servant or servants shall procure themselves to be married, without consent of his or her master or mistress, such servant or servants shall, for such their offence, each of them serve their respective masters or mistresses one whole year after their time of servitude by indenture or engagement is expired; and if any person, being free, shall marry with a servant as aforesaid, he or she so marrying shall pay to the master or mistress of the servant, if a man, twelve pounds, and if a woman, six pounds, or one year's service; and the servant so being married, shall abide with his or her master or mistress, according to indenture or agreement, and one year after, as aforesaid. And if any person shall presume to marry or be witnesses to any marriage, contrary to this act, such person, so married, shall forfeit twenty pounds to the proprietary and governor; and the witnesses being present at such marriage, shall forfeit and pay each of them five pounds, to the use of the proprietary and governor, as aforesaid, and pay damages to the party grieved, to be recovered in any court of record within this government.

SECT. 2. *Provided*, that this law shall not extend to any who shall marry or be married in the religious society to which they belong, so as notice shall be given by either of the parties, to the parents, masters, mistresses, or guardians, one full month at least before any such marriage be solemnized.

SECT. 3. No license or dispensation shall hinder or obstruct the force or operation of this act, in respect of notice to be given to parents, masters, mistresses, or guardians, as aforesaid.

ACT 14 FEBRUARY 1729-30. Purd. 698.

SECT. 1. No justice of the peace shall subscribe his name to the publication of any marriage within this province, intended to be had between any persons whatsoever, unless one of the persons, at least, live in the county where such justice dwells, and unless such justice shall likewise have first produced to him a certificate of the consent of the parent or parents, guardian or guardians, master or mistress, of the persons whose names or banns are to be so published, if either of the parties be under the age of twenty-one years, or under the tuition of their parents, or be indentured servants, if such parent, guardian, master or mistress, live within this province, or can be consulted with. And also, that no person or persons, of what character or degree soever he be, shall presume to publish the banns of matrimony, or intentions of marriage, between any person or persons, in any church, chapel, or other place of worship, within this province, unless one of the parties, at least, live in the town, county or city, where such publication shall be made, and unless the

person or persons making or causing to be made such publication, shall have received such certificate of the consent of the parent, guardian, master or mistress, as is herein before directed, if the parties who ought to grant such certificate live within this province.

SECT. 2. If any justice of the peace, clergyman, minister or other person, shall take upon him or them, to join in marriage any person or persons, or if any justice of the peace shall be present at, and subscribe his name as a witness to, any marriage within this province, without such publication being first made, as aforesaid, such justice of the peace, clergyman, minister or other person, taking upon him to sign, make or cause to be made, any publication contrary to the directions of this act, or shall marry or join in marriage any person or persons not published, as in the aforesaid act of assembly and by this act is directed, every justice of the peace, clergyman, minister or other person so offending, shall for every such offence forfeit the sum of fifty pounds, to be recovered in any court of record within this province, by bill, plaint or information, by the person or persons grieved, if they will sue for the same, wherein no essoin, protection or wager of law, nor any more than one imparlance shall be allowed.

SECT. 3. *Provided*, that nothing herein contained shall be deemed to extend to any person who shall be married in the religious society to which they belong, so as notice be given to the parent or parents, guardian or guardians, masters or mistresses, of the person or persons so to be married, if such parent, guardian, master or mistress, live within this province, at least twenty days before such marriage be solemnized; nor that this law shall extend to any person marrying by the authority of any lawful license, so as such consent or approbation, in writing, of the parent or parents, guardian or guardians, masters or mistresses, as by this act is directed, be first had, and the same consent be certified in the body of the said license.

ACT 10 APRIL 1849. Purd. 699.

SECT. 2. Every person in whose care or possession may be found the record kept by any minister of the gospel, judge, alderman or justice of the peace, of any marriage contract solemnized by or in the presence of such minister of the gospel, judge, alderman or justice of the peace, shall, on application made to him, and the payment or tender of a fee of fifty cents in every case, deliver to the person applying for the same, a full transcript of the record or entry in such case, with a proper certificate of the correctness of said transcript; and any person having possession of such record as aforesaid, neglecting or refusing to comply with the provisions of this section, shall be liable to a penalty of fifty dollars, to be sued for and recovered with costs, before any justice of the peace of the proper county, by any person aggrieved, one half to be paid to the person suing for the same, and the other half to the county in which suit is brought.

ACT 8 MAY 1854. Purd. 699.

SECT. 4. Any judge, justice or clergyman who shall perform the marriage ceremony between parties when either of said parties is intoxicated shall be deemed guilty of a misdemeanor, and upon a conviction thereof shall pay a fine of fifty dollars, and be imprisoned at the discretion of the court not exceeding sixty days.

ACT 14 MAY 1857. Purd. 699.

SECT. 1. In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock and cohabit, such child or children shall thereby become legitimated, and enjoy all the rights and privileges as if they had been born during the wedlock of their parents.(a)

II. Marriage is a civil contract, which may be entered into before any witnesses, and for which there is no particular form of ceremony required by law; neither need it be performed before a clergyman or a magistrate. 6 B. 405. 2 W. 9. 3 P. F. Sm. 132. 4 N. Y. 230. 2 Chicago Leg. News 66.

(a) By act of 21st April 1857, this act is to apply to prior cases of marriage; but no estate is to be thereby divested. Purd. 699. The act 6th April 1868, legalizes prior marriages between parties within the prohibited degrees of affinity, of which issue is born, and legitimates the issue thereof. Purd. 1516.

The validity of a marriage is to be determined by the law of the place where it was celebrated; if valid there, it is valid anywhere. 10 W. 158. 2 Brewst. 290.

For civil purposes, cohabitation and reputation are sufficient evidence of marriage. 1 P. R. 450. 2 Brewst. 149, 179, 202, 239. 11 C. 157. 10 P. F. Sm. 228. See 4 N. Y. 230. 8 P. F. Sm. 132. 11 *Ibid.* 861.

The provisions in the acts of 1701 and 1729-30, requiring all marriages to be solemnized in the presence of twelve witnesses, and to be preceded by the publication of banns, are only directory; and a non-compliance with them does not invalidate a marriage. 2 W. 9.

The consent of the parties to the alleged marriage is to be determined by what took place at the time of its celebration; it is not affected by a secret reservation of one of them. 11 C. 13.

An apprentice is not an indented servant within the meaning of the act of 1701. 3 R. 805.

In an action against a clergyman or justice to recover the penalty given by the act of 1729-30, the previous assent of the parent may be proved, to show that the marriage was not clandestine. 2 W. 9. 10 W. 82. 5 R. 211. But not his subsequent indications of satisfaction with it. A. 192. 10 W. 82.

A surviving mother is a parent within the meaning of the act. 1 Barr 431. And so is the putative father of an illegitimate child. A. 212.

The parent is entitled to sue, though the child be apprenticed to another. 3 R. 805. But not a father who has relinquished his parental control over the child, and turned it upon the world to shift for itself. 7 W. & S. 362. It is no defence, however, to such an action, that the father, by reason of moral degradation, was unfit to take care of his minor child. 10 C. 325.

It is no defence that the justice or clergyman misconceived the age of the person married. 5 R. 124.

No penalty is recoverable for marrying the minor daughter of a citizen of another state, not resident within this commonwealth, without the consent of her parent. 2 J. 205.

It is the joining in marriage without publication, to which the penalty is attached, and not the doing so without a certificate of consent. A. 346. And the burden of proving that there was no publication of banns lies on the plaintiff. 5 R. 209.

In such an action, the jury can give neither more nor less than the exact penalty of £50 or \$183.33½. A. 214. Nor is the tender of any less sum a sufficient amendment. 8 W. 817. 4 B. 25. But, it seems, the party may waive the penalty and sue for damages under the act of 1701. 14 S. & R. 289.

There can be but one penalty recovered; and if the parent of one party has already recovered, no action can be maintained by the parent of the other party. 14 S. & R. 287. But a collusive recovery in the first action is not a defence. *Burns v. Bryan*, Pittsburgh Leg. J., 16 December 1854.

In such action, no actual damage need be proved. 5 R. 209. It is sufficient, that the marriage is an unjustifiable interference with the relation existing between the parent and his offspring. *Ibid.* 124.

It is a well settled principle, that the husband is *not* bound by the contracts of his wife, unless by some act or declaration, prior or subsequent to the contract, his consent may be fairly inferred. 5 B. 236.

The husband is not liable on a negotiable note given by his wife, even in a suit by a *bona fide* indorsee, unless it were given with his authority or approbation, and that must be shown before such note is admissible in evidence against the husband. 5 W. & S. 164. 3 H. 185.

The husband is liable for necessities furnished his wife during her separation from him, though it was by her agreement, if she offer to return and he refuse to receive her, and have furnished no means for her subsistence. 7 S. & R. 247.

If a man cohabit with a woman, to whom he is not married, and permit her to assume his name, and appear, to the world, as his wife, and in that character to contract debts for necessities, he will become liable, although the creditor be acquainted with her real situation; for here a like assent will be implied, as in the case of husband and wife. *Selw. N. P.* 296.

If a man marry a woman having children by a former husband, he is not bound, by the act of marriage, to maintain such children; but if he hold them out to the

world as part of his family, he will be considered as standing in *loco parentis*, [in the place of a parent,] and liable, even on a contract made by his wife, during his absence abroad, for the maintenance of such children. Selw. N. P. 296. 3 N. Y. 312.

When is a wife excused for criminal misconduct? In some cases the command or authority of the husband, either expressed or implied, will privilege the wife from punishment; and therefore, if a woman commit theft, burglary or other civil offence against the laws of society by the coercion of her husband, or even in his company, which the law construes a coercion, she is not guilty of any crime: being considered as acting by compulsion and not of her own will. 1 Hawk. P. C. 3. Whart. C. L. § 71. 1 Eng. L. & Eq. 549.

The husband, however, must be present when the offence is committed, or the presumption of coercion by him does not arise. R. & R. C. C. 270.

The wife is not treated as an accessory to a felony, for receiving her husband who has been guilty of it; though, on the contrary, it appears the husband would be, for receiving his wife. Hale's P. C. 44. Whart. C. L. § 80.

The law seems to protect the wife in all *felonies* committed by her in company with her husband, except murder and manslaughter. Hale's P. C. 47.

In treason, also, no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt. Ibid. Add. Ch. 66.

In all *misdemeanors* it appears that the wife may be found guilty with the husband, and in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any *feme sole*. 4 Bl. Com. 29, 30.

III. MARRIAGE CEREMONY.

The magistrate, addressing the persons assembled, shall say:—

We are gathered together here, in the sight of God and in the face of this company, to join together this man and this woman in holy matrimony, which is honorable among all men, and, therefore, is not by any to be entered into unadvisedly or lightly, but reverently, discreetly, advisedly, soberly and in the fear of God. Into this holy estate these two persons present come now to be joined; if any one can show just cause why they may not be lawfully joined together, let him now speak, or else, hereafter, for ever hold his peace.

The magistrate shall then address himself to the man, and say:

A. B., wilt thou have this woman to be thy wedded wife, to live together after God's ordinance in the holy estate of matrimony? wilt thou love her, comfort her, and keep her in sickness and in health, and forsaking all others, keep thee only unto her so long as ye both shall live?

The man shall answer, "I will."

Then shall the magistrate say unto the woman:

C. D., wilt thou have this man to be thy wedded husband, to live together after God's ordinance in the holy estate of matrimony? wilt thou obey him, and love him, and keep him in sickness and in health, and forsaking all others, keep thee only unto him so long as ye both shall live?

The woman shall answer, "I will."

The magistrate, then joining their right hands together, shall say:

Forasmuch as A. B. and C. D. have consented together in holy wedlock, and have witnessed the same before God and this company, and thereto have given and pledged their faith each to the other, and have declared the same by joining of hands, I do, by virtue of the authority vested in me by the laws of the state of Pennsylvania, pronounce that they are man and wife; and let no one put asunder those who have thus been joined together in the presence of God and before this company.

A MARRIAGE CERTIFICATE.

By authority of the Commonwealth of Pennsylvania,

THIS IS TO CERTIFY, That, on the [tenth] day of [June,] in the year of our Lord one thousand eight hundred and [sixty,] before me, P. C., one of the aldermen in and for the city of Philadelphia, [George Goodfellow, of the city of Philadelphia, and Mary Johnson, of Camden, New Jersey,] having plighted the solemn vows of duty and affection, were by

me legally joined in marriage, each of them declaring themselves of full age, and free, respectively, from any prior engagement, or other lawful impediment; whereupon I, the said alderman, have declared, and by these presents do declare, them to be man and wife, according to the constitution and laws of the commonwealth of Pennsylvania.

In witness whereof, I, the said alderman, have subscribed my name and affixed my seal, the day and year above mentioned.

P. C., Alderman. [L. s.]

Married Women.

I. Acts relating to the rights of married women. II. Judicial decisions and authorities.

I. ACT 11 APRIL 1848. Purd. 699.

SECT. 6. Every species and description of property, whether consisting of real, personal or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman, as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture, by will, descent, deed of conveyance or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property; and the said property, whether owned by her before marriage, or which shall accrue to her afterwards, shall not be subject to levy and execution for the debts or liabilities of her husband, nor shall such property be sold, conveyed, mortgaged, transferred or in any manner incumbered by her husband, without her written consent first had and obtained, and duly acknowledged before one of the judges of the courts of common pleas of this commonwealth, that such consent was not the result of coercion on the part of her said husband, but that the same was voluntarily given, and of her own free will: (a) *Provided*, That her said husband shall not be liable for the debts of the wife contracted before marriage: *Provided*, That nothing in this act shall be construed to protect the property of any such married woman from liability for debts contracted by herself, or in her name by any person authorized so to do, or from levy and execution on any judgment that may be recovered against a husband for the torts of the wife; and in such cases, execution shall be first had against the property of the wife.

SECT. 7. Any married woman may dispose, by her last will and testament, of her separate property, real, personal or mixed, whether the same accrues to her before or during coverture: *Provided*, That said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband.

SECT. 8. In all cases where debts may be contracted for necessities for the support and maintenance of the family of any married woman, it shall be lawful for the creditor, in such case, to institute suit against the husband and wife for the price of such necessities, and after obtaining a judgment, have an execution against the husband alone; and if no property of the said husband be found, the officer executing the said writ shall so return, and thereupon an alias execution may be issued, which may be levied upon and satisfied out of the separate property of the wife, secured to her under the provisions of the first section of this act: *Provided*, That

(a) The act of 9th April 1849, (Purd. 322.) enacts,—that all deeds made by married women since the act of 1848, and all deeds thereafter to be made by them, shall be valid, if acknowledged according to the laws previously in force; that all deeds made by married women out of the commonwealth shall be sufficient, if acknowledged according to the requisitions in such cases provided;—and that deeds, mortgages or powers of attorney, executed by married women out of

the United States, may be acknowledged in the manner prescribed by the act of 1848, before any minister, ambassador, *charge d'affaires*, consul or vice-consul of the United States. The first of these provisions is re-enacted by act 11th April 1856. Purd. 323. And by act of 25th April 1850, (Purd. 323.) the deeds, &c., of married women made in any other of the United States, may be acknowledged before any judge of any court of record.

judgment shall not be rendered against the wife, in such joint action, unless it shall have been proved that the debt sued for in such action was contracted by the wife, or incurred for articles necessary for the support of the family of the said husband and wife.

ACT 22 APRIL 1850. Purd. 700.

SECT. 20. The true intent and meaning of the act of assembly to secure the rights of married women, passed the 11th day of April, A. D. 1848, is and hereafter shall be, that the real estate of any married woman in this commonwealth shall not be subject to execution for any debt against her husband, on account of any interest he may have, or may have had, therein, as tenant by the curtesy; but the same shall be exempt from levy and sale for such debt, during the life of said wife.(a)

ACT 25 APRIL 1850. Purd. 701.

SECT. 39. Any suit or suits at law hereafter to be commenced in any of the courts of this commonwealth, touching or concerning, or for the recovery of any property, real, personal or mixed, belonging or secured to any married woman by virtue of the provisions of the act relating to the rights of married women, passed the 11th day of April 1848, may be brought in the names of such married woman and her husband to the use of the said married woman; and a recovery in such suit or suits shall be for the exclusive benefit of such married woman.

ACT 11 APRIL 1856. Purd. 702.

SECT. 3. Whensoever any husband shall have deserted or separated himself from his wife, or neglected or refused to support her, or she shall have been divorced from his bed and board, it shall be lawful for her to protect her reputation by an action for slander or libel; and she shall also have the right by action to recover her separate earnings or property: *Provided*, That if her husband be the defendant, the action shall be in the name of a next friend.

ACT 22 APRIL 1863. Purd. 1306.

SECT. 1. Where any estate in lands, tenements, hereditaments or any property, real or personal, has been heretofore, by any will or other instrument, taking effect subsequent to the 11th day of April 1848, devised, conveyed, given to or in any way acquired by any married woman, to and for the separate use, or as her separate estate, without the intervention of a trustee, and the same shall heretofore have been conveyed or mortgaged by her, by any deed or instrument duly acknowledged by her before any officer having authority to take acknowledgments of deeds and mortgages, and in which her husband has joined as a party, the said conveyance or mortgage, and the estates and interests thereby created, shall be and be taken to be of like force and effect, in all respects as if the same had been given and executed under and in the due exercise of a power authorizing such conveyance or mortgage, contained in the instrument by which the said separate estate of the said married woman was created: *Provided*, That this act shall not affect any case heretofore finally adjudicated by the supreme court.

II. The act of 1848 enables a married woman to hold property, not as a *feme sole*, but as if it were settled to her use as a *feme covert*. 9 C. 525. Ibid. 118. 12 Ibid. 410. The earlier cases of Cummings' Appeal, 1 J. 272, and Goodyear v. Rumbaugh, 1 H. 480, in which a different construction was given to the act, are no longer recognised as authority in the courts of Pennsylvania.

The fact that real estate was paid for with the wife's earnings or savings, does not give her a separate estate in the property, under this act; the husband is entitled in his own right to the earnings of his wife during coverture. 8 H. 308. Nor can she acquire and hold property against the creditors of her husband by carrying on a

(a) The act 1 April 1863 provides that no judgment obtained against the husband of any married woman, before or during marriage, shall bind or be a lien upon her real estate, or upon any interest the husband may be entitled to therein, as tenant by the curtesy. Purd. 1306.

mercantile business in her own name with capital loaned to her for that purpose; the husband is the owner of goods thus purchased, as he is also of the proceeds of the joint skill and labor of himself and wife 11 C. 375. 3 Wr. 129. 13 Wr. 232.

But a friend of the family (the husband being insolvent) may furnish money to the wife, in trust, to be employed in business for the benefit of the family, the husband acting as agent, without exposing the property to the creditors of the husband. 1 Wr. 247. 7 P. F. Sm. 428. And if the goods of a debtor be sold by the sheriff, and the purchaser make a *gift* of them to the debtor's wife, she may sell them and invest the proceeds in other goods, and hold the same against her husband's creditors. 6 Wr. 311. The distinction appears to be, that she can acquire property by *gift*, but not by *loan*, or by a *credit*; for the law makes the husband responsible for these, if assented to by him, by virtue of the marital relation. See 13 Wr. 129. 3 P. F. Sm. 400.

The act protects the wife's interest in her separate property, both as to title and possession; when she and her husband are in possession, a purchaser at sheriff's sale of the husband's interest cannot recover possession in an action of ejectment against him. 9 H. 402. The act does not require that the use and possession of the property of the wife should be exclusive of the husband. 5 C. 43. 10 H. 381. 12 C. 383. Ibid. 410. 9 Wr. 530. Nor does it protect the wife's chattels from a distress for rent. 2 Wr. 344. In a clear case, a creditor will be enjoined from selling the wife's real estate for the husband's debt. 4 Wr. 194. 11 P. F. Sm. 18.

Where property is claimed by a married woman as against the creditors of her husband, she must show by evidence which does not admit of a reasonable doubt, either that she owned it at the time of her marriage, or else acquired it afterwards by gift, bequest or purchase; in case of a purchase after marriage the burden is upon her to prove distinctly that she paid for it with funds which were not furnished by her husband. 6 H. 366. 12 C. 410. 1 Wr. 156, 247, 433. 2 Wr. 277. 9 Wr. 89. 11 Wr. 221. 13 Wr. 231. 2 P. F. Sm. 412. In the absence of such proof, the presumption is a violent one, that her husband furnished the means of payment. And this rule applies as well to purchases of real as of personal property. 9 H. 349. 5 C. 513. 7 Ibid. 328. 11 Ibid. 261. 14 Wr. 266. 26 Leg. Int. 245. It is not enough, that the wife had the means of paying, without proof of actual payment by her out of her separate funds. 8 Wr. 307. 13 Wr. 129. But the rule has no application in an action against a mere trespasser. 10 H. 381. Nor in a contest with a purchaser for value. 4 P. F. Sm. 75.

The provision for a separate acknowledgment of consent before a judge, only applies to cases where the husband, by the wife's authority, undertakes to transfer or incumber her estate; it makes no change in the form of acknowledgment where both join in the deed. 12 H. 253. 1 C. 142. A wife may bind her separate estate for her husband's debt, but she cannot bind it to pay the expenses of collecting it. 1 Gr. 402. She may, in this mode, assign her interest in her deceased father's residuary estate, to secure the debts of her husband. 12 C. 131.

The act does not empower her to convey her real estate by a deed in which her husband has not joined. 6 H. 506. 7 H. 361. 1 C. 326. 2 P. F. Sm. 400. 3 Ibid. 167. 25 Leg. Int. 29. Or to execute an obligation for the payment of money, or the performance of any other act. 6 H. 82. 8 C. 85. 6 Wr. 325. 7 Wr. 63. Or to enter into a valid recognisance as bail for her husband. 3 Am. L. J. 138. But in a mortgage of her separate estate for the debt of her husband, she may waive the limitation given by the act of 1705, and covenant that a writ of *scire facias* may immediately issue on default of payment of the mortgage debt. 12 H. 18. 1 C. 82. 4 Wr. 140. See 37 N. Y. 35.

The last proviso of the 6th section of the act of 1848, refers to debts contracted by the wife before marriage, from liability for which the husband is exempted by the preceding proviso. 8 C. 85. 9 C. 529. It does not confer upon her a new power to contract debts, with the privilege of being sued for them. Ibid. It seems she is empowered to contract debts for the improvement of her separate estate. 12 H. 80. 8 C. 432. 11 C. 384. But her bond given for such a debt is void. 8 C. 85. 11 Wr. 67. And she is not liable for a debt contracted for the avowed purpose of improving her separate estate, unless it be shown that the money was actually applied to that object. Ibid. 432. See 7 P. F. Sm. 328. 27 Leg. Int. 221.

In an action against husband and wife, brought with a view of charging the wife's separate estate, the plaintiff must set forth in his pleadings such facts as bring the case within some one of the exceptions contained in this act; otherwise the plea of coverture is a good defence for the wife. 11 C. 384. 1 Wr. 251. 3 Gr. 146.

An attachment execution is an alias execution within the meaning of the act, and requires to support it a previous execution against the husband. 1 Phila. 571.

The plaintiff in an action against husband and wife, for a debt contracted for necessities, must aver and prove, not only that the debt was incurred for necessities for the support and maintenance of the family, but that it was contracted by herself. 11 C. 384. 1 Wr. 251. 25 Leg. Int. 124. The same point was ruled in Texas, under the statute of that state. 23 Texas 180. She may, however, contract by her husband as her authorized agent. 3 Gr. 296.

An action cannot be sustained against a married woman for necessities furnished to her before the passage of the act. 1 Phila. 39. What are family necessities, is a question for the jury, under the circumstances of the particular case. 1 Wr. 251. It undoubtedly includes the board and education of her children. 4 Phila. 375.

To render the separate estate of a married woman liable for a debt contracted during coverture, all that is required is, that the claim shall be for necessities for the support and maintenance of her family, that they were contracted for, in her name, by some one authorized by her, and that her husband was insolvent. 10 P. F. Sm. 430.

In an action to recover such a claim, the husband should be joined as a defendant. 7 P. F. Sm. 328. So also, in an action against the executor of a married woman, for necessities furnished in her lifetime, the surviving husband must be joined. 9 Pitts. L. J. 355.

Prior to the passage of the act of 1850, it had been determined that, under the act of 1848, an action to recover the separate property of a married woman, or for injuries done to it, might be brought in the joint names of husband and wife, or that she might sue in her own name without joining her husband, as circumstances might require. 1 H. 480. 4 Ibid. 134. A married woman can neither sue nor be sued on her contract made during coverture; but in actions by or against her, on her antenuptial contract, she is to be joined with her husband. 1 Gr. 21. 5 C. 465. Neither the act of 1848, nor any of its supplements, empowers her, by her next friend, to maintain an action of debt against her husband, on a contract made during coverture. 7 C. 396. Where a joint action is brought against husband and wife, under the act of 1848, with a view of charging the wife's separate estate, she is the substantial party defendant, and may appeal from an award, without her husband joining in the appeal. 11 C. 384.

Under the act of 1856, a wife may sue for slander without joining her husband; her incapacity to sue under that act cannot be taken advantage of on the general issue; it must be pleaded in abatement. 1 Wr. 130.

Master and Servant.

I. Different kinds of servants.

II. Of the relation of master and servant.

I. THE several kinds of persons who come within the description of servants, may be subdivided into hired servants and persons bound by indenture, as regulated by the acts of assembly of 1700 and 1771.

The first class of servants are hired servants; and this relation of master and servant rests altogether upon contract. The one is bound to render the service, and the other to pay the stipulated consideration. *Ibid.* 209.

Another class of servants are servants who become such by indenture, according to the provisions of the foregoing acts of assembly.

To constitute an indenture of servitude, express words, binding the servant, as such, are necessary. 2 Y. 257.

An indentured servant is not liable to be committed as a vagrant. 1 Br. 275.

No instance, I think, can be found in any act of assembly, where the terms "servant" and "apprentice" are used as synonymous. 3 R. 307.

II. There are many important legal consequences which flow from the relation of master and servant.

A master may bring an action against any man for beating or maiming his servant, but in such case he must assign, as a special reason for so doing, his own damage by the loss of his services; and this loss must be proved upon the trial. 1 Bl. Com. 429.

The master is answerable for the act of his servant, if done by his command, either expressly given or implied. Therefore, if the servant commit a trespass, by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. 1 *Ibid.* 480.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it. If I pay it to a clergyman's or a physician's servant, whose usual business is *not* to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm without the owner's knowledge, the owner must stand to the bargain, for this is a steward's business. *Ibid.*

If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust, for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up, for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority. 1 *Ibid.* 480.

When a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again; but if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit. Peake's N. P. 47.

The acts of a servant bind his master only when done in the course of the business committed to him, or within the scope of an authority specially delegated. 4 W. 222. And, therefore, a master is not responsible for the wrongful conversion of his servant, not committed in the regular course of his employment, nor commanded by the master, and the benefit of which did not enure to the master. 27 Leg. Int. 221.

A master is chargeable if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual, or is a common nuisance, for the master has the superintendence and charge of all his household. 1 Bl. Com. 431.

If a servant, by his negligence, does any damage to a stranger, the master shall

answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases, the damage must be done while he is actually employed in the master's service, otherwise the servant shall answer for his own misbehavior. Ibid. 431.

A master is not liable in trespass for the acts of his servant, unless the particular wrongful act of the servant were done by his order. 7 C. 319. Nor is he liable for his servant's deceit. 11 Wr. 480.

A master is not liable for injuries designedly or intentionally inflicted by his servant. 2 Gr. 43.

Where a person employed by one as his servant is using the team of his master for his own purposes and benefit, and in the absence of, and without any directions from the master, uses the team so negligently as to occasion injury to a third party, the master is not liable for such injury, although he assented to the servant using the team for his own benefit. 2 C. 482.

Faithful service is a condition precedent to the right of a servant to his wages; and if, during the term for which he has agreed to serve, he commit a criminal offence, although not immediately injurious to the person or property of his master, he will not be entitled to recover any part of his wages. 1 W. & S. 267.

In the case of a hiring by the year, at a specified sum per month, it is not competent for the employer, within the period contracted for, to reduce the amount of monthly pay without the consent of the other party. 4 H. 196.

If one hired at an agreed price, for a certain time, continue in the same service after the expiration of the term, without any new agreement, the presumption of law is, that the parties understood that the original rate of compensation was to be continued. Such is the contract which the law implies, and there can be no recovery upon a *quantum meruit*, for any increased rate of compensation. 5 C. 184. 12 C. 367.

Where a person is employed for a determinate period, and is improperly dismissed before the expiration of the term, he can recover wages for the whole term, unless it can be shown that he was engaged and rejected profitable service. 8 Wr. 99. But where the duration of service is not defined, it is at will. 10 Wr. 434.

In Pennsylvania, a master has no right to inflict corporal punishment on his hired servant. 1 Ash. 267.

An action is maintainable at common law for enticing away the servant of another. 1 Bl. Com. 429. Whoever, wrongfully and maliciously, or with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harboring and keeping him as a servant, after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act, for which he is responsible at law. 20 Eng. L. & Eq. 176.

And this rule is not confined to menial servants, or laborers, but extends to all cases where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service for a given time, under the direction of an employer, who is injured by the wrongful act. 20 Eng. L. & Eq. 168.

A servant cannot maintain an action against his master for not giving him a character. 3 Esp. 201. If the master give a character which is false and slanderous, the servant may sue the master for it; but a master who honestly and fairly gives the real and true character of a servant to one who asks his character under pretence of hiring him, is not liable to an action for so doing. Bull. N. P. 8. 1 T. R. 110.

Mayhem.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. PURD. 231.

SECT. 80. If any person, on purpose, and of malice aforethought, by lying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off the nose, ear or lip, or cut off or disable any limb or member of another, or brand another, with intention in so doing to maim or disfigure such person; or shall voluntarily, maliciously and of purpose, pull or put out an eye, or bite off the nose, ear, lip, limb or member, or any part of the nose, ear, lip, limb or member of his opponent while fighting, or otherwise; every such offender shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, three-fourths parts whereof shall be for the use of the party grieved, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years: *Provided also*, That the party grieved shall, in such prosecution, be received as a competent witness, his credibility to be judged of by the jury as in other cases.

SECT. 83. If any person, unlawfully and maliciously, shall shoot at any person, or shall, by drawing a trigger, or by any other manner, attempt to discharge any kind of loaded arms at any person, or shall stab, cut or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure or disable such person, the person so offending shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 84. If any person shall unlawfully, wilfully and maliciously, by the explosion of gunpowder, or other explosive substance, burn, maim, disfigure, disable or do grievous bodily harm to any person, he shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement, not exceeding three years.

SECT. 85. If any person shall unlawfully and maliciously cause any gunpowder, or other explosive substance, to explode, or send or deliver to, or cause to be taken and received by any person, any explosive substance, or any other dangerous or noxious thing, or cast or throw at or upon, or otherwise apply to any person, any corrosive fluid, or other destructive or explosive substance, with intent, in any of the cases aforesaid, to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to such person, he shall be guilty of felony, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 90. If upon the trial of any indictment for felony, except murder or manslaughter, the indictment shall allege that the defendant did cut, stab or wound any person, and the jury shall be satisfied that the defendant is guilty of the cutting, stabbing or wounding charged in such indictment, but are not satisfied of his guilt of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of a misdemeanor, in unlawfully cutting, stabbing and wounding; and thereupon, such defendant shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, either at labor by separate or solitary confinement, or to simple imprisonment, not exceeding three years.

II. Cutting or biting off the ear was not mayhem, at common law, but has been made so by statute. 6 S. & R. 226.

On the trial of an indictment for mayhem, the malice and lying in wait, need not be expressly proved, but may be collected from all the circumstances of the case. 1 Y. 415. An indictment, however, which leaves out the words "lying in wait" is defective. 3 Y. 282.

To convict under the first clause of the 80th section, there need be only a general intent to maim and disfigure; but under the second clause, a particular intent to put out the eye must be shown. 1 Y. 415. An indictment, under the latter clause, which leaves out the word "voluntarily" is bad. 3 Y. 282.

Mechanics' Lien.

- I. Lien of mechanics and material-men.
- II. Lien for alterations and repairs.
- III. Lien on leaseholds and fixtures.
- VI. Of the claim.

- V. Proceedings on the claim.
- VI. Claims for extra compensation.
- VII. Forms of claims of various sorts, as well for material-men as mechanics.

I. LIEN OF MECHANICS AND MATERIAL-MEN.

EVERY building (a) erected (b) within the several counties of this commonwealth, to which the act, entitled "An act securing to mechanics and others, payment for their labors and materials in erecting any house or other building, within the city and county of Philadelphia," passed the 17th of March 1806, and the several supplements thereto, now extends, (c) shall be subject to a lien (d) for the payment of all debts contracted (e) for work done, or materials furnished (g) for,

(a) The public buildings belonging to a county are not within the act. 7 W. & S. 197. Nor is a public school-house. 6 H. 275. Nor a railroad company's depot. 5 Leg. & Ins. Rep. 107. Nor any property of a public corporation, that is essential to its active operations. 10 P. F. Sm. 27. See 5 Phila. 13. But a church is such a building. 10 Barr 413. Where the facts are undisputed, the question whether a building is within the act, is necessarily one of law for the court. 1 Phila. 213. 2 Ibid. 113. Where, however, it is difficult to decide upon the whole of the evidence, whether the building be a new structure, or only the alteration of an old one, it must be left to the jury as a question of fact. 8 H. 520.

(b) See *infra*, II. An alteration of, or an addition to a house, is not the subject of a lien. 10 Barr 379. Hence, the addition of a basement story to a frame-house finished so far as to have received a family, is not within the act. 8 W. 514. So, where the front wall was taken down, and a new wall erected on a different foundation, and the inside of the house, excepting the floors, was altered and renewed, and a new roof was put on, and a new back building erected, the alterations were held not to be the subjects of lien. 10 Barr 379. 2 Am. L. J. 83. If the outward appearance of the old building remain unchanged, however great the interior alterations and additions may be, there is nothing to put purchasers upon inquiry for liens, and such a case would clearly not be within the act. 1 Phila. 213. 1 Wr. 182. But where the structure of a building is so completely changed that, in common parlance, it may be properly called a new building, or a re-building, it comes within the mechanics' lien law. 8 H. 520. It is the extent and character of the alterations and not the change of purpose, which makes the difference between an old and a new building: the building should present that external change indicating newness of structure which would put purchasers and lien-creditors on inquiry. 9 P. F. Sm. 64. An ice-house, if attached to the principal building, is within the purview of the act. 1 Phila. 220-1. So is a building erected for a kitchen to an old house which it adjoins and is connected with. 11 C. 348, 349. And in such case the lien attaches as well to the old, as to the new building. 4 C. 156. 8 P. F. Sm. 382. And so is a new wing or addition to a building. 7 Wr. 322. See 2 M. 359. 2 Am. L. J. 36, 83. 24 Leg. Int. 108.

(c) The counties to which the acts here referred to had been extended at this time were Allegheny, Armstrong, Beaver, Bedford, Berks, Bucks, Butler, Cambria, Centre, Chester, Clearfield, Columbia, Crawford, Cumberland, Dauphin, Delaware, Erie, Franklin, Huntingdon, Indiana, Juniata, Lancaster, Lebanon, Luzerne, Lycoming, Mercer, Mifflin, Montgomery, Northumberland, Perry, Philadelphia, Schuylkill, Somerset, Susquehanna, Tioga, Union, Venango, Warren, Washington, York and the borough of Easton in Northampton county.

By subsequent acts, it has been extended to the counties of Adams, Bradford, Carbon, Chester, Clarion, Clinton, Dauphin, Elk, Fayette, Green, Jefferson, Lawrence, Lehigh, McKean, Monroe, Northampton, Pike, Potter, Wayne and Westmoreland. Where a new county is erected out of parts of other counties in which the act is in force, it applies to such new county, without further provision. 1 Gr. 160.

(d) A copper kettle or boiler in a brew-house, is part of the freehold, and subject to the mechanics' lien law. 17 S. & R. 413. So is the engine by which a steam saw-mill is propelled. 3 W. 140. And burr mill-stones. 5 W. 115. But buildings and fixtures erected by a lessee for years for the purposes of trade are not the subject of a lien. 9 Barr 117. 10 Barr 252. 2 H. 118. But see *infra*, III.

(e) One who furnishes nothing but his superintendence and skill as an undertaker of a building, has no lien. 4 W. & S. 257. Nor has a journeyman. 8 Barr 463. 2 J. 287. An architect, however, employed to make the plans and drawings for a building, and to direct and oversee its erection in accordance therewith, is within the provisions of the law. But, it seems, that a mere architect, who only furnishes the plans and drawings and performs no services in the erection of the building, is not entitled to a lien. 11 C. 423.

(g) A mechanic is entitled to a lien for work done with derricks, in hoisting the materials used in the construction of a building. 3 Phila. 261. And for hauling the materials used. 2 Wr. 151. The mechanics' lien law has been specially extended, by act of assembly, to paper-hangers; Purd. 710: to plumbing, gas-fitting and the furnishing and erection of grates and furnaces; Ibid. 710; to wharf-builders and all concerned in the making or constructing of the same; Ibid. 710; to every

or about the erection or construction of the same. (a) Act 16 June 1836, § 1. *Purd.* 708.

The lien of such debt shall extend to the ground covered by such building, and to so much other ground immediately adjacent thereto, and belonging in like manner to the owner (b) of such building, as may be necessary for the ordinary and useful purposes of such building, (c) the quantity and boundaries whereof shall be determined as follows. (d) *Ibid.* § 2.

It shall be the duty of the prothonotary of the court of common pleas of every county to which the provisions of this act extend, and the prothonotary of the district court of the city and county of Philadelphia, respectively, [and of the city and county of Lancaster,] the district court of Allegheny county, to procure and keep a book docket, which shall be called "The Mechanics' Lien Docket," in which he shall cause to be entered and recorded, all descriptions or designations of lots, or pieces of ground, as hereinafter mentioned; and all claims that may be filed by virtue of this act, together with the day of filing the same; and he shall cause the names, as well of the owner of the lot or piece of ground, as of the contractor, architect or builder, if such be named, and of the persons claiming any lien under this act, to be alphabetically indexed therein. (e) *Ibid.* § 3.

It shall be lawful for the owner of any lot or piece of ground, who may be desirous of erecting or of contracting with any other person for the erection of any building, as aforesaid, to declare or define in writing, the boundaries of the lot, or curtilage appurtenant to such building, previously to the commencement thereof, and cause the same to be entered in a book aforesaid, and such designation of boundaries so made and entered upon record, shall be obligatory upon all persons concerned. *Ibid.* § 4.

In default of such designation of boundaries, previously to the commencement of any building, it shall be lawful for the owner of such lot or piece of ground, or for any person having a lien upon the same, by mortgage, judgment or otherwise, or entitled to a lien by virtue of this act, to apply by petition, in writing, to the proper court, to appoint competent and skilful persons as commissioners, to designate the boundaries aforesaid. (g) *Ibid.* § 5.

It shall be the duty of the court to whom application shall be made as aforesaid, after reasonable notice given to all parties interested, to appoint such competent persons commissioners, as aforesaid, as all the parties interested shall nominate, but if the parties cannot agree upon a nomination, it shall be lawful for the court to appoint such competent persons for that purpose, as they shall think proper. *Ibid.* § 6.

steam-engine, coal-breaker or parts thereof, pump-gearing, hoisting-gearing, fixture or machinery, in and about mills of any kind, iron or coal works, coal mines and iron mines; *Ibid.* 710; to persons furnishing curb-stone for the pavement of any building, in the counties of Philadelphia, Northampton and Perry, and in the city of Lancaster; *Ibid.* 710, 1614; and see *Ibid.* 714, pl. 42; to measurers' charges, in Philadelphia; *Ibid.* 153; and to lime furnished to lands in Chester county. *Ibid.* 1518. The act of 1856 (*Purd.* 710) introduces no new principle into the lien law; it does not authorize a lien on personal property; it specifies the objects for which, and not on which, a lien may be had. 1 *Wr.* 182.

(a) Materials furnished for a building, though not used in its erection, constitute a lien. 2 *S. & R.* 170. 12 *S. & R.* 301. 2 *Br.* 104. 10 *Barr.* 413. 6 *H.* 52. 12 *H.* 508. But, although used, if not expressly furnished for the building, no lien is acquired. 16 *S. & R.* 56. One who furnishes materials to a subcontractor, has no lien; the owner and the contractor under him alone have power to bind the building. 3 *C.* 511. Materials furnished

on the credit of a building immediately become the property of the owner, and are not liable to be taken in execution for the debts of the contractor. 6 *H.* 52.

(b) A vendee by articles of agreement is such owner. 2 *W. C. C.* 33. 1 *Phila.* 466. 1 *C.* 521. Where mechanics' liens are entered against an equitable estate, their value depends upon that estate, and they survive or perish with it. 12 *C.* 247.

(c) If the building be removed or destroyed, before a claim is filed, the lien ceases as to the ground. A lien against a former building is not good against one erected subsequently on the same land. 2 *C.* 246. 4 *C.* 161.

(d) See 3 *W. & S.* 320.

(e) A mechanic's claim is not a record; the lien docket is the record, and it alone affects incumbrancers and purchasers. 11 *C.* 485. But it is valid as between the parties, though not properly indexed. 8 *Wr.* 76.

(g) The execution of a prior judgment creditor will be stayed, on the petition of a subsequent mechanics' lien creditor, until the curtilage appurtenant to the building has been set out. 7 *C.* 344.

It shall be the duty of the commissioners so appointed, to examine the building, or place at which such building is being erected, and to make a report to the court, in pursuance of the order to them directed, and in such report they shall sufficiently designate and describe by metes and bounds, with their courses and distances, and by a draft, if necessary, the limits and extent of ground necessary for the convenient use of such building, for the purposes for which it is designed, (a) and such report shall be entered at length upon the record book aforesaid, and if approved by the court, shall be conclusive upon all persons concerned. Ibid. § 7.

If execution shall be awarded for the levy and sale of any lot or piece of ground, upon which a building shall be erected as aforesaid, before the boundaries of the lot or curtilage which ought to be appurtenant thereto shall be designated, it shall be lawful for the court, upon application, to stay such execution until such designation shall be made, and thereupon order the sale to proceed, in such manner, and for such part or parts, and in such parcels, as shall be most convenient for the administration of equity, among all persons interested. Ibid. § 8.

If the building against which any claim shall be filed as aforesaid, or any part of the ground adjacent thereto, shall be sold by virtue of an execution upon any mortgage or judgment, before the extent of the lien of the claimant shall be ascertained as aforesaid, the court out of which such execution shall have issued shall have power to determine the rights of the respective parties, and the apportionment or appropriation of all liens as aforesaid, and for that purpose may appoint an auditor to inquire into and report the facts, and may decree distribution of the proceeds accordingly, or upon the application of any of the parties may direct an issue for the determination of disputed facts. Ibid. § 9.

The lien for work and materials aforesaid shall be preferred to every other lien or incumbrance which attached upon such building and ground, or either of them, subsequently (b) to the commencement (c) of such building. Ibid. § 10.

The lien created by the act entitled "An act relating to the lien of mechanics and others upon buildings," passed the 16th day of June 1836, shall not be construed to extend to any other or greater estate (d) in the ground on which any building may be erected, than that of the person or persons in possession (e) at the time of commencing the said building, and at whose instance the same is erected; (g) nor shall any other or greater estate, than that above described, be sold by virtue of any execution authorized or directed in the said act. Act 28 April 1840, § 24. Purd. 714.

(a) See 5 P. L. J. 286.

(b) A prior mortgage has precedence of lien. 1 Ash. 207. Although given to secure future advances. 5 B. 585. See 2 S. & R. 138. 5 R. 291. A mortgage for purchase-money is entitled to priority over a mechanics' lien against the equitable estate of the vendee, under the contract of sale, although dated more than sixty days prior to the time of delivery and recording, and, by agreement, made to a third person, who advanced the purchase-money. 12 C. 247.

(c) See 5 R. 291. 5 Wh. 301. 2 S. & R. 138. 13 S. & R. 269. When the plan of a building is changed and greatly enlarged, while it is in the course of construction, the liens of mechanics and material-men subsequent to such change, relate only to the commencement of the alteration on the ground, and are subject to all liens which then had fastened on the land. 6 C. 122.

(d) A mechanics' lien on an equitable estate attaches to the subsequently acquired legal estate. 4 Barr 126. 1 C. 521. But not as against an intermediate mortgagee of the legal estate, without notice. 12 C. 247. Or a *bond fide* purchaser of the legal title. 3 Phila. 337. See 4 W. & S. 223. A lessee

for years has not an estate in the land which will be bound by a mechanics' lien. 9 Barr 117-20. But see 12 C. 437, 4 Wr. 63, and 7 Wr. 310, where it was held that a lessee under an improvement lease, who had contracted to put up a valuable building upon the land, had power to bind by his contract with the mechanics and material-men, the estate of his lessor. A defendant sued as contractor and owner, may plead that he is neither owner nor contractor. 1 Phila. 289. But the plaintiff's right to recover on the *scire facias* does not depend upon the quantity of the defendant's interest in the land. 1 Gr. 233. See 12 C. 437. Where a married woman is the owner of the land, and her husband erects a building on it, a lien filed against him as reputed owner will bind the wife's title. 4 Phila. 10. 18 Leg. Int. 380.

(e) The possession of the person whose title is to be incumbered, must be an actual, not a constructive one. 9 W. & S. 120.

(g) A person who furnishes materials to rebuild a house by an insurance company in pursuance of the terms of their policy, in place of one consumed by fire, has no lien. 9 W. & S. 119. And see 7 Leg. & Ins. Rep. 125.

It is hereby declared that the provisions of the act, approved June 16th 1836, entitled "An act relating to the lien of mechanics and others upon buildings," according to the true intent and meaning thereof, extend to and embrace claims for labor done, and materials furnished and used in erecting any house or other building which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, (a) and the provisions of the said act shall be so construed; and no claim which has been or may be filed against any house or other building, or the lien thereof, or any proceedings thereon, shall be in any manner affected by reason of any contract having been entered into for the erection of such building, but the same shall be held as good and valid as if the building had not been erected by contract: *Provided*, That no case shall be affected by this section which may have been decided by the supreme court, or in which the proceeds of the sale of any real estate may have been distributed by the decree of any court, from which no appeal has been taken. Act 16 April 1845, § 5. Purd. 714.

II. LIEN FOR ALTERATIONS AND REPAIRS.

The said act, entitled "An act relating to the lien of mechanics and others upon buildings," approved the 16th day of June, Anno Domini 1836, together with the several supplements thereto, shall hereafter be held and taken to apply to debts contracted for work done or materials furnished for or about the repair, alteration of, or addition to any house or other building, so that liens may hereafter be had for the payment of all debts contracted for work done or materials furnished for or about the repair, alteration of, or addition to any house or other building, in the same manner as liens may now be had for debts contracted for work done or materials found for or about the erection or construction of any house or other building under the aforesaid act, approved June 16th, Anno Domini 1836, and the several supplements to said act: *Provided, nevertheless*, That this act shall not apply to debts, such as aforesaid, where the same are of less amount than twenty dollars: *And provided also*, That this act shall apply only to Chester, Delaware and Berks counties. (b) Act 1 May 1861, § 1. Purd. 709.

The act entitled "An act relating to the liens of mechanics and others upon buildings," approved the 16th day of June, Anno Domini 1836, together with the several supplements thereto, shall hereafter apply to all debts contracted for work done and materials furnished for, in or about the repair, alteration or addition to any house or other building, in the same manner and to the same extent, as liens may now be had and filed for debts contracted for work done and materials furnished for or about the erection or construction of any house or other building, under the aforesaid acts and supplements thereto; nothing in this act shall render property

(a) A reference to the contract, in the claim, is unnecessary. 9 Barr 97. And, where it has been performed, the items of work and materials need not be set forth in the claim. 9 Barr 449. 1 Phila. 52. But it must contain a specification of the nature of the work and materials, and of the particular building for which the same was done and furnished. 1 H. 497. Such sub-contractor will be held to a strict compliance with the act of 1836, in setting forth the nature or kind of work done and amount of materials furnished, the time, &c. 8 Wr. 47. See 3 P. L. J. 323. 3 Wr. 409.

(b) By act 22 April 1863, this section is extended to Huntingdon county, with a proviso that nothing therein contained shall render property liable to liens for repairs, alterations or additions, where the same has been altered by any lessee or tenant without the written consent of the owner or owners, or reputed owner or owners, or his or her duly authorized agent; and that the lien thereby given shall not have priority over any other

lien entered before the commencement of such repairs. Purd. 1306. By act 16 February 1868, it is likewise extended to Allegheny county. Purd. 1401. By act 22 March 1863, to Lancaster county. P. L. 580. By act 28 February 1866, to Montgomery county. Purd. 1437. By act 4 April 1866, to Lawrence county. Purd. 1437. By act 12 March 1863, to the counties of Lycoming, Erie, Warren, Venango and Perry. Purd. 1577. By act 12 February 1870, to Bucks county. Purd. 1614. By act 14 March 1870, to Carbon and Monroe counties. P. L. 430. And by act 4 April 1870, to the counties of Lehigh and Union. P. L. 857. The act 14 February 1867 makes a similar provision for the county of York, P. L. 211; the act 4 April 1867, for the county of Dauphin, P. L. 748; the act 4 April 1863, for the counties of Blair and Armstrong, P. L. 756; the act 20 March 1858, for the counties of Cumberland and Franklin, P. L. 407; the act 13 April 1868, for the county of Monroe, P. L. 946. And the act 10 April 1868, for the county of Northumberland. P. L. 846.

liable to liens for repairs, alterations or additions, where the same has been done by any lessee or tenant, without the written consent of the owner or owners, or their authorized agent or agents; a copy of which written consent must be filed with the claim or statement; this act shall not apply to debts such as aforesaid, where the same are for a less amount than fifty dollars: *Provided*, That nothing in this act shall give a lien or render property liable for repairs, alterations or additions as aforesaid, except from the time of filing a claim or statement of such work done and materials furnished; which claim or statement must be filed within six months after such work shall have been finished or materials furnished; but no property shall be rendered liable for repairs, alterations or additions as aforesaid, which shall have been conveyed, before any such claim or statement shall have been filed, to purchaser or purchasers thereof, by the party or parties contracting said debts. (a) Act 1 August 1868, § 1. Purd. 1519.

III. LIEN ON LEASEHOLDS AND FIXTURES.

The several provisions of an act, entitled "An act relating to the liens of mechanics and others upon buildings," approved the 16th day of June 1836, and the several supplements thereto, are hereby extended to all improvements, engines, pumps, machinery, screens and fixtures, erected or put up by tenants of leased estates (b) on land of others, in the counties of Luzerne and Schuylkill, (c) and to all mechanics, machinists and material-men doing work or furnishing the articles or materials therefor: *Provided*, That the lien hereby created shall extend only to the interest of the tenant or tenants, lessee or lessees therein, and to the improvements, engines, pumps, machinery, screens and fixtures erected, repaired or put up by the mechanics, machinists, persons or material-men entering liens thereon. Act 17 February 1858, § 1. Purd. 710.

The several provisions of an act, entitled "An act relating to the liens of mechanics and others upon buildings," approved the 16th day of June 1836, and the several supplements thereto, are hereby extended to all improvements, engines, pumps, tanks, machinery and fixtures, in or about, or in any way connected with, or appurtenant to, oil or other refineries, and to all tanks for the storage of petroleum, coal or carbon oil, or the products thereof, whether said tanks be connected with a refinery or otherwise, and on all pumps, machinery and fixtures connected therewith, and to all mechanics, machinists, material-men and contractors doing work or furnishing materials or articles therefor. Act 27 February 1868, § 1. Purd. 1518.

The 1st section of this act shall be held and construed to be applicable to the tanks, improvements, engines, pumps, machinery and fixtures erected or put up by tenants of leased premises, on land owned by others, as also to such as are erected or put up by the owners of estates of freehold on their said land: *Provided*, That the lien created thereby shall extend only to the interest of the tenant or tenants in said leased land, and to the tanks, improvements, engines, pumps, machinery and fixtures erected, repaired or put up by the mechanics, machinists, material-men and contractors entering liens thereon: *Provided*, That the provisions of this supplement shall only extend to the counties of Allegheny, Armstrong, Venango and Warren. Ibid. § 2.

All persons furnishing materials for or about the erection, construction or repair of any engine, engine-house, derrick, tank, machinery or wood or iron improvement, or for or about any building which may be constructed, erected or repaired upon any leasehold, lot or parcel of ground, or material furnished, necessary for the improvement or development thereof, (d) held by written lease for any term of years,

(a) This act applies only to the city of Philadelphia. Purd. 1520.

(b) This act extends generally to all leasehold estates; it is not confined to coal leases only. 6 Wr. 68. The lien must be filed, specially, against the leasehold interest. 10 P. F. Sm. 395. A railroad constructed by a lessee for mining coal in the slope of a mine, is not an improvement or fixture to which a lien will attach under the act. 4 P. F. Sm. 193. See 16 Pitts. L. J. 227.

(c) Extended to Westmoreland and Allegheny counties, by act 21 March 1865. Purd. 1401. To the counties of Erie, Warren, Crawford and Venango, by act 11 April 1866. Purd. 1437. To Northumberland county, by act 12 March 1867. Purd. 1518. To Forest county, by act 10 April 1867. P. L. 1100. And to Carbon county, by act 4 April 1868. P. L. 680.

(d) Extended by act 16 March 1870, § 2, so that all materials furnished shall be a lien

and which shall or may be so constructed, erected or repaired by the tenants or lessees of said leased estate, or for them or for their use and benefit, shall have a lien upon all such engine or engines, material, machinery, buildings, tanks, wood or iron improvements, as may be upon or pertaining to said leasehold, lot or parcel of ground, at the time such claim may be filed, as hereinafter provided, together with the lease, lot or parcel of ground on which the same is situated, for the price and value of the materials so furnished: *Provided*, That the lien hereby given shall extend only, as to such lease or lot, to the interest of the lessee or lessees, tenant or tenants therein. Act 8 April 1868, § 1. Purd. 1518.

All persons doing work for, on, or about the erection, construction or repair of any engine, engine-house, tanks, derricks, building, machinery, wood or iron improvement, erected, constructed or repaired upon any leasehold estate as aforesaid, or for boring, drilling or mining on said lease or lot, for the development or improvement of the same, whether such labor is or may be done by the day, month or year, or by contract, for the tenant or tenants, lessee or lessees of such lot or lease or parcel of land, or for their use and benefit, shall have a lien upon the personal property and fixtures on said lot or lease of ground, and upon such lot or leasehold itself, for the price and value of such work and labor: *Provided*, That such lien shall extend, as to said lot or leasehold, only to the interest of the tenant or tenants, lessee or lessees thereon: *Provided further*, That this act shall not apply to debts such as aforesaid, where the same is of less amount than twenty-five dollars. Ibid. § 2.

Every person entitled to a lien by the provisions of this act, shall file in the office of the prothonotary of the court of common pleas of the county in which such leasehold and property is situated, within three months from the time the last work was done or last materials furnished, a statement of his claim or demand, verified by affidavit, which shall set forth:

I. The names of the party claimant, and of the owner or owners or reputed owner or owners of the property, and the names of the person or persons with whom the contract was made, and for whom the work was done or materials furnished.

II. The sum of money claimed to be due, and the kind of work done, and the kind and amount of the materials furnished, and the time when the work was done or materials furnished, with the date and amount of each item.

III. The locality of the property, with a particular description of each and every part thereof, against which the said claim is filed, with the size and boundaries of the lease or lot or parcel of ground, designating it by number, if any there be, and such other matters of description as shall be sufficient to identify the same. Ibid. § 3.

Every such debt as aforesaid shall be a lien as aforesaid, for the period of "three" (a) months after the last work shall be done or the last materials furnished, although no claim shall have been filed therefor, and no longer; but no such lien shall continue, but shall be released and discharged, unless the party claimant or his legal representative shall, within three months from the date of filing his statement of claim as aforesaid, prosecute the same, by causing a *scire facias* to be issued thereon, as provided by the act of June 16th 1836. Ibid. § 4.

All proceedings under this act, to enforce the collection of claims, shall be as provided by the act of June 16th 1836, except as provided in section four of this act, and except further, that in case no person can be found upon whom service can be made of the writ of *scire facias*, service thereof shall be had, in addition to posting a copy of the writ on the most public part of the premises, by publication of the same in two newspapers published in said county, if so many there be, one in the paper of each political party; which publication shall be made for two successive weeks prior to the return day of said writ. Ibid. § 5.

The provisions of the act of June 16th 1836, and supplement approved the 1st day of May 1861, relating to liens of mechanics and material-men, upon buildings, are hereby extended to all laborers, and to all work done, whether by the day, month, year or contract, for or about the drilling, boring and mining, and for or

upon any buildings, of whatever nature or otherwise. P. L. 453.

(a) So amended by act 13 April 1869. Purd. 1577.

about the construction, erection or repairing of any engine, buildings, tanks, derricks, machinery, wood or iron improvements, which may be made or done for the mineral development or improvement of any land, and to all materials furnished for the improvement or development thereof, and for or about the construction, erection or repair of any engine, buildings, tanks, derricks, machinery, wood or iron improvements thereon. Ibid. § 6.

From and after the filing of any claim under the provisions of this act, as aforesaid, it shall not be lawful for any owner or owners, contractor or contractors, lessee or lessees, tenant or tenants, of any property named and described in such statement of claim, or their assignees or sub-lessees, to remove or attempt to remove the same from such lot, lease or parcel of land, while the said claim remains unpaid, pending and undetermined: *Provided*, The said party claimant shall sue out a writ of *scire facias* upon said claim, within three months from the day of filing the same, as hereinbefore provided. And in case of any such removal, or attempted removal, actually begun, it shall be lawful for any such claimant, his agent or attorney, acquainted with the facts, to apply to the court of common pleas of said county, or any judge thereof in vacation, by petition, setting forth the facts under oath, and an affidavit of a good and subsisting cause of action under this act; and it shall be the duty of such court or judge to hear the same immediately, and upon such hearing, and upon being satisfied of the truth of said petition, to issue an order under seal of the said court, directed to the sheriff of the county, commanding him forthwith to seize and hold said property, until said claim shall be heard and determined: *Provided*, That the court shall have power at any time thereafter, to vacate such order, upon good cause shown, upon such tenant or tenants, owner or owners, lessee or lessees entering into good and sufficient bond to the claimant, with freehold security; which bond shall contain a warrant of attorney to confess judgment without stay of execution, in double the amount of such claim, conditioned that such owner or owners, tenant or tenants, lessee or lessees and their sureties, will pay whatever may be adjudged against them, together with costs. Ibid. § 7.

The provisions of this act shall extend only to the county of Venango; (a) and all laws and parts of laws and supplemental acts inconsistent herewith, relating to liens of mechanics and material-men and laborers, doing work or furnishing materials for or about engines, buildings and mineral improvements on leasehold estates, heretofore passed or enacted for said county of Venango, are hereby repealed. Ibid. § 8.

All persons furnishing material or doing work for or about leasehold estates, and who shall desire to file a statement of claim to secure payment therefor, as provided in the act to which this is a supplement, shall before being entitled to file his or their statement of claim as in said act provided, give notice, in writing, to the tenant or tenants of such leasehold and owner or owners of the property thereon, or any of them, his or their agent or legal representatives, within "thirty" (b) days from the day such person or persons shall commence work on said property, of his or their intention to claim a lien upon said property for the price and value of such labor or materials: *Provided*, That if such tenant or tenants, owner or owners cannot be found in the county where such property may be, and shall have no agent in said county upon whom service may be made, the same may be served by posting a copy thereof on the most public part of the said premises, within the time aforesaid; and proof of the giving of such notice shall be, by affidavit of the claimant, indorsed on a copy thereof and filed with his statement of claim, as provided by the act to which this is a supplement. Act 13 April 1869, § 1. Purd. 1577.

After receiving notice as aforesaid, it shall be lawful for any owner of the property, tenant or lessee or contractor interested in the property, and work being done or materials furnished therefor, to retain from any contractor or sub-contractor a sufficient sum of money to pay the claim of such laborer, mechanic or material-man, with all costs of the proceedings under this act, had by reason of the non-payment to such laborer, mechanic or material-man of his claim. Ibid. § 2.

(a) Extended to the counties of Crawford, L. 452.

Warren and Clarion, by act 18 March 1869.

Purd. 1577. And to Armstrong, Clarion and

Butler counties, by act 16 March 1870. P.

(b) So amended by act 16 March 1870, § 3.

P. L. 453.

The true intent and meaning of the act to which this is a supplement, as regards the extent of the lien of the mechanic, laborer or material-man upon the machinery and material on such leasehold estate, is declared to be, that such lien shall extend only to the interest of the tenant or tenants, owner or owners in such machinery and material, and not to the property of third persons having no interest in such leasehold or benefit from the work done thereon: *Provided, nevertheless*, That neither this act nor the act to which it is a supplement shall be held in any way to repeal, modify or affect the provisions of an act, approved the 27th day of February 1868, entitled "A further supplement to an act relating to the lien of mechanics and others upon buildings, approved June 16th 1836, extending the same to improvements, machinery, tanks and fixtures about oil or other refineries." Ibid. § 4.

IV. OF THE CLAIM.

Every person entitled to such lien shall file a claim (a) or statement of his demand in the office of the prothonotary of the court of common pleas of the county in which the building may be situate. Act 16 June 1836, § 11. *Purd.* 710.

Every claim as aforesaid must set forth:

1. The names (b) of the party claimant (c) and of the owner (d) or reputed owner of the building, and also of the contractor, (e) architect or builder, where the contract of the claimant was made with such contractor, architect or builder.

2. The amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, (g) and the time when the materials were furnished, or the work was done, as the case may be. (h) Ibid. § 12.

3. The locality of the building, (i) and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same. (k)

(a) It may be signed by the party's attorney. 2 J. 45. And filed by a surviving partner. 1 W. & S. 240.

(b) The firm name of the claimants is sufficient. 2 W. & S. 179. Or their individual names, omitting the name of the firm. 10 Barr 186-9. The initial letter of a middle name may be omitted. 10 Barr 186. See 3 P. L. J. 323. By act 9 April 1862, if too many persons are, by mistake, included as claimants, owners or reputed owners, contractors, architects or builders, the court may permit an amendment, by striking out the names of all such persons as may, by mistake, be included therein. *Purd.* 1281.

(c) A contractor and sub-contractor cannot file a joint claim. 8 W. 478.

(d) One who was not owner at the commencement of the building, but became so afterwards, need not be named. 4 W. & S. 257. It would not, however, be improper to do so. 5 Wh. 366. A mechanic's claim filed against the owner of an unfinished building, as owner and contractor, for materials furnished for its completion after the sale, binds the land in the hands of the vendee. 2 Phila. 19. See 6 Barr 187. 3 P. L. J. 323.

(e) The person who erected the building, and was owner when the work was done, may be named as contractor; and a subsequent purchaser joined as owner. 5 Wh. 366. Unless it appears that there was a contractor other than the owner, the name of a contractor need not be set out in the claim. 10 Barr 186. Naming wrong persons as contractors, is a fatal error. *Hershey v. Odd Fellows' Hall*, Sup. Court, 19th May 1853. MS. And so is the omission to name the contractor. 1 Wr. 125. But the act of 9 April 1862, authorizes the striking out of the names of parties improperly joined. *Purd.* 1281.

(g) A claim which omits this statement is incurably defective. 2 C. 248. 15 Leg. Int. 85. A claim for work and materials, must state the amount claimed for each, as a distinct item. 6 Barr 187. See 9 Barr 449. 1 Phila. 364. If the work be done by contract, for a round sum, no specification of items is required. 1 Phila. 29. It is not necessary to aver in the claim filed that the materials were furnished on the credit of the building. 16 Leg. Int. 85.

(h) The claim should state when the materials were furnished. 3 W. & S. 258. 9 W. & S. 183. 2 J. 45. 3 Phila. 110. It should state not only that the work was done or the materials furnished within six months from the entry of the claim, but upon its face, or by reference to some accompanying paper, a date or dates must be given, by which such allegation can be verified. 4 C. 153. But an impossible date in the bill annexed will not vitiate it, if explained. 1 H. 186. 1 Wr. 125. In a claim for work done or materials furnished under an entire contract, but one date need be stated. 4 C. 153. A statement that the work was done within six months last past is good, after verdict. 5 Barr 18. Or between two certain dates. 2 H. 167. And see 5 W. & S. 262. 6 Barr 187. 2 H. 56. 7 Barr 394. 4 W. & S. 257. 10 Barr 186. 1 Phila. 52, 322. 16 Leg. Int. 85.

(i) The amount of land claimed in the lien filed is not material, if the locality and the building be designated. 4 C. 156. But the lien does not extend beyond the description in the claim filed. 3 R. 492. See 12 S. & R. 301. 6 Wh. 187. 1 Barr 499. 2 Barr 76. 5 Barr 18. 10 Barr 186.

(k) A claim for work done in the erection of a building therein described, and appurtenances, is not sufficiently certain. 1 H. 493.

Whereas it sometimes happens that several houses and other buildings, adjoining each other, are erected by the same owner, so that it is impossible for the person who has found and provided materials for the same, to specify in his claim filed, the particular house or other building for which the several items of his demand were so found and provided: (a) and whereas doubts have arisen as to the true construction, in such case, of the laws of this commonwealth: *Therefore*, It shall and may be lawful, in every such case, for the person so finding and providing materials as aforesaid, for two or more adjoining houses (b) and other buildings, built by the same person, owner of the same, and debtor for the said materials, to file with his claim thereof, an apportionment of the amount of the same among the said houses and other buildings; and each of the said houses and other buildings shall be subject to the payment of its said apportioned share of the debt contracted, in the same manner as provided by law in other cases. Act 30 March 1831, § 4. *Purd.* 711.

The several laws of this commonwealth authorizing an apportionment of the amount due for materials furnished to two or more buildings owned by the same person, among the said buildings, shall extend to and shall authorize in similar cases an apportionment for work done, and for work done and materials furnished, where the same are furnished under one contract, as fully and in the same manner as is now authorized and allowed in the case of materials furnished. (c) Act 25 April 1850, § 38. *Purd.* 711.

In every case in which one claim for materials shall be filed by the person preferring the same, against two or more buildings, owned by the same person, (d) the person filing such joint claim shall, at the same time, designate the amount which he claims to be due to him on each (e) of such buildings, otherwise such claim shall be postponed to other lien creditors; (g) and the lien of such claimant shall not extend beyond the amount so designated, as against other creditors having liens by judgment, mortgage or otherwise. Act 16 June 1836, § 13. *Purd.* 711.

Every such debt shall be a lien as aforesaid, until the expiration of six months (h)

But a claim for materials furnished in and about the erection and construction of a building and *appurtenances*, describing the building, and accompanied by a bill of particulars, wherein it was stated that the materials were delivered for the building in question, designating it, was held sufficient. 12 H. 508. And see 1 Phila. 220-1.

A mechanic is bound to file his claim with certainty, sufficient to give creditors and purchasers record notice; and nothing less than certainty to a common intent will affect them. 18 Leg. Int. 86. But if there be enough in the description of the locality, and other peculiarities of the building, to point out and identify it with reasonable certainty, it is a sufficient compliance with the requisitions of the act. 5 Wr. 39. 17 Pitts. L. J. 90. If the claim be insufficient, the proper course is to move the court to strike it from the record. 5 W. & S. 262. 5 Barr 21. Or to demur; but such objection is waived by pleading to the *sci. fa.* 2 Wr. 471. 12 C. 347.

(a) If the claimant can specify the particular work done to such house, he must file separate claims. 5 Leg. & Ins. Rep. 19.

(b) An apportioned claim cannot be filed against two or more separate blocks of buildings, situate on different streets. 3 H. 265. A mechanic's lien filed against three distinct blocks of buildings, separated by streets, is null and void upon its face. 11 C. 130. But if all the buildings be on one lot, and the curtilages adjoin, although the houses be on different streets, an apportioned claim may be filed. 8 H. 443. See 1 Phila. 372. 7 W. & S. 383.

(c) The district court of Philadelphia had decided otherwise, in *McNamee v. Stoeve*, 2 Wh. Dig. 317, pl. 205. But see 2 J. 45-8.

(d) A material-man, who has furnished materials to one contractor, jointly and indiscriminately, for the use of two buildings owned by different persons, may apportion his bill, and file a separate claim against each building. 1 H. 167. 5 H. 234. Where a mechanic has performed work on two properties of the same owner, and a settlement is made, acknowledging a certain balance due him, such balance may be a fair lien on either one of the properties; but it must be left to the jury to say, from the evidence, whether the balance was so appropriated, or not; and if not, how much of the balance was due upon the particular property against which the lien was entered. 12 Wr. 195.

(e) Separate writs of *sci. fa.* must be issued on such apportioned claim. 2 Wh. 193. 4 W. & S. 257.

(g) Although their claims be subsequently filed. 7 W. & S. 381.

(h) Where materials were furnished on the 22d of January, a claim filed on the 23d of July, was held to be too late. 2 M. 241. 22 Leg. Int. 237. It is enough if the last item only was furnished within the six months. 3 P. L. J. 323. The time does not begin to run until extra work done at the request of the owner was finished, although the work which had been specially contracted for, had been previously completed. 2 J. 339. Where there is an entire contract for plastering several houses for a gross sum, work done at one of them will not keep the lien alive against

after the work shall have been finished (a) or materials furnished, (b) although no claim shall have been filed therefor, but such lien shall not continue longer than the said period of six months, unless a claim be filed as aforesaid, at or before the expiration of the same period. (c) Ibid. § 14.

It shall be lawful for any mechanic or material-man in the city or county of Philadelphia, and county of Chester, who performs work and furnishes materials, to include both in the same claim filed; and where the value or amount of the work or materials can only be ascertained by measurement when done, or shall be done by contract for a stipulated sum, it shall be lawful to file a statement of the time when the work was commenced and when finished, (d) and of the aggregate price of the work and materials; and all claims heretofore filed in conformity herewith and not decided judicially, are hereby confirmed. Act 24 March 1849, § 2. Purd. 711.

Whenever the items of a mechanic or material-man's bill, for work done or materials furnished continuously towards the erection of any new building, are in any part *bona fide* within six months before the filing of the claim therefor, the lien shall be valid for the whole; and any lien heretofore filed within six months after furnishing the last item of a continuous bill, shall be good and valid, the same as if the whole bill were furnished within six months. Act 14 April 1855, § 2. Purd. 713.

Every claimant having a claim filed for work or materials, or both, who shall afterwards proceed to perform further work, or furnish other materials, or both, may make suggestion thereof on the same record, and filing a statement of the amount and particulars thereof, which may be recovered with the original claim under the writ; but if the original claim shall have been sued out, then a separate *scire facias* may be issued for the supplemental claim. Ibid. § 3.

III. PROCEEDINGS ON THE CLAIM.

The proceedings to recover the amount of any claim as aforesaid, shall be by a writ of *scire facias*. (e) Act 16 June 1836, § 15. Purd. 712.

Provided, That no such *scire facias* shall in any case be issued within fifteen days previous to the return day of the next term. Ibid. § 16.

others, upon which no-work was done within six months from the time of filing the joint claim. 6 C. 129.

(a) A church having been completed in February, bricks were furnished in May, to erect a wall or curbing around the basement window, and a claim was filed in November, embracing the bricks furnished to the whole building: it was properly left to the jury to say, whether the wall erected in May was necessary to the completion of the building, and if it were so, the claim was filed in time. 10 Barr 413. Where there had been a cessation on the work for upwards of a year after part of it was done, and before it was completed, the question for the jury was, whether the last work was done under the original agreement without unreasonable delay, and with the consent of the owners, or whether it was done under a distinct contract. 6 H. 160. See 2 Barr 77.

(b) Where materials are furnished in pursuance of a contract, the limitation begins to run from the date of the last act done in execution of it. 7 H. 341-3. 3 Gr. 204. Thus, if a contract be made with a bricklayer to do all the brick and stone work about the erection of a building, including the laying of the pavement, the contract being entire, a mechanic's lien may be filed within six months from the completion of the work, although all of it may have been done, except the pavement, more than six months before the lien was filed. But

if the laying of the pavement were under a separate contract, the case would be different. 10 H. 489. Where materials are furnished under a special contract, as, for the brick or lumber of a particular house, the lien may be entered within six months after the delivery of the last item, for that is the completion of the contract; but a contractor who goes to a lumber-merchant, and obtains lumber as he needs it for the job in hand, makes a new contract at each purchase, and the statute bars all of the account more than six months old at the filing of the lien. 12 Leg. Int. 5, 6. 13 Ibid. 180. But see 2 Leg. & Ins. Rep. 18. 26 Leg. Int. 221.

(c) It may be doubted, whether a claim can be amended after the six months have elapsed. 8 Wr. 47.

(d) A claim for work and materials combined in a single charge, must state when the work was begun and finished, so as to show that it was done within six months from filing the claim. 2 Phila. 102. See 3 Gr. 227.

(e) For form of *sci. fa.* see Purd. 712. The *sci. fa.* must conform to the claim. 6 Barr 187. There is no provision for bringing in a purchaser as *terre tenant*. 4 W. & S. 263. But if the claim be filed in the name of a firm, the names of the individual partners may be introduced in the *sci. fa.* 2 W. & S. 181. If the party die before the filing of the claim, the *sci. fa.* must issue against his legal representatives. 3 Luz. Leg. Obs. 10.

The writ of *scire facias* aforesaid shall be served in the same manner as a summons, upon the defendant therein named, if he can be found within the county, and a copy thereof shall also be left with some person residing in the building, if occupied as a place of residence, but if not so occupied, it shall be the duty of the sheriff to affix a copy of such writ upon the door, or other front part of such building. (a) Ibid. § 17.

Upon the return of such writ, it shall be lawful for any other person, having filed a claim as aforesaid, to cause to be entered on the record of the same suit a suggestion, (b) setting forth the amount and nature of his demand; and thereupon he may have a rule upon the defendant to appear and plead thereto, as in other actions. Ibid. § 19.

If the defendant shall appear (c) and plead to such suggestion, and issue either in fact or law, be joined upon any plea, (d) such particular issue shall be tried and determined as in other cases; (e) if the defendant shall not plead to such suggestion, after due notice, judgment shall be entered for the claimant filing the same, and the amount of the claim shall be ascertained as in other cases. Ibid. § 20.

The execution for every such judgment shall be by a writ of *levari facias*. (g) Ibid. § 21.

Provided, That if the proceeds of such building and ground as aforesaid, shall not be sufficient to pay the full amount of all debts due as aforesaid, for work done and materials furnished, after deducting therefrom any prior liens upon the same, then such debts shall be averaged, and the creditors aforesaid shall be paid in proportion to their respective demands. (h) Ibid. § 22.

(a) "Served by copy, on A. and by putting up a copy in front of the building, and *nihil* as to B." is a sufficient return. 2 J. 45. Where the *sci. fa.* was served on the contractor, and not on the owner, but both pleaded, and the jury were sworn, and judgment was entered generally against both, it was held, that though irregular, yet as there was no personal liability imposed thereby on the owner, the judgment could not be reversed. 5 Wh. 366. The § 18 of this act, which required the sheriff to advertise the writ, was repealed by act 29th March 1842, § 3. P. L. 213.

(b) For form of suggestion, see 2 M. 162.

(c) A mortgagee, subsequent to the commencement of the building, may appear and take defence. 1 Phila. 297. And so, it seems, may judgment-creditors and other incumbancers. 10 Barr 192. See 7 W. & S. 381. But the mere fact that a person has been notified as terre tenant, does not make him a party, or liable for costs. 7 H. 449.

(d) The proper general issue plea is "*nil debet*." The claim not being a record, the plea of *nil tiel record* is bad. 1 W. & S. 240. So is a plea denying that plaintiffs ever had any claim, because it denies the legal conclusion, not the facts. 1 Phila. 187. So is a plea in bar averring that the materials were furnished on a credit which had not expired, because it goes only in suspension of the remedy, and should be pleaded in abatement. Ibid. The short plea of "no lien," is in effect a general demurrer; but it is so uncertain that it should be struck off, on motion. Ibid. 102. So the court will strike off a plea averring that the claim was null and void because it did not state the kind and amount of materials, and the times when furnished. 2 Barr 363. The proper mode to take advantage of such a defect is, by motion to strike off the claim from the record. 5 W. & S. 262. 12 C. 347. The judgment will not be arrested after verdict for such an irregularity.

1 Phila. 181. It is waived by pleading to the *scire facias*. 2 Wr. 471. 12 C. 347.

(e) On the trial the claim cannot be read in evidence. 16 S. & R. 56. Except there be no negative plea. 1 Gr. 233. See 7 Wr. 322-3. The formal validity of a mechanic's lien is not put in issue by the plea of payment; and hence, under such plea, the claim may be read to the jury, as an admitted cause of action. 12 C. 347. The plaintiff's book of original entries is evidence to prove that the materials were furnished at and for the particular building. 2 Wh. 277. And if the book do not specify the building, it may be proved by parol. 9 W. 304. 3 H. 268. 8 H. 446. 2 Wr. 296. 6 P. F. Sm. 87. See 10 Barr 413. The bargain between the plaintiff and the contractor is evidence as to the price of the materials: but, it seems, the owner may show that the price agreed to be paid was too high, beyond the fair market value; that the contractor had been careless of his interests, or had not done as well for him as he would probably have done for himself. 4 Am. L. J. 345. A debt due by the plaintiff to the contractor may be set off. 1 H. 181. And there cannot be set-off against set-off. 4 W. & S. 19. The owner of a building erected by contract occupies the position of a surety for the contractor; and therefore a binding agreement to give time to the contractor, without the consent of the owner, discharges the latter from the claim of the mechanic or material-man. 2 Phila. 72. But see 3 Wr. 226.

(g) For form of *levari facias*, see *Purd.* 712. In case of a life estate, a sequestrator may be appointed. 6 W. & S. 483.

(h) The contractor who employed the mechanics and material-men, cannot claim *pro rata* with them, although he may have filed a claim. 1 Phila. 513. The costs are payable out of the fund raised by a sale of the property, although the *sci. fa.* may not have been prosecuted to judgment. 2 Wh. 122.

In every case in which any claim shall be filed against any building as aforesaid, and no *scire facias* shall have issued thereon, it shall be lawful for the owner of such building, or any person interested therein, to apply, by petition, to the court in which such claim shall be filed, setting forth the facts, whereupon such court may grant a rule upon the party claimant, and others interested, to appear in court, at a time to be fixed for such purpose, and on the return of such rule, may proceed in like manner as if a *scire facias* had been issued by such claimant, and had been duly served and returned. (a) Ibid. § 23.

The lien of every such debt, for which a claim shall have been filed as aforesaid, shall expire (b) at the end of five years from the day on which such claim shall have been filed, unless the same shall be revived by *scire facias*, in the manner provided by law in case of judgments, in which case such lien shall continue in like manner, for another period of five years, and so from one such period to another, unless such lien be satisfied, or the same be extinguished by a sheriff's sale, or otherwise, according to law. Ibid. § 24.

In every case in which the amount of any claim as aforesaid shall be paid, or otherwise satisfied, it shall be the duty of the claimant, or his legal representative, at the request of the owner of the building, or of any other person interested therein, and on payment of the costs, to enter satisfaction on the record of such claim, in the office of the prothonotary of the court in which claim shall have been entered, which shall for ever thereafter discharge and release the same. Ibid. § 25.

If any person who shall have received satisfaction as aforesaid, shall neglect or refuse to enter satisfaction of such claim as aforesaid, within sixty days after request, and payment of the costs of suit, as aforesaid, he shall forfeit and pay to the party aggrieved any sum not exceeding one-half of the amount of such claim, to be recovered as debts of a like amount are recoverable. Ibid. § 26.

Provided, That nothing in this act contained shall be construed to impair or otherwise affect the right of any person to whom any debt may be due, for work done, or materials furnished, to maintain any personal action against the owner of the building, or any other person liable therefor, to recover the amount of such debt: (c) *Provided further*, That nothing in this act contained, shall be construed to affect the relative jurisdiction of the court of common pleas, and the district court of the city and county of Philadelphia, which shall remain as heretofore. Ibid. § 27.

The district courts of the counties of Philadelphia, [Lancaster] and Allegheny, shall have jurisdiction (d) of all joint claims against two or more buildings owned by the same person or persons, now filed, or that may be filed in said respective counties, in accordance with the provisions of an act, entitled "An act relating to the liens of mechanics and others upon buildings," passed June 16th 1836, wherein such mechanics and others claim a sum equal to that of which said courts have respectively jurisdiction, according to the several acts heretofore passed, constituting and regulating them, notwithstanding the several apportioned claims therein be less than the sum of which said courts have jurisdiction as aforesaid: *Provided*, That nothing herein contained shall prevent or impair the issuing and executing of separate writs of execution as heretofore, against all or any of such several apportionments. (e) Act 10 April 1848, § 5. Purd. 718.

(a) For the mode of proceeding under this section, see 2 M. 109. Where defendant proceeds under this section, the plaintiff cannot suffer a nonsuit on the trial. 2 M. 348. See 5 W. & S. 262.

(b) The issuing of a *sci. fa.* within the five years, is sufficient to keep alive the lien. 8 H. 319. 5 Phila. 171. But it must be duly prosecuted. 10 Wr. 372. Where the plaintiff has been nonsuited, he may file another claim, if the time for so doing has not expired, although the former claim remains on the records of the court. 10 Barr 133. 3 Phila. 507. And the discontinuance of an irregular *sci. fa.* after an award, does not affect the plaintiff's right to proceed by a new writ. 5

Barr 145.

(c) A judgment for the defendant in a personal action, is a bar to a *sci. fa.* on the claim. 2 Wh. 118. The right to file a lien is not extinguished by the acceptance of a note for the amount of the claim. 4 W. & S. 257. 2 J. 339. Nor will the acceptance of a sealed note have that effect. 5 W. 118. Nor of a bond, and the entry of judgment on it. 2 M. 214. 2 Br. 297. See 8 S. & R. 59.

(d) This is only in affirmance of the law, as it then was. 1 H. 132. 11 H. 58.

(e) The § 6 of this act validated judgments previously obtained in such cases, and sheriff's sales thereon.

In all mechanics' claims, the court having jurisdiction thereof may, upon the application of any party in interest, require the claimant to file an affidavit of the amount actually due thereon; and upon security, approved by the court in double said amount, being entered in the manner to be prescribed by the court, or upon the payment of the same into court, such security or money shall be substituted for the premises against which the claim is filed, and shall abide the final judgment of the court thereon; and thereupon the said premises shall be released from the lien of the said claim; and in case the said claimant, upon due notice, shall neglect or refuse to file such affidavit, the claim shall be stricken from the record, and cease to be a lien against said premises. (a) Act 1 August 1868, § 4. Purd. 1520.

In all liens now filed, or upon the filing of any lien hereafter, for materials furnished or work and labor done, it shall be lawful for the owner of the premises against which the same shall be filed, to move for a rule on the claimant to sue out a writ of *scire facias* to the next monthly return-day; if the rule shall be made absolute by the court, it shall be lawful for any party to appear and defend the same, as now authorized by law, as to writs of *scire facias*; and if said claimant shall not issue a *scire facias* in obedience to the rule, the court on motion shall strike the lien from the record. Ibid. § 5.

IV. CLAIMS FOR EXTRA COMPENSATION.

Two main causes unite to produce frequent disputes relative to builders' claims. Of these, the chief is to be found in that continual struggle of competition, which, pervading every trade, causes the employer to beat down the contractor below a fair price; whilst on the other hand it induces the contractor to keep in the back-ground many items which must eventually come forward. The other is the natural consequence of those accidents and chances attendant upon all building transactions, which makes the slightest deviation from the original plan, the source of many heavy, and, we must add, frequently groundless charges by the contractor, under the head of "extras."

A third, but comparatively insignificant source of contention, is to be found in the architect's specification. To any person who will consider for a moment the multitude of provisions to be made in the erection even of an ordinary dwelling-house—the intricacy of their nature, and the almost trifling minutiae of their arrangement—it cannot appear extraordinary that some items should escape his notice. Indeed, the wonder would seem rather to be, that so many are carefully remembered, than that a few should be forgotten.

From whichever of these causes disputes between the contractor and his employer originate, their nature is almost invariably the same—they are points of construction, not matters of fact. In other words, the question at issue is not one of workmanship, nor of price, but whether the subject of extra claim forms a part of the contract or not.

All specifications have a schedule of conditions annexed, which, after alluding to the completion of the building, payment of the money, &c., usually contain a clause to the following effect: "And also, that if the description of anything necessary to complete the said building, according to the design expressed in the drawings, or in the foregoing specification, or to be understood by fair inference therefrom, be omitted in the said specification or drawings, the contractor shall take no advantage of such omission or omissions, but shall supply whatever may be needed to complete the whole, without any additional charge."

It is evident to the dispassionate reader of such a condition as this, that it is intended to supply any trifling omissions on the part of the architect; such omissions being actually necessary to complete work directly specified to be performed: but, as we have already stated, it is on this point that the disputes turn, and with reference to their several reading of this or a similar clause, the contending parties usually join issue.

The general principles on which a contractor, performing work under a special agreement, and for a fixed price, shall be allowed to recover the value of any additional work which may be ordered during the progress of the undertaking,

have been laid down by Lord TENTERDEN, C. J., in the case of *Loveloch v. King*, 1 M. & Rob. 60.

The action was brought to recover the amount of a carpenter's bill for alterations in the house of the defendant. The work having been originally undertaken on a contract for a fixed sum, alterations were subsequently made, on which the plaintiff claimed to abandon the contract, and recover a measuring value price for the work actually done. The original contract was for 62*l.* 10*s.*; there was some entirely new work done, under a separate contract for 10*l.*, and there were considerable alterations and departures from the original plan, which, by the usual evidence, it was shown that the defendant had seen and had not objected to, and, in some cases, that he had expressly approved of them. Among these were the alteration and enlargement of a window, which were proved to have occasioned an increased expense of 5*l.* The defendant had paid 82*l.* in all. The plaintiff's witnesses stated the value of the whole work to be 140*l.*; the defendant's witnesses estimated it below the sum actually paid.

The chief justice, in summing up to the jury, observed, that the case, although very common in its circumstances, involved a very important principle, and required their very serious consideration. "In this case, as in most others of the kind, the work was originally undertaken on a contract for a fixed sum. A person intending to make alterations of this nature, generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking; and it will very frequently depend on this estimate, whether he proceeds or not. It is therefore a great hardship upon him, if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases, he will be completely ignorant whether the particular alterations suggested, will produce any increase of labor and expenditure; and I do not think, that the mere fact of assenting to them, ought to deprive him of the protection of his contract. Sometimes, indeed, the nature of the alterations will be such, that he cannot fail to be aware, that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering, that a party does not abandon the security of his contract, by consenting that such alterations shall be made, unless he is also informed, at the time of the consent, that the effect of the alteration will be to increase the expense of the work. In the present case, it is not pretended that any such caution was given; and it does not appear to me, that any of the alterations, except that of the window, (the additional costs of which the money paid is enough to cover,) were of such a nature, as necessarily to import an increase of expense. The question, however, is entirely for the jury; and it is of great importance, from the frequency of such cases, that they should adopt a correct principle in its decision." The verdict was for the defendant.

The subject has also received the consideration of the supreme court of Pennsylvania, in *Miller v. McCaffrey*, 9 Barr 245. There, the defendants, who were the building committee of a congregation, had entered into a contract with the plaintiff for the erection of a church edifice, according to a designated plan, and at a fixed price. The contract contained the following stipulation: "At any time during the progress of the building, the committee reserves the right to direct any alteration or variation from the original plan, so as not to vary therefrom in any very essential manner, or to cause any material extra expense to the building; but any alteration suggested by them shall be made, and the expense, if any, shall be agreed upon at the time; but no extras shall be allowed, under any pretext whatever."

The action was brought for extra work done upon the building. The evidence was, that the plaintiff had made various alterations in the plan, by which the cost of the building was increased. The price for one item only was agreed upon. But the defendants knew of the alterations, and made no objections; and some of them at least approved of the acts of the plaintiff.

The court held that the defendants would not be liable for the increased cost of the work, occasioned by such alterations, for which the price had not been agreed upon as stipulated in the contract, except on proof of an express promise to pay for it. And ROGERS, J., delivering the opinion of the court, said: "The action can

only be maintained by clear and satisfactory evidence of a new, distinct and independent contract between the parties, authorizing the alterations in the original plan, and expressly agreeing to pay for them a certain fixed price, or what they may be reasonably worth. Short of full proof of these essential particulars, the action cannot be sustained. It is obvious, that unless these principles are *rigidly* enforced, it is worse than useless to enter into a special contract, or attempt to guard against impositions sometimes ruinous to the owner." And after referring to the evidence in the cause, the learned judge continued: "We shall never be in want of testimony of the kind above alluded to; and it will follow that the only possible mode of escaping, for the owner, (even if that can protect him,) will be to absent himself altogether, while the work is in progress. If the unhappy owner expresses his satisfaction with the building, he is bound to give an additional compensation; nay, if he does not expressly dissent, he is still in the same category. In truth, he would be an unnatural and ill-natured man, who would not express satisfaction, when he observes that the builder is more than fulfilling his contract—that he is making a better job of it, in workmanship and plan, than he agreed to do. But does it follow, that when improvements are made, without consultation with the owner, to gratify the taste or laudable vanity of the contractor, that he shall be compelled to pay the additional expense, if any there be, in direct opposition to the words and spirit of his contract? The adoption of such a rule would be particularly unjust here." "It is an elementary principle, that a workman employed to do a job, who adds extra work without consulting his employer, cannot charge for it. *Hart v. Norton*, 1 McCord 22. So, in *Wilmot v. Smith*, 3 C. & P. 453, where the plaintiff agreed to construct a printing-press, with a cast-iron bottom, for the defendant, for 4*l.* 10*s.*, and he furnished him one with a wrought-iron bottom, and sued for 5*l.* 5*s.*, it was held, that he could recover but 4*l.* 10*s.*, although the press was better, and the defendant did not object to it, or offer to return it. This is a case very like the present, and rules it."

V. FORMS OF CLAIMS.

FORM OF CLAIM BY A HOUSE-CARPENTER AGAINST ONE WHO IS OWNER AND CONTRACTOR, FOR WORK AND MATERIALS FOR A BUILDING.

A. B. } In the — Court for the County of —,
 vs. } — Term, 186—, No. —
 C. D. }

A. B., house-carpenter, of the county of —, files this his claim for the payment of the sum of — dollars and — cents, against all that certain — story — building, containing in front — feet, and in depth — feet, and the lot or piece of ground on which the same is erected, with the curtilage appurtenant thereto, situate on the — side of — street, at the distance of — feet — from the — side of — street, in the said county: the sum of — dollars and — cents, part of the sum claimed, being a debt contracted for work, viz., carpenter's work; and the sum of — dollars and — cents, the residue thereof, being a debt contracted for materials, viz., bricks, lime, sand, lumber and ironmongery; done and furnished by the said A. B., within six months last past, in, for and about the erection and construction of said building, of which the said C. D. was and is the owner or reputed owner, and at his instance and request, he being the contractor, architect and builder thereof; and the said A. B. claims to have a lien on the said building and the lot or piece of ground and curtilage appurtenant to said building from the commencement thereof, for the sum aforesaid, according to the act of assembly in such case made and provided; and the said claimant hereto annexes a bill of particulars of the amount of his said debt, showing the nature and kind of work done, the kind and amount of materials furnished, and the time when the said work and materials were done and furnished.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY A HOUSE-CARPENTER AGAINST C. D., OWNER, AND E. F., CONTRACTOR, FOR WORK AND MATERIALS FOR A BUILDING.

A. B. } In the Court of — for the County of —,
 vs. } — Term, 186—, No. —
 C. D. and E. F. }

A. B., of the county of —, house-carpenter, files this his claim for the payment of the sum of — dollars and — cents, against all that certain — story (stone, brick or frame) building, containing in front — feet, and in depth — feet, and the lot or piece of ground on which the same is erected, with the curtilage appurtenant thereto,

situate on the — side of — street, at the distance of — feet from the corner of — street, in the county aforesaid; the sum of — dollars and — cents, part of the sum claimed, being a debt contracted for work, viz., carpenter's work, &c.; and the sum of — dollars and — cents, the residue thereof, being a debt contracted for materials, viz., lumber, lime, bricks, &c., done and furnished by the said A. B., within six months last past, in, for and about the erection and construction of the said buildings, of which the said C. D. is the owner or reputed owner, and the said E. F. the architect, builder and contractor for the said work and materials, at whose instance and request they were done and furnished as aforesaid; and the said A. B. claims to have a lien on the said building and lot or piece of ground and curtilage appurtenant to said building, from the time of its commencement, for the sum aforesaid, according to the act of assembly in such case made and provided; and said claimant hereto annexes a bill of particulars of the amount of his said debt, showing the nature and kind of work done, the kind and amount of materials furnished, and the time when the said work was done, and the said materials furnished as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY A BRICKMAKER, AGAINST ONE WHO IS OWNER AND CONTRACTOR, FOR MATERIALS FURNISHED FOR TWO OR MORE BUILDINGS, WHERE THE AMOUNT CLAIMED IS EQUALLY DIVIDED.

A. B. } In the — Court, for the County of —,
 vs. — Term, 186—, No. —.
 C. D. }

A. B., brickmaker, of the county of —, files this his claim for the payment of the sum of — dollars and — cents, against all those — certain — story brick houses [or buildings] situate in the — of —, in the county aforesaid, in — street, between — and — streets, each house being about — feet in front, on said — street, and in depth — feet, and the lots or pieces of ground and curtilages appurtenant to said buildings: the said sum of — dollars being a debt contracted for materials: viz., bricks furnished and provided by the said A. B., within six months last past, for and about the erection and construction of the said buildings, of which the said C. D. was and is the owner, or reputed owner, and at his instance and request, he being the contractor, architect and builder thereof; and the amount claimed to be due on each of the said buildings, for materials furnished and provided as aforesaid, is — dollars and — cents, which the said claimant hereby designates according to the act of assembly, in such case made and provided, and claims to have a lien for on the said buildings and appurtenances from the commencement of the same; and said claimant hereto annexes a bill of particulars of the amount of his said debt, showing the kind and amount of materials furnished, and the time when said materials were furnished as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY A BRICKMAKER, AGAINST C. D., OWNER, AND E. F., CONTRACTOR, FOR MATERIALS FURNISHED FOR TWO OR MORE BUILDINGS, WHERE THE AMOUNT CLAIMED IS EQUALLY DIVIDED.

A. B. } In the — Court, for the County of —,
 vs. — Term, 186—, No. —.
 C. D. & E. F. }

A. B., brickmaker, of the county of —, files this his claim for the payment of the sum of — dollars and — cents, against all those — certain — story brick houses, situate in the — of —, in the county aforesaid, at the — corner of — and — streets, [or as the case may be,] each house being about — feet in front on said — street, and — feet in depth on said — street, and the lots or pieces of ground and curtilages appurtenant to said buildings: the said sum of — dollars and — cents, being a debt contracted for materials: viz., bricks, furnished by the said A. B., within six months last past, for and about the erection and construction of the said buildings, of which the said C. D. was and is the owner, or reputed owner, and E. F. the architect, builder and contractor, for said materials, at whose instance and request they were furnished as aforesaid; and the amount claimed to be due on each of the said buildings for the said materials is — dollars and — cents, which the said claimant hereby designates according to the act of assembly, in such case made and provided, and claims to have a lien for on said buildings and appurtenances, from the commencement of the same; and said claimant hereto annexes a bill of particulars of the amount of his said debt, showing the kind and amount of materials furnished, and the time when said materials were furnished as aforesaid.

[Plaintiff's bill annexed.]

FORM OF CLAIM FILED BY A BRICKMAKER AGAINST C. D., OWNER, AND E. F., CONTRACTOR, FOR MATERIALS FURNISHED FOR TWO OR MORE BUILDINGS, WHERE THE AMOUNT CLAIMED IS UNEQUALLY DIVIDED.

A. B. } In the — Court, for the County of —,
 vs. } — Term, 186—, No. —.
 C. D. & E. F. }

A. B., brickmaker, of the county of —, files this his claim for the payment of the sum of — dollars and — cents, against all those — certain brick houses, situate in —, in the county aforesaid, in — street, between — and — streets, and the lots or pieces of ground and curtilage appurtenant to the said buildings: being a debt contracted for materials: viz., bricks, &c., furnished by the said A. B., within six months last past, for and about the erection and construction of the said buildings, of which the said C. D. was and is the owner, or reputed owner, and E. F. the architect, builder and contractor, for said materials, at whose instance and request they were furnished as aforesaid: and the said A. B. hereby designates the amount he claims to be due to him for the same on each of the said buildings, as follows: viz., on the northernmost of the said buildings, which is a three-story [or as the case may be] brick house, — feet in front on said — street, by — feet in depth, and the lot or piece of ground and curtilage appurtenant to said building, the sum of — thousand dollars and — cents: on the southernmost of said buildings, which is a two-story [or as the case may be] brick, — feet in front on said — street, by — feet in depth, and the lot or piece of ground and curtilage appurtenant to said building, the sum of — hundred dollars and — cents, according to the act of assembly, in such case made and provided; and claims to have a lien on the said buildings and appurtenances for the same, from the time of their commencement; and said claimant hereunto annexes a bill of particulars of the amount of his said debt, showing the kind and amount of materials furnished, and the time when said materials were furnished, as aforesaid. (Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY A BRICKMAKER AGAINST ONE WHO IS OWNER AND CONTRACTOR, FOR MATERIALS FURNISHED FOR TWO OR MORE BUILDINGS, WHEN THE AMOUNT CLAIMED IS UNEQUALLY DIVIDED.

A. B. } In the — Court, for the County of —,
 vs. } — Term, 186—, No. —.
 C. D. }

A. B., brickmaker, of the county of —, files this his claim for the payment of the sum of — dollars and — cents, against all those — certain brick houses, situate in the — of — in the county aforesaid, in — street, between — and — streets, and the lots or pieces of ground and curtilages appurtenant to said buildings: being a debt contracted for materials: viz., bricks, furnished by the said A. B., within six months last past, for and about the erection and construction of the said buildings, of which the said C. D. was and is the owner, or reputed owner, and at his instance and request, he being the architect, contractor and builder thereof; and the said A. B. hereby designates the amount he claims to be due for the same on each of the said buildings, as follows: viz., on the northernmost of the said buildings, which is a three-story [or as the case may be] brick house, — feet in front on said — street, by — feet in depth, and the lot or piece of ground and curtilage appurtenant to said building, the sum of — thousand dollars and — cents: on the southernmost of said buildings, which is a two-story [or as the case may be] brick, — feet in front on said — street, by — feet in depth, and the lot or piece of ground and curtilage appurtenant to said building, the sum of — hundred dollars and — cents, according to the act of assembly, in such case made and provided; and claims to have a lien on said building and appurtenances thereto for the same, from the time of their commencement: and said claimant hereto annexes a bill of particulars of the amount of his said debt, showing the kind and amount of materials purchased, and the time when said materials were purchased as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED AGAINST ONE WHO IS OWNER AND CONTRACTOR, BY A BRICKLAYER, FOR WORK.

A. B. } In the Court of —, for the County of —,
 vs. } — Term, 186—, No. —.
 C. D. }

A. B., of the county of —, bricklayer, claims, in his own right, a lien for the payment of the sum of — dollars, against all that certain — story brick house, [or building,] situate [describing the situation and size of the building] in the — of —, in the county aforesaid, and the lot or piece of ground and curtilage appurtenant to said building; the said sum of — dollars, being a debt contracted for work, viz.: bricklaying, &c., done by the said A. B., within six months last past, for and about the erection and construction of the said building, of which the said C. D. was and is the owner, or reputed owner, and at his instance and request, he being the contractor, architect and builder

thereof; and said claimant hereto annexes a bill of particulars of the amount of his said debt, showing the nature and kind of work done, and the time when said work was done as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED AGAINST C. D., OWNER, AND E. F., CONTRACTOR, BY A BRICKLAYER, FOR WORK.

A. B. }
 vs. } In the — Court for the County of —,
 C. D. & E. F. } — Term 186—, No. —.

A. B., bricklayer, of the county of —, files this his claim, in his own right, for work, viz.: bricklayer's work done for and about the erecting and constructing a certain — story brick building, (or all that certain — story brick message and tenement,) situate, &c., (here follows the description of its size and situation, or boundaries,) in the — of —, in the county aforesaid, of which C. D. was and is the owner, or reputed owner, and E. F. the architect, builder and contractor, for said work, done by the said A. B., within six months last past, to said building, at the instance and request of the said E. F., contractor. This claim is filed as well against said building, as against the lot or piece of ground and curtilage appurtenant to the same; and the said A. B. annexes hereto a statement of the particulars of the amount of his said debt, showing the nature and kind of work done, and the time when said work was done, as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY A LUMBERMAN, AGAINST ONE WHO IS OWNER AND CONTRACTOR, FOR LUMBER FURNISHED FOR ONE BUILDING.

A. B. }
 vs. } In the — Court for the County of —,
 C. D. } — Term, 186—, No. —.

A. B., lumber-merchant, of the county of —, files this his claim, for the payment of the sum of — dollars, and — cents, against all that certain — story — message and tenement, situate in —, in the township of —, in the county aforesaid, on the north side of — road, containing in front, on said road, — feet, more or less, and in depth about — feet, (or otherwise describing its situation, boundaries, &c.,) and the lot or piece of ground and curtilage appurtenant to said building; the said sum of — dollars and — cents being a debt contracted for materials, viz.: lumber furnished by the said A. B., within six months last past, for and about the erection and construction of the said building, of which the said C. D. was and is the owner or reputed owner, and at his instance and request, he being the contractor, architect and builder thereof; and the said A. B. claims to have a lien for the aforesaid sum of — dollars and — cents, on the said building, and lot or piece of ground and curtilage appurtenant thereto, from its commencement, according to the act of assembly in such case made and provided; and the said claimant hereto annexes a bill of particulars of the amount of the said debt, showing the kind and amount of materials furnished, and the time when said materials were furnished.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY A LUMBERMAN, AGAINST C. D., OWNER, AND E. F., CONTRACTOR, FOR LUMBER FURNISHED FOR ONE BUILDING.

A. B. }
 vs. } In the — Court for the County of —,
 C. D. & E. F. } — Term 186—, No. —.

A. B., lumber-merchant, of the county of —, files this his claim for the payment of the sum of — dollars and — cents, against all that certain — story — message and tenement, situate in —, in the township of —, in the county aforesaid, on the south side of the — road, containing in front, on said road, — feet, more or less, and in depth about — feet, and the lot or piece of ground and curtilage appurtenant to said building; the said sum of — dollars and — cents being a debt contracted for materials, to wit, lumber furnished by the said A. B., within six months last past, for and about the erection and construction of the said building, of which the said C. D. was and is the owner, or reputed owner, and the said E. F. the architect, builder and contractor for said materials, at whose instance and request they were furnished and provided, as aforesaid; and the said A. B. claims to have a lien for the aforesaid sum, in the said building, and lot or piece of ground and curtilage appurtenant to said building, from the commencement of the same, according to the act of assembly in such case made and provided; and said claimant hereto annexes a bill of particulars of the amount of the said debt, showing the kind and amount of materials furnished, and the time when said materials were furnished.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY LUMBER-MERCHANTS, (PARTNERS,) AGAINST ONE WHO IS OWNER AND CONTRACTOR, FOR LUMBER FURNISHED FOR TWO OR MORE BUILDINGS, WHERE THE AMOUNT CLAIMED IS EQUALLY DIVIDED.

A. B. and C. D., merchants in copartnership, trading under the firm of A. B. & Co.

vs.
E. F.

In the — Court, for the County of —,
— Term, 186—, No. —.

A. B. and C. D., lumber-merchants in copartnership, trading under the firm of A. B. & Co., of the county of —, file this their claim, for the payment of the sum of — dollars and — cents, against all those — certain — story — houses, situate in the — of —, in the county aforesaid, in — street, between — and — streets, each house being about — feet in front on said — street, and in depth about — feet, and the lots or pieces of ground and curtilages appurtenant to said buildings; the said sum of — dollars and — cents being a debt contracted for materials, viz.: lumber found, furnished and provided by the said A. B. and C. D., within six months last past, for and about the erection and construction of the said buildings, of which the said E. F. was and is the owner, or reputed owner, and at his instance and request, he being the contractor, architect and builder thereof; and the amount claimed to be due on each of the said buildings, for materials found, furnished and provided, as aforesaid, is — dollars and — cents, which the said claimants hereby designate, according to the act of assembly in such case made and provided, and claim to have a lien for on said buildings and appurtenances, from the commencement of the same; and said claimants hereto annex a bill of particulars of the amount of their said debt, showing the kind and amount of materials furnished, and the time when the said materials were furnished, as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY LUMBERMEN, (PARTNERS,) AGAINST E. F., THE OWNER, OR REPUTED OWNER, AND G. H., CONTRACTOR, FOR LUMBER FURNISHED FOR TWO OR MORE BUILDINGS, WHERE THE AMOUNT CLAIMED IS EQUALLY DIVIDED.

A. B. and C. D., lumber-merchants in copartnership, &c. (see last form),

vs.
E. F. and G. H.

In the — Court, for the County of —,
— Term 186—, No. —.

A. B. and C. D., lumber-merchants, &c., &c., [as per last form,] of the county of —, file this their claim for the payment of — dollars and — cents, against all those — certain — story — houses, situate in the — of —, in the county aforesaid, between — and — streets, in — street, each house being about — feet in front on said — street, and — feet in depth, and the lots or pieces of ground and curtilages appurtenant to said buildings: the said sum of — dollars and — cents, being a debt contracted for materials, viz.: lumber found, furnished and provided, within six months last past, by the said A. B. and C. D., for and about the erection and construction of the said buildings, of which the said E. F. was and is the owner, or reputed owner, and the said G. H. the architect, builder and contractor for said materials, at whose instance and request they were found, furnished and provided, as aforesaid; and the amount claimed to be due on each of the said buildings for the said materials, is — dollars and — cents, which the said claimants hereby designate, according to the act of assembly, in such case made and provided, and claim to have a lien for on said buildings and appurtenances from the commencement of the same; and said claimants hereto annex a bill of particulars of the amount of their said debt, showing the kind and amount of materials furnished, and the time when said materials were furnished, as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM FILED BY LUMBER-MERCHANTS, (PARTNERS,) AGAINST ONE WHO IS OWNER AND CONTRACTOR, FOR LUMBER FURNISHED FOR TWO OR MORE BUILDINGS, WHERE THE AMOUNT CLAIMED IS UNEQUALLY DIVIDED.

A. B. and C. D., lumber-merchants in copartnership, trading under the firm of A. B. & Co.,

vs.
E. F.

In the — Court, for the County of —,
— Term, 186—, No. —.

A. B. and C. D., lumber-merchants in copartnership, trading under the firm of A. B. & Co., of the county of —, file this their claim for the payment of the sum of — dollars and — cents, against all those certain houses situate in the — of —, in the county aforesaid, in — street, between — and — streets, Nos. — and —, and the lots or

pieces of ground and curtilages appurtenant to said buildings; being a debt contracted for materials, to wit, lumber furnished by the said A. B. and C. D., within six months last past, for and about the erection and construction of the said buildings, of which the said E. F. was and is the owner, or reputed owner, and at his instance and request, he being the architect, contractor and builder thereof: and the said A. B. and C. D. hereby designate the amount they claim to be due to them for the same, on each of the said buildings, as follows, viz.: on the northernmost of the said buildings, which is a three-story (or as the case may be) brick house, — feet in front on said — street, by — feet in depth, and the lot or piece of ground and curtilage appurtenant to said building, the sum of — thousand dollars and — cents: on the southernmost of said buildings, which is a two-story (or as the case may be) brick, — feet in front on said — street, by — feet in depth, and the lot or piece of ground and curtilage appurtenant to said building, the sum of — hundred dollars and — cents, according to the act of assembly in such case made and provided, and claim to have a lien on said buildings and appurtenances thereto for the sum aforesaid, from the time of their commencement: and the said claimants hereto annex a bill of particulars of the amount of their said debt, showing the kind and amount of materials furnished, and the time when said materials were furnished, as aforesaid.

(Plaintiffs' bill annexed.)

FORM OF CLAIM FILED BY LUMBER-MERCHANTS, (PARTNERS,) AGAINST E. F., OWNER, AND G. H., CONTRACTOR, FOR LUMBER FURNISHED FOR TWO OR MORE BUILDINGS, WHERE THE AMOUNT CLAIMED IS UNEQUALLY DIVIDED.

A. B. and C. D., lumber-merchants, &c.	} In the — Court, for the County of —,
vs. E. F. and G. H.	

A. B. and C. D., lumber-merchants, &c., &c., (as per last form,) file this claim for the payment of the sum of — dollars and — cents, against all those — certain houses situate in —, in the county of —, aforesaid, in — street, between — and — streets, and the lots or pieces of ground and curtilages appurtenant to said buildings: being a debt contracted for materials, to wit: lumber furnished by the said A. B. and C. D., within six months last past, for and about the erection and construction of the said buildings, of which the said E. F. was and is the owner, or reputed owner, and the said G. H. the architect, builder and contractor, for the said materials, at whose instance and request they were furnished, as aforesaid; and the said A. B. and C. D. hereby designate the amount they claim to be due to them for the said materials on each of the said buildings, as follows, viz.: in the northernmost of the said buildings, which is a — story brick house, — feet in front on said — street, by — feet in depth, and the lot or piece of ground and curtilage appurtenant to said building, the sum of — thousand dollars and — cents: on the southernmost of the said buildings, which is a — story frame tenement, — feet in front on said — street, by — feet in depth, and the lot or piece of ground appurtenant to said building, the sum of — dollars, according to the act of assembly, in such case made and provided, and claim to have a lien on the said buildings and appurtenances for the same, from the time of the commencement: and said claimants hereto annex a bill of particulars of the amount of their said debt, showing the kind and amount of materials furnished, and the time when the said materials were furnished, as aforesaid.

(Plaintiff's bill annexed.)

FORM OF CLAIM AGAINST A LEASEHOLD INTEREST.

A. B.	} In the Court of —, for the County of —,
C. D., owner or reputed owner, and	
E. F., contractor.	

A. B., of the — of —, files this his claim for the payment of the sum of — dollars, — cents, against all — certain — story — building and lot or piece of ground and curtilage appurtenant thereto, situate (describing it accurately). The said sum of — being a debt contracted for — at the request of the said C. D. by the said E. F. within six months last past, for and towards the erection and construction of, and on the credit of, the said building, at the times and in the quantities, in the annexed bill of particulars mentioned, which said claimant prays may be taken and considered as part of this lien against said building of which the said C. D. then was and now is the owner or reputed owner and the lessee of the said lot or piece of ground, and the said E. F., contractor for the erection of said building, with whom the said contract was made; and the said A. B. claims to have a lien on said building and on the leasehold interest of the said C. D. in the said lot or piece of ground and curtilage appurtenant thereto, for the amount of his said claim from the commencement of said building, according to the act of assembly in such case made and provided.

(Plaintiff's bill annexed.)

FORM OF CLAIM BY A HOUSE-CARPENTER FOR REPAIRS MADE BY A TENANT WITH THE CONSENT
OF THE LANDLORD.

<p>A. B. vs. C. D., owner or reputed owner, and E. F., lessee and contractor.</p>	}	<p>In the Court of Common Pleas for the County of Philadelphia, ——— Term. 187— No. —.</p>
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A. B., of the city of Philadelphia, house-carpenter, files this his claim for the payment of the sum of ——— dollars ——— cents, against all that certain three story brick dwelling-house and lot or piece of ground and curtilage appurtenant thereto, situate on the ——— side of ——— street, between ——— and ——— streets, No. —, in the ——— ward of the city of Philadelphia, containing in front on said ——— street ——— feet, and in depth ——— feet, the said sum of money being a debt contracted for work done and materials furnished, to wit, carpenter work done and lumber, nails, &c., furnished by the said A. B. within six months last past, to wit, between the ——— day of ——— 1869 and the ——— day of ——— 1870, in and about the repairing of the said building, of which the said C. D. was and is the owner or reputed owner, and the said E. F. was and is the lessee or tenant and the contractor with whom the contract of the said A. B. was made, and at whose request the said work was done and the said materials furnished as aforesaid; and the said A. B. hereto annexes a detailed statement or bill of particulars exhibiting the amount or sum due, the nature or kind of the work done, the kind and amount of the materials furnished, and the time when the said work was done and materials furnished. And he also annexes a copy of the consent in writing of the said C. D. for the making of the said repairs by the said E. F., the lessee; and he claims to have a lien on said building and the curtilage appurtenant thereto, for the amount of his said claim, from the time of filing this claim, according to the act of assembly in such case made and provided.

[Plaintiff's bill annexed.]

Milk.

The act of 20 April 1869 empowers the councils of cities and boroughs to provide for the inspection of milk, under such rules and regulations as will protect the people from adulteration and dilution of the same. Purd. 1578.

And the act of 14 April 1870 provides that, in the counties of Erie, Crawford and McKean, whoever shall knowingly sell, supply or bring to be manufactured to any cheese manufactory in this state, any milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as skimmed milk, or whoever shall keep back any part of the milk known as strippings, or whoever shall knowingly bring or supply milk to any cheese manufactory that is tainted, or partly sour, from want of proper care in keeping pails, strainers or any vessels in which said milk is kept, clean and sweet, after being notified of such taint or carelessness, or any cheese manufacturer who shall knowingly use, or direct any of his employees to use, for his or their individual benefit, any cream from the milk brought to said cheese manufacturer, without the consent of all the owners thereof, shall, for each and every offence, forfeit and pay a sum not less than twenty-five dollars nor more than one hundred dollars, with costs of suit, to be sued for in any court of competent jurisdiction, for the benefit of the person or persons, firm or association or corporation, or their assigns, upon whom such fraud shall be committed. P. L. 1176.

Mill-Dams.

I. Statutory provisions.

II. Judicial decisions.

I. ACT 23 MARCH 1803. Purd. 743.

SECT. 3. If the owner or owners of any raft, boat or other vessel, or other person having the charge thereof, shall be obstructed, or suffer damage, or shall be delayed in his or their passage on any stream within the jurisdiction of this commonwealth, that now is, or hereafter may be, declared a public highway, by any dam or dams as aforesaid, or fish-dam or other device whatsoever, made or erected in any stream, which was declared by law to be a public stream or highway, within the jurisdiction of this commonwealth, before the time the damage actually happened, it shall be the duty of any *justice of the peace* of the county where such dam or dams as aforesaid, or fish-dams, or other device, is or are made or erected, on application of the owner or owners of the raft, boat or other vessel or of the person having the charge thereof, to cause the owner of such dam or dams, or other device, forthwith to appear before him, the said justice: and if, on the appearance of the said owner, the parties cannot agree in respect to the damage alleged to be done, or in the choice of referees to determine the same, it shall be the duty of the said justice forthwith to appoint three disinterested persons, whose duty it shall be to view the injury so sustained, and inquire into the loss occasioned by delay, and make an estimate thereof, on oath or affirmation, if such oath or affirmation is required by either of the parties; and it shall be the duty of such justice of the peace forthwith to award judgment, and issue execution in a summary manner, for the amount, with costs of suit: *Provided, however*, that the said damages, so to be recovered, do not in the whole exceed the sum of fifty dollars; but if damages shall be alleged to a greater amount than fifty dollars, the same may be sued for and recovered in the court of common pleas of the county wherein the said damages shall have been sustained: *And provided also*, that appeals shall be allowed from the judgment of the justice of the peace, given for damages as aforesaid, to the court of common pleas, as in other cases.

II. The erection of a dam which causes the formation of an obstruction in the stream below, subjects him who erected or maintains it to any damage which such obstruction may occasion to a navigator. 4 W. 437.

In an action for obstructing a stream made navigable by law, if it appear that the injury to the plaintiff arose from causes which might have been foreseen, such as ordinary periodical freshets, or the collection of ice, he, whose superstructure is the immediate cause of the mischief, will be liable to damages; but if the injury be occasioned by an act of Providence, which could not have been anticipated, the defendant will not be liable. 9 W. 119.

Persons passing such dams are required to use ordinary care, diligence and skill; but where these are used, and the dam is such an obstruction as to occasion loss to those attempting its passage, the one erecting or maintaining it must answer in damages, no matter what was the stage of the water at the time of passing it. 2 J. 81. See 7 P. F. Sm. 487.

The term "raft," used in this act, is applicable to a number of logs, not fastened together, but floated in the stream contiguous to each other. 3 H. 9.

Misfeasance.

MISFEASANCE is the improper performance of some act which might lawfully be done. 1 Chit. Pl. 185.

An action on the case lies against an officer for maliciously executing process in an oppressive and unreasonable manner, with intent to vex, harass and oppress the party. 5 Johns. 125.

As where a constable, having a warrant against the plaintiff for a military fine, refused to take property tendered by him, but took and sold his horse, with the avowed intent of hurting his feelings, and otherwise vexing him. Ibid.

An action on the case lies against a justice of the peace for a false return to a *certiorari* brought to reverse his judgment, notwithstanding the judgment was affirmed by default of plaintiff in error. 14 Johns. 195. 2 D. 114.

No action lies at the suit of an individual against a public officer for misbehavior in office, neither for misfeasance nor non-performance, unless the plaintiff can show a special damage peculiar to himself. 19 Johns. 223.

No action lies for merely bringing a suit without sufficient ground. 10 Johns. 156.

An action lies against an innkeeper for goods lost or stolen out of his inn, without proving negligence. 14 Johns. 175.

Money.

Current and *lawful* money are *synonymous*. 1 D. 126.

The word *specie* is synonymous with *gold and silver, real efficient money, solid coin, or current money*. 4 Y. 95.

When foreign money is the object of the suit, the settled rule is, that the value must be fixed according to the rate of exchange at the time of trial. 5 S. & R. 48.

A payment in current bank notes discharges the debt, although, in consequence of the previous failure of the bank, of which both parties were ignorant, the notes were of no value at the time of payment. 1 W. & S. 92.

If a payment or receipt of money, in coins or bank notes, be proved, without showing of what denomination, it will be presumed that the coins or bank notes were of the lowest denomination in circulation. 2 Greenl. Ev. § 129 a.

Name.

I. How names of persons may be changed. II. Judicial decisions and authorities.

I. ACT 9 APRIL 1852. Purd. 753.

SECT. 1. It shall be lawful for the court of common pleas of any county of this commonwealth, to make a decree, changing the name of any person, resident in said county, at any time three months after being petitioned to do the same by such person: *Provided*, That notice of the decree, after the same shall be made, shall be published in one or more newspapers, to be designated by the court, for four successive weeks.

SECT. 2. Every person whose name shall be so changed, shall, before the entering of the decree, pay to the prothonotary of said court, in addition to the costs of publication, ten dollars, two dollars whereof shall be retained by the said prothonotary as and for his fees in the matter, and the remainder shall be received by him for the use of the state, as and for a tax upon the decree.

The act of 15th April 1859, provides that when the name of the parent of a minor child or children, then under the care of such parent, shall be changed, the new name of such parent shall thereafter be borne also by such minor child or children. Purd. 753.

II. The addition of *junior* to a name is mere description of the person, and the omission of it does not affect or invalidate any act or proceeding done by the same person. 7 Johns. 549.

An initial letter interposed betwixt the Christian and surname is no part of either. 4 W. 329.

A variance or mistake in the names of parties to a contract, whether individuals or corporations, is not fatal to their contract, if there can be a sufficient description of the parties whereby they are known. 10 Mass. 360.

Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously and according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer. 1 W. C. C. 285.

Whether *Harry* and *Henry* are the same name, so that an attainder of *Harry* Gordon by the name of *Henry* Gordon is valid, *dubitat*. Ibid.

In cases of pleas of misnomer, questions of identity, &c., the change of the letters of a name which does not alter the *sound*, is not a fatal variance, as *Shackspere* for *Shakspeare*. 7 S. & R. 479.

But in an indictment for forgery, &c., which professes to set out an instrument in *hæc verba*, the change of a letter is fatal, though the word be *idem sonans* [sounding the same]. Ibid.

Identity of name is ordinarily, but not always *prima facie* evidence of personal identity. Identity of name is something from which an inference may be drawn, unless the name be a very common one, or the transaction remote. 2 Barr 183. 4 Ad. & Ellis 632. 2 W. C. C. 201. 12 Verm. 9. 4 Monr. 451. 2 P. L. J. 302. 2 Am. L. R. 499. 27 Leg. Int. 76.

By act of 4th May 1852, the several courts of this commonwealth have power, in all actions brought therein, and in all cases of judgments entered by confession, "in any stage of the proceedings, to permit amendments, by changing or adding the name or names of any party, plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party." Purd. 47.

The act of 27th April 1855 provides that illegitimate children shall take and be known by the name of their mother. Purd. 753.

Negligence.

I. Provisions of the Penal Code.

negligence.

II. Civil liability for death caused by III. Judicial decisions and authorities.

I. ACT 31 MARCH 1860. Purd. 222.

SECT. 29. If any person shall be maimed, or otherwise injured in person, or injured in property, through or by reason of the wanton and furious driving, or racing, or by reason of the gross negligence or wilful misconduct of the driver of any public stage, mail coach, coachee, carriage or car, employed in the conveyance of passengers; or through or by reason of the gross negligence or wilful misconduct of any engineer or conductor of any locomotive engine or train of railroad cars or carriages; or any captain or other officer of any steamboat employed in the conveyance of passengers, or of goods, wares, merchandise or produce of any description; such driver, engineer, conductor, captain or officer, shall, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement, or by simple imprisonment, not exceeding five years: *Provided*, That the provisions of this act shall not interfere with the civil remedies against the proprietors and others, to which the injured party may by law be now entitled.

ACT 23 MARCH 1865. Purd. 1410.

SECT. 1. If any person or persons in the service or employ of a railroad or other transportation company, doing business in this state, shall refuse or neglect to obey any rule or regulation of such company, or, by reason of negligence or wilful misconduct, shall fail to observe any precaution or rule, which it was his duty to obey and observe, and injury or death to any person or persons shall thereby result, such person or persons so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not exceeding five thousand dollars, and to undergo an imprisonment in the county jail, or in the state penitentiary, not exceeding five years: (a) *Provided*, That nothing in this act shall be construed to be a bar to a trial and conviction for any other or higher offence, or to relieve such person or persons from liability, in a civil action, for such damages as may have been sustained.

SECT. 2. It shall be the duty of the prosecuting attorney of the city or county where any such injuries may have happened, as soon as he shall have notice of the same, to take immediate action and legal measures for the apprehension and arrest of the person or persons who may be charged with causing the injuries as aforesaid, and to direct *subpenas* to issue from any justice of the peace to witnesses, to appear and testify on the part of the commonwealth touching such offences charged as aforesaid, and to prosecute the offenders as in other cases of misdemeanor: *And provided further*, That no conviction of the employees shall relieve the company from any liability for any such injuries or death.

II. ACT 15 APRIL 1851. Purd. 754.

SECT. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

SECT. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.

ACT 26 APRIL 1855. Purd. 754.

SECT. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other

(a) For the construction of this act, see 27 Leg. Int. 76.

relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors.

SECT. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter.

ACT 4 APRIL 1868. Purd. 1521.

SECT. 1. When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee: *Provided*, That this section shall not apply to passengers.

SECT. 2. In all actions now or hereafter instituted against common carriers, or corporations owning, operating or using a railroad as a public highway, whereon steam or other motive power is used, to recover for loss and damage sustained and arising either from personal injuries or loss of life, and for which, by law, such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained, not exceeding in case of personal injury, the sum of three thousand dollars,^(a) nor in case of loss of life, the sum of five thousand dollars.

III. A railroad company is responsible for the sufficiency of its road, and it is only necessary to show an injury to person or property, sustained through the negligence of the company or its officers, to recover. 1 J. 141.

In an action against a railroad company for an injury to a passenger, occasioned by the negligence of the defendants and their servants, *held*, that the mere fact of the accident (a collision with another train) having occurred, was *prima facie* evidence of negligence on the part of the defendants. 2 Eng. L. & Eq. 360. 15 Jur. 299. 2 Greenl. Ev. § 222, 230.

The plaintiff travelling in a railroad car, permitted his hand to be extended outside of the window, whereby his arm was broken in passing a bridge; the carrier is not liable for the injury if he gave timely warning of the danger, which the plaintiff might have avoided. Whether such warning was given—and if so, whether it was heard by the plaintiff, is a matter of fact for the jury. To show such warning, it is admissible for the defendant to prove that an agent of the road had notified another passenger of the danger, who sat so close to the plaintiff that the latter must have heard the notice. 8 Barr 479.

In the case of excavations, more especially in public places, it is the duty of those owning or having them in charge, so to guard and fence them, or, at least, to give such warning notice of their existence, as will be sufficient to prevent others using ordinary caution from falling into them. Bright. R. 489. 4 H. 463.

There is no distinction between the responsibility of an employer for the acts of an ordinary agent or servant, and of a contractor for the erection of a building. Ibid. See 2 Greenl. Ev. § 68, 232 a.

When, in a city, a horse attached to a carriage is found running on the side-walk, to the injury of citizens, the law will presume negligence on the part of the owner; and he is liable in such case for the carelessness or neglect of his servant. Bright. R. 133. 3 H. 188.

Under the act of 26th April 1855, the damages to be recovered by the surviving relations for an injury resulting in death, are confined to such as are capable of a pecuniary estimate; nothing is to be allowed for the mental sufferings of the survivors, or the corporeal sufferings of the injured party. 9 C. 318.

In case of the loss of a minor son, the measure of damages is, the pecuniary value of his services during his minority. Ibid.

A parent may recover for the death of an adult son, if the family relation be shown to continue. 5 P. F. Sm. 499.

The sum to be recovered is the pecuniary loss which the plaintiffs have suffered from the death of their relation; nothing can be recovered as a *solatium* for wounded feelings, or by way of vindictive damages. 12 C. 298.

(a) See 25 Leg. Int. 332.

Notary Public.

I. Acts of assembly, extracts from.

II. Judicial decisions.

I. ACT 2 JANUARY 1815. Purd. 759.

SECT. 1. The official acts, protests and attestations of all notaries public, (acting by the authority of this commonwealth,) certified according to law, under their respective hands and seals of office, may be read and received in evidence of the facts therein certified, in all suits that now are or hereafter shall be depending: *Provided*, that any party may be permitted to contradict, by other evidence, any such certificate.

ACT 14 DECEMBER 1854. Purd. 759.

SECT. 1. The official acts, protests and attestations of all notaries public, certified according to law, under their respective hands and seals of office, in respect to the dishonor of all bills and promissory notes, and of notice to the drawers, acceptors or indorsers thereof, may be received and read in evidence as proof of the facts therein stated, in all suits now pending or hereafter to be brought: *Provided*, That any party may be permitted to contradict, by other evidence, any such certificate.

ACT 10 AUGUST 1864. Purd. 1323.

SECT. 1. Each notary public of this commonwealth shall have power to take depositions and affidavits, to take and receive the acknowledgment or proof of all deeds, conveyances, mortgages, or other instruments of writing, touching or concerning any lands, tenements or hereditaments, situate, lying and being in any part of this state; and also power to take and receive the separate examination of any *feme covert*, touching or concerning her right of dower, or the conveyance of her estate, or right in or to any such lands, tenements or hereditaments, as fully, to all intents and purposes whatsoever, as any judge of the supreme court, or president or associate judge of any of the courts of common pleas, or any alderman or justice of the peace, within this commonwealth; and the fees to be received by said notaries public, shall be the same as are now allowed by law to the aldermen and justices of the peace for similar services.

SECT. 2. All acknowledgments or proof of conveyances, mortgages or other instruments of writing, made before any notary public of this commonwealth, under and by virtue of a supposed authority given by an act authorizing notaries public in this state, and in any state or territory in the United States, to take acknowledgments of deeds and letters of attorney, and to confirm acknowledgments heretofore made, approved April 22d, Anno Domini 1863, shall be as valid, to all intents and purposes, and be in like manner entitled to be recorded, as if the same had been duly acknowledged or proven according to the previously existing laws of this commonwealth.

II. A protest for non-payment must appear under a notarial seal. 1 D. 193.

The certificate of a notary public, under his notarial seal, is *prima facie* evidence that the person signing the certificate is a commissioned notary. 6 S. & R. 484.

A notarial protest is evidence, under the act of 1815, of notice to the indorser of a promissory note, of non-payment by the maker. 6 S. & R. 484, 324. 4 W. & S. 505. And see 8 Leg. & Ins. Rep. 212. 9 Wr. 193.

After the protest of a notary has been given in evidence by the plaintiff, in a suit against the indorser of a promissory note, the defendant may call the notary to explain the protest, and even, it seems, to contradict it. 10 S. & R. 377. And he may be compelled to testify against the truth of his certificate of protest. 12 Ibid. 284.

The books of a notary, proved to have been regularly kept, are admissible in evidence, after his death, to prove a demand of payment, and notice of non-payment of a promissory note. 8 Wheat. 326. 20 Johns. 160.

A protest made by a notary, who is a stockholder in the bank, is not admissible evidence to charge the indorser. 2 W. 141.

The protest of a notary public is admissible in evidence, under the act of 1815, however insufficiently or defectively the words may be stated with respect to demand and notice. The question of the sufficiency arises afterwards. 4 Wh. 486.

By the law merchant, a notary cannot present bills for acceptance or payment by a clerk or deputy, and protest them on his report. 2 Bay 410. 3 Hill 53. 7 N.Y. 269. 24 Texas 311

Notice.

A NOTICE, in legal proceedings, means a *written* notice, and in calculating time, in *all* notices, one day is to be taken inclusive, and the other exclusive. 3 Johns 209. 2 Ibid. 261. Bright. R. 121.

It seems that a *verbal* notice will not affect a party, unless given to him in person. 2 Wh. 193.

Where a rule of court requires notice to be given to the opposite *party*, notice to his attorney is not sufficient. 5 S. & R. 352. 16 Ibid. 126.

Where an act of assembly requires *reasonable* notice to be given by one party to the other, ten days, generally, would be sufficient. 1 P. R. 462.

A party is not bound to produce a paper, unless the opposite party has given him notice for that purpose. 1 Johns. 340.

Whatever puts the party upon inquiry, amounts to notice, in judgment of law, provided the inquiry become a duty, as in case of purchasers and creditors, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding. But notice of a rumor of a conveyance or incumbrance seems not to be considered as actual or implied notice. 7 W. 261. 2 P. 17. 7 C. 331.

If one, in the course of his business, as agent, attorney or counsel for another obtain knowledge from which a trust would arise, and afterwards become the agent, attorney or counsellor, of a subsequent purchaser, in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. 8 W. 489. 3 C. 504.

Constructive notice is evidence of notice, the presumption of which is so violent, that the courts will not allow of its being contradicted. 5 C. 154.

Payment of a judgment to the nominal plaintiff after actual notice that it has been assigned to another, is not a payment to the proper person. And it is not necessary that direct notice of the assignment be given by the assignee or his agent; it is sufficient if the information be given by circumstances, and in terms calculated to arrest the intention of the debtor. 1 C. 80.

A notice to a plaintiff in an action before a justice, to enter satisfaction on the judgment, may be properly served by leaving a copy with his wife, at his dwelling-house. 7 C. 469.

Nuisance.

I. Provisions of the Penal Code.

1. Disorderly houses.
2. Bawdy-houses.
3. Public nuisances.

4. Gaming-tables and lotteries.

II. Obstruction of private roads by railroad companies.

III. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 225.

1. SEC. 42. If any person shall keep and maintain a common, ill-governed and disorderly house or place, to the encouragement of idleness, gaming, drinking or other misbehavior, to the common nuisance and disturbance of the neighborhood or orderly citizens, he or she shall be guilty of a misdemeanor, and on conviction,

be sentenced to pay a fine not exceeding five hundred dollars, or to undergo an imprisonment not exceeding one year, or both, or either, at the discretion of the court.

2. **SECT. 43.** If any person shall keep and maintain a common bawdy-house, or place for the practice of fornication, or shall knowingly let or demise a house, or part thereof, to be so kept, he or she shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding two years.

3. **SECT. 73.** Any person who shall erect, set up, establish, maintain, keep up or continue, or cause to be erected, set up, established, maintained, kept up or continued, any public or common nuisance, shall be guilty of a misdemeanor, and, on conviction, shall be sentenced to pay a fine, and suffer an imprisonment, or either, or both, according to the discretion of the court under the circumstances of the case; and where the said nuisance shall be in existence at the time of the conviction and sentence, it shall be lawful for the court, in its discretion, to direct either the defendant or the sheriff of the proper county, at the expense of the defendant, to abate the same: *Provided also*, That all obstructions to private roads, laid out according to law, shall be nuisances, which would be nuisances in cases of obstructions to public roads or highways.

ACT 2 APRIL 1870. Purd. 1601.

4. **SECT. 1.** The seventy-third section of the act to which this is a supplement shall be extended to apply to any person who shall be legally indicted, in any court of criminal jurisdiction within this commonwealth, of the crime of keeping or exhibiting any gaming-table, device or apparatus to win or gain money or other property of value, or of engaging in gambling for a livelihood, or of aiding and assisting others to do the same; and also to any person who may be legally indicted in any such court of selling tickets or policies in any unlawful lottery.

II. ACT 12 APRIL 1851. Purd. 844.

SECT. 2. That any chartered railroad company in this commonwealth obstructing or impeding the free use or passage of any private road or crossing-place, by standing burden cars or engines, or placing other obstructions on any railroad, wherever any private road or crossing-place may be necessary to enable the occupant or occupants of land or farms to pass over any railroad with horses, cows, hogs, sheep, carts, wagons and implements of husbandry; shall, for every such offence, after any agent or other person in the employment of any railroad company shall have received at least fifteen minutes' verbal notice to remove burden cars, engines or other obstructions from any private road or crossing-place that may pass over any railroad, be liable for a penalty of thirty dollars, which shall be for the use of the person or persons aggrieved, and which shall be recovered before any justice of the peace, in the same manner that debts not exceeding one hundred dollars are by law recoverable. And in all suits or actions that may be brought against any railroad company for the recovery of said penalty of thirty dollars, the service of legal process on any agent or other person in the employment of any railroad company shall be as good and available in law as if made on the president thereof.

III. Nuisance, or annoyance, signifies anything that worketh hurt, inconvenience or damage. There are two kinds of nuisances: *public* or *common* nuisances, which affect the public; and *private* nuisances, which may be defined anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. 3 Bl. Com. 215.

If a man build his house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an action will lie. *Ibid.*

If one erect a house, or other building, so near to mine that it obstructs my ancient lights and windows, it is a nuisance. 2 Am. L. J. 14. 1 P. 494.

If a person keep his hogs or other noisome animals so near the house of another, that the stench of them incommodes him and makes the air unwholesome, (Lord Mansfield has said that "it is not necessary that the smell should be unwhole-

some; it is enough if it renders the enjoyment of life and property uncomfortable," 1 Burr. 337,) this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like nuisance is, if one's neighbor sets up and exercises an offensive trade. 3 Bl. Com. 217.

But depriving one of a mere matter of pleasure, as, of a fine prospect, by building a wall, or the like, this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is, therefore, not an actionable nuisance. Ibid. 218.

If one erect a house for smelting lead so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance; and by consequence it follows that if one do any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, and where it will be less offensive. Ibid. 218. 4 Eng. L. & Eq. 15.

It will be a nuisance, if life be made uncomfortable by the apprehension of danger; it has, therefore, been held to be a nuisance, a misdemeanor, to keep great quantities of gunpowder near dwelling-houses. 2 Str. 1167.

Some actions, which would otherwise be nuisances, may be justified by necessity; thus a man may throw wood into the street, for the purpose of having it carried into his house, and it may lie there a reasonable time. 1 S. & R. 219.

So, because building is necessary, stones, brick, sand and other materials may be placed in the street, provided it be done in the most convenient manner. Ibid.

So, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time, but he has no right to keep them in the street for the purpose of selling them there. Ibid.

An action cannot be supported for an obstruction to a highway, which is a common nuisance, but by a person who has suffered some *special damage*. 1 B. 463.

The erection of a building upon a public square, in a town or city, is a public nuisance, which may be abated by the party aggrieved, so as it is done peaceably and without any riot. 2 W. 23. 3 Barr 202.

A grant will not be presumed of a part of a public square or street, from the lapse of time, so as to bar an indictment for a nuisance. 1 Wh. 469.

If a person entitled to raise water to a certain height, by means of a dam, raise it higher than he is entitled to do, the person injured may reduce the dam to the proper height, but has not the right to demolish it. 5 Wh. 584.

Lapse of time will not change the nature of a nuisance, because statutes of limitation run not against the public. 7 W. 450. 7 P. L. J. 82.

All erections of every kind, adapted to sports or amusements, having no useful end, and notoriously fitted up and continued in order to make profit for the owner, are regarded by the common law as nuisances. 5 Hill 121.

A pig-sty, in a city, is *per se* a nuisance. 7 P. L. J. 82. "There are some trades so necessarily offensive, that merely carrying them on within the limits of a populous city, is in itself a nuisance: the law is perfectly well settled that a hog-pen in a city is a nuisance." Ibid. Bright. R. 69. 2 P. 92. In The Commonwealth v. Hutz, Judge PARSONS applied the same doctrine to the rural districts of Philadelphia county,—"The principle is the same everywhere," said the learned judge, "if persons will locate their piggeries near a public road, they must take the necessary care to keep them in such a cleanly state as not to annoy the passengers along the road." Bright. R. 85.

It is a public nuisance, and indictable at common law, to place on the footway of a public street, a stall for the sale of fruit and confectionery, although the defendant pay rent to the owner of the adjoining premises, for the use of so much of the pavement as is occupied by him. 1 Am. L. J. 548. Bright. R. 318. The obstruction of a highway was indictable at common law.

It is a public nuisance, at common law, to stand on the side-walk of a public street, with others, and to hawk about newspapers, to the annoyance of the passers-by; thereby preventing the transit of passengers, and their free entry and egress to and from places of business. 5 Law Rep. 222.

One who lets his house for the purpose of keeping a bawdy-house, cannot be convicted on an indictment which simply charges in general terms the offence of keeping a bawdy-house; the facts must be specially set forth. 2 Am. L. J. 359.

Oaths and Affirmations.

I. Statutory provisions.

II. Judicial decisions and authorities.

III. Forms of administering oaths.

I. ACT 31 MAY 1718. Purd. 760.

SECT. 3. All and all manner of crimes and offences, matters and causes whatsoever to be inquired of, heard, tried and determined, by virtue of this or any other act or law of this province or otherwise, shall and may be inquired of, heard, tried and determined by judges, justices, inquests and witnesses, qualifying themselves according to their conscientious persuasion respectively, either by taking a corporal oath, or by the solemn affirmation allowed by act of parliament to those called Quakers in Great Britain; which affirmation of such persons as conscientiously refuse to take an oath shall be accounted and deemed, in the law, to have the full effect of an oath, in any case whatsoever in this province. And all such persons as shall be convicted of falsely and corruptly affirming or declaring any matter or thing, which if the same had been upon oath, would by law amount to wilful and corrupt perjury, shall incur the same penalties, disabilities and forfeitures, as persons convicted of wilful perjury.

ACT 21 MARCH 1772. Purd. 760.

SECT. 1. All and all manner of crimes, offences, matters, causes and things whatsoever, to be inquired of, heard, tried and determined, or done or performed by virtue of any law in this province or otherwise, shall and may be inquired of, heard, tried and determined, by judges, justices, witnesses and inquest, and all other persons qualifying themselves, according to their conscientious persuasion respectively, either by taking the solemn affirmation, or any oath in the usual and common form by laying the hand upon and kissing the book, or by lifting up the right hand, and pronouncing or assenting to the following words: "I, A. B., do swear by Almighty God, the searcher of all hearts, that I will * * * * *", and that as I shall answer to God at the great day." Which oath so taken by persons who conscientiously refuse to take an oath in the common form, shall be deemed and taken in law, to have the same effect with an oath taken in the common form.

II. An oath is an outward pledge, given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God. Tyler on Oaths, 15. 1 Greenl. Ev. § 328.

The administration of an oath supposes that a moral and religious accountability is felt to a Supreme Being, and this is the sanction which the law requires upon the conscience, before it admits a person to testify. 5 Mason 18.

All witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their own consciences. If the witness be not of the Christian religion, the court [or justice] will inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form. 1 Greenl. Ev. § 371.

If, being a Christian, he has conscientious scruples against taking an oath in the usual form, he will be allowed to make a solemn religious asseveration, involving a like appeal to God for the truth of his testimony, in any mode which he shall declare to be binding on his conscience. Ibid.

III. FORMS OF ADMINISTERING OATHS AND AFFIRMATIONS.

FORM OF OATH OF A WITNESS BEFORE A JUSTICE BY KISSING THE BOOK.

You do swear, that the evidence you shall give, in the issue trying before me, wherein A. B. is plaintiff, and C. D. is defendant, shall be the truth, the whole truth, and nothing but the truth: So help you God.

OATH OF A WITNESS BY LIFTING UP THE RIGHT HAND.

You do swear by Almighty God, the searcher of all hearts, that the evidence you shall give, in the issue trying before me, wherein A. B. is plaintiff, and C. D. is defendant,

shall be the truth, the whole truth, and nothing but the truth: And that as you shall answer to God at the great day.

AFFIRMATION OF A WITNESS.

You do solemnly, sincerely and truly declare and affirm, that the evidence you shall give in the issue trying before me, shall be the truth, the whole truth, and nothing but the truth: And so you affirm.

VOIR DIRE TO BE ADMINISTERED TO A WITNESS TOUCHING HIS COMPETENCY; OR TO A PARTY OFFERED TO PROVE HIS OWN BOOK OF ORIGINAL ENTRIES.

You do swear, that you will true answers make to such questions as shall be asked you touching the matter now before me: So help you God.

OATH OF AN INTERPRETER.

You do swear, that you will truly interpret between the justice, the counsel and the witness, in the issue now trying, wherein A. B. is plaintiff, and C. D. is defendant: So help you God.

Officers, Public.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 228.

SECT. 62. If any officer of this commonwealth, or of any city, borough, county or township thereof, shall loan out, with or without interest or return therefor, any money or valuable security received by him, or which may be in his possession, or under his control by virtue of his office, he shall be guilty of a misdemeanor in office, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years; and if still in office, be adjudged thereafter incapable of exercising the same, and the said office shall be forthwith declared vacant by the court passing the sentence.

SECT. 63. If any such officer shall enter into any contract or agreement with any bank, corporation or individual, or association of individuals, by which said officer is to derive any benefit, gain or advantage from the deposit with such bank, corporation or individual, or association, of any money or valuable security held by him, or which may be in his possession, or under his control by virtue of his said office, he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment not exceeding one year; and if still in office, be adjudged thereafter incapable of exercising the same, and the said office shall be forthwith declared vacant by the court passing sentence.

SECT. 65. If any state, county, township or municipal officer of this commonwealth, charged with the collection, safe keeping, transfer or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money intrusted to him for collection, safe keeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the state, county or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sen-

tenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of the money embezzled.

SECT. 66. It shall not be lawful for any councilman, burgess, trustee, manager or director of any corporation, municipality or public institution, to be at the same time a treasurer, secretary or other officer, subordinate to the president and directors, who shall receive a salary therefrom, or be the surety of such officer, nor shall any member of any corporation or public institution, or any officer or agent thereof, be in anywise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to, or for the use of any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and his office or appointment thereunder, and shall be held guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars: *Provided*, That nothing in this section contained, shall prevent a vice-president of any bank from being a director of such bank, or of receiving a salary as vice-president.

SECT. 67. Any person who shall contract for the sale, or sell any supplies or materials as aforesaid, and shall cause to be interested in any such contract or sale, any member, officer or agent of any corporation, municipality or institution, or give or offer to give any such person any reward or gratuity, to influence him or them in the discharge of their official duties, shall not be capable of recovering anything upon any contract or sale, in relation to which he may have so practised or attempted to practise corruptly, but the same shall be void, and such party shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars.

SECT. 68. If any officer of any municipal or other corporation, not authorized by law, shall be instrumental in, or shall consent to or connive at, the making or issuing of any note, bill, check, ticket or order, intended to be used as currency, he shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding one thousand dollars for each offence, and to undergo an imprisonment not exceeding six months.

II. Officers required by law to exercise their judgments are not answerable for mistakes of law, or mere errors of judgment, without any fraud or malice. 11 Johns. 114. 1 South. 74.

If an officer (such as a sheriff or constable) having authority to attach the goods of a person, (say by process or under an execution,) keep them in an unsafe place, or expose them to destruction, he is liable for the damage sustained. 9 Johns. 381.

The oppression of officers in executing process is indictable. 5 Johns. 125.

Any officer, civil or military, may increase the rigor of the confinement of a prisoner, if necessary to prevent his escape. 14 Johns. 235.

Where a court has jurisdiction of the *action*, their officers are not responsible for errors in the process. 8 B. 404. 2 Flo. 171.

It is a well settled principle, that the acts of public officers *de facto* [in fact] are valid, when they concern the public or the rights of third persons, who have an interest in the acts, though they may be void when for their own benefit. 2 R. 139.

Where a public officer seeks to enforce a legal right by action, he must be able to show that he has duly qualified himself to act; but where a stranger seeks to recover from a public officer as such, it is only necessary for him to show that he was an officer *de facto*. 5 W. 538. Bright R. 426.

Public officers allowing papers or records to be taken from their offices without process or order of the court, are responsible, with their sureties, for the loss or mutilation of such documents. 9 W. 311.

Every public officer can appoint a deputy to perform a mere ministerial act. 4 Eng. L. & Eq. 423.

A public officer charged with the appointment of persons to public office, may discuss the character of an applicant, without subjecting himself to a suit for slander,

if the comments did not originate in malice, and were upon the character and fitness of the applicant for the office. 4 Am. L. J. 358. s. c. 1 Phila. R. 269.

A board of public officers having held a meeting, in pursuance of notice duly given, stating the purpose for which it was to be held, may transact such business at an adjourned meeting held for completing the business unfinished at the first meeting, without further notice; the original notice in such case, extends to all adjourned meetings. 5 Eng. L. & Eq. 16.

Original Entries; *some Instructions relative to.*

DEVIATING from the strictness of that rule of the common law which excludes the testimony of a *party*, the courts of Pennsylvania have always received in evidence the day-book of the plaintiff, if it has been regularly kept, supported by his own oath or affirmation, or that of his clerk, or other agent, by whom the entry was made, as *prima facie* [on the face of it] evidence of the sale and delivery of goods, and of work and labor done and services rendered. They however refuse to receive it as evidence of money paid or money lent. It is therefore a matter of some importance to all who keep such books, that they have them so kept as to be received and not rejected when offered as evidence. Whether such books, when offered, shall be received or not, is a legal question entirely for the court, or justice, as the case may be, to determine.

For these reasons, it is the interest of every person who keeps such books to be acquainted with the manner of keeping them, so as to insure their admissibility as evidence. To impress these facts upon the memory of those who are interested in knowing them, we propose to give particular and minute instructions how such books should be kept. It is thought better to be particular and minute even tediousness, than to be inaccurate or obscure.

Every storekeeper should provide himself with a day-book of the size which he thinks his business will require. On the covers of this book, inside or outside, it would be well to have written or printed the name of the person or the firm to whom the book may belong.

It should be kept as free as possible from blots; more especially do not permit erasures, interlineations, alterations or defacements of any kind. If you discover any error, mistake or omission in an original entry, which requires correction or addition, do not erase, deface or in any wise alter the original entry. So soon, however, as you discover the necessity of correcting it, let it be done by making an entire new entry, under date of the time at which it shall be made, and as near the original entry as the regular entries in your book will allow. By this course of conduct you bar out interlineations and erasures, things which disfigure and vitiate original entries, and are offensive to the eye of the law, if it can, by any persuasion, be prevailed upon to look at them. Above all things, let there be nothing in the appearance of the book to give rise to suspicion of an intention to deceive or impose upon the buyer by anything in the nature of fraud or overcharge. The dates should follow regularly, day after day. There should be no vacant spaces. A book in which the entries have been made regularly, one after another, always carried with it the appearance of fair dealing. 1 J. 249.

The name or names of the persons to whom the goods are sold and delivered should be distinctly written, and the dates, year, month and day, at the head of every purchase; then should follow the articles sold and the quantity of each together with the price per piece, per yard, per lb. or per gross. The whole amount of the sale should be carried out in dollars and cents on the right hand of the page on which the entry is made, in perpendicular columns, which shall have been ruled for the purpose. In making these entries, it would be well to avoid using inks of different shades. Entries made with inks of different shades, although all under-

one date, do not seem to the eye to have been made at one time, and the idea that they were made at different times might insinuate itself, and give birth to a suspicion of unfairness. This suspicion would be greatly strengthened, if the writing should appear to have been made by different persons, or if the prices, or figures, or amount carried out, should be made with ink of different shades, or by a different hand, or at different times from the general entry of goods sold and delivered. In the same way, and for pretty much the same reasons, interlineations or erasures should not be made. The business of each day should be carefully registered on the same day on which it is transacted, or, at furthest, on the succeeding day. If longer delayed they would not be admitted as legal evidence, unless under very peculiar circumstances.

When a purchaser at a store ascertains the prices, selects the articles he wants, and has them laid aside to be sent for by him, or to be forwarded to him by the storekeeper, *then* is the *time* to make the charge against the purchaser, inasmuch as the requirements of the law, as to sale and delivery, are then fully complied with; or the entries may be made after the goods have been actually delivered to the servant or other agent of the purchaser, or left at his dwelling-house.

When goods are sold to be forwarded to a distant place, the proper *time* to make the entry is when they are loaded and started for the place to which they were, by the purchaser, directed to be sent. If the purchaser direct the goods to be forwarded by a particular carrier, or a particular line, or by a given route, the seller should not only send the goods by that carrier, line and route, but also be able to *prove* that they were so sent. To enable him to do this, he should take receipts in a book to be kept for that purpose, for the packages of goods so forwarded, and thus have it in his power to establish the facts, if required. Letters received from purchasers acknowledging the receipt of goods, should be carefully filed away. It is the part of prudence always to be prepared. The seller cannot tell the time or the occasion, or the persons against whom such proof may be wanted.

Scraps of paper, alleged to contain original entries of goods sold and delivered, although regularly kept, will not be received as evidence. In the same way entries made in a book from scraps of paper, carried in the pocket for one or more days, have been held, by the court, to be inadmissible.

An entry of the sale of goods, at the time they were *ordered*, but before they were *delivered*, is not competent evidence of a sale and delivery. Let it always be borne in mind, that the goods must not only be sold, but also be *delivered*, before a legal entry of sale and delivery can be made. It should be remembered, that a book of original entries is not evidence of the delivery of goods to be sold *on commission*—or of goods sold and delivered under a *special contract*.

If the person charged on the book be not the original debtor, but one who assumed to pay the debt, or guarantied the debt of another, the creditor will not be allowed to prove the sale and delivery of the goods by an entry in his books.

For work and labor done. The law as laid down in the preceding instructions relative to original entries of the sale and delivery of goods, will, it is believed, apply with equal truth and force to sustain a claim for work and labor done, or services rendered, provided the person by whom the work was done, or his agent, shall have kept it in the same strict and regular way in which it would require to be kept to make it evidence of the sale and delivery of goods.

A person who works for another should always be able to prove that that other had employed him. It would avail him nothing to work and to prove the work he had done, if he were unable to prove that a certain person or persons had employed him to do it. If the laborer can prove by whom he was employed to do the work, even though no bargain or agreement were made as to compensation, yet he shall recover a compensation for his labor. If A. shall prove that B. employed him to do a certain job of work, the law will presume that B. was to pay him, and A., if compelled to bring suit, shall have judgment in his favor for the amount usually paid, where the work was done, for the same kind and quantity of work.

A person for whom work has been done, cannot, if sued, give in evidence an account kept by him, of the plaintiff's work and labor, but an account kept by the person who did the work will be received as evidence. The law is indulgent and

does not require from a laboring man that exactness or fulness of account which it requires from dealers who are presumed to be more qualified and better able to keep accounts than men who earn their daily bread by the sweat of their brow. If a laborer who cannot write shall make a nick (with a knife) in a stick, or a mark with ink, or a pencil, or chalk, on paper, a board, or any other substance, and take care to do it every night, after his work is done, so that he can produce the substance so marked, and be duly qualified that he made these marks every day he worked for the individual whom he sues, such substance so marked and proved shall be received as evidence of the debt. 8 Met. 289.

Every mechanic or other person, who undertakes to do a job of work, is bound to do it in a workmanlike manner, and if he does not so do it, the person by whom he was employed may recover damages. A mechanic having executed the work he undertook to execute in a workmanlike manner, if there be no special agreement or custom of trade, is entitled to be promptly paid, and if the employer neglects or refuses to pay him, he may keep the article he had made or repaired, until he shall be paid for the work and labor he has bestowed on it. But if he delivers the article to the employer, he has no right to go and take it away, as security for the payment of the work done. If he does so, he may be sued as a trespasser. He has no right to keep a job as security for the payment of any other work for which the same employer may be indebted to him.

The day-laborer's account book. A paragraph to make plain and clear the whole art and mystery of keeping an account between a day-laborer and his employer may be useful, particularly to that class of men who stand most in need of all the help which can be given them.

Buy two cents worth of writing-paper, fold it in the form of a book; with two more cents buy a pen and a little ink. A pen and ink is better than a pencil, not only because it speaks plainer, but it more clearly shows any interlineation or alteration. Let the employer write at the beginning of the book something to the following effect:

"This day, January 1st 1845, I agreed with Jacob Faithful to work for me for six months. He is to find his own board and lodging, and I am to pay him one dollar a day."

The book should now be handed back to Jacob, to keep his time, which should be done thus. He should every night make a straight stroke, thus |, to signify or bear witness that he had worked the whole day, for his employer. This must be done every night, on the same day after the work has been done. Half days may be distinguished by a short mark, thus †, and quarter days by a point, thus †. The making of these marks must not be postponed, neglected or put off, to the next or to any future day or evening. It must be done on the evening of the day on which the work was done. It would be well to have a regular time to make these marks. Let it be just before or just after supper, and there will be no fear of forgetting it.

Parent and Child.

I. When mothers to exercise parental rights. II. Judicial decisions and authorities.

I. ACT 4 MAY 1855. PURD. 701.

SECT. 3. Whosoever any husband or father, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his child or children, the mother of such children shall have all the rights and be entitled to claim, and be subject to all the duties reciprocally due between a father and his children, and she may place them at employment and receive their earnings, or bind them to apprenticeship without the interference of such husband, the same as the father can now do by law: *Provided always*, That she shall afford to them a good example, and properly educate and maintain them according to her ability: *And provided*, That if the mother be of unsuitable character to be intrusted as aforesaid, or dead, the proper court may appoint a guardian of such children, who shall perform the duties aforesaid, and apply the earnings of such children for their maintenance and education.

SECT. 6. No father who shall have as aforesaid, for one year or upwards previous to his death, wilfully neglected or refused to provide for his child or children, shall have the right to appoint any testamentary guardian of him, her or them, during minority.

II. *The duties of parents* to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation. 2 Kent's Com. 159.

During the minority of the child, the parent is absolutely bound to provide reasonably for his maintenance and education, and he may be sued for necessities furnished, and schooling given to a child, under just and reasonable circumstances. 3 Day 37. 13 Johns. 480. But if willing and able to support his child, he cannot be made liable for its maintenance to one who has wrongfully withheld it from him. 3 C. 50.

The father is bound to support his minor children, if he be of ability, even though they have property of their own; but this obligation, in such a case, does not extend to the mother. 2 Mass. 415. 4 Ibid. 97. This is the rule as to private parties, but as to the public, the obligation of the surviving mother, if of sufficient ability, to maintain her children, is co-extensive with that of the father. 17 Pitts. L. J. 34.

The legal obligation of the father to maintain his child ceases as soon as the child is of age, however wealthy the father may be, unless the child become chargeable to the public as a pauper. 2 Kent's Com. 161.

A father is not bound by the contract of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one; were it otherwise, a father who had an imprudent son might be prejudiced to an indefinite extent. What is necessary for the child is left to the discretion of the parent, and where the infant is *sub potestate parentis*, [under the protection of the parent,] there must be a clear omission of duty as to necessities before a third person can interfere, and furnish them and charge the father. 2 Ibid. 162.

The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority, and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. Ibid. 169. 4 Am. L. J. 137. The father may bind out his minor child and appropriate his wages; but he is not bound to do so for the benefit of creditors. 3 C. 220.

It has been decided, that a parent is intrusted with the *religious*, moral and literary education of his children—this duty gives him the right to select proper teachers—and therefore a minister of the gospel has no right to administer baptism by immersion, against the express prohibition of the father, to a female of about

seventeen years of age, who was already baptized according to the usage of the denomination to which she belonged. 1 P. L. J. 393. Lewis' Cr. L. 20. But it is also ruled, that a father has no right to control or interfere with the rights of conscience of his minor child, who has arrived at the age of discretion, in relation to the worship of Almighty God. 3 P. L. J. 252.

The duties that are enjoined upon children to their parents, are obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives. 2 Kent's Com. 172. 3 Am. L. J. 505.

In general, a father is entitled to the custody of his children. But where both the father and mother are persons of immoral character, the court may order a female child to be delivered to a third person. 1 Br. 143.

Where the father is a vagabond, and apparently unable to provide for the safety and wants of the child, the court will not interfere in his favor, to take the child from any safe custody to deliver it to him. 16 Pick. 203.

A mother, *as such*, has no legal authority over a son, and is not entitled to his services while he lives with her. 4 B. 492-4.

The relation between parent and child is so far relaxed, that a father may authorize his son to contract with an employer, and receive his wages for his own use. 2 W. 406. 3 C. 220.

Where a son continues with his father after he has arrived at full age, and is supported by him without any contract to be paid for his services, but with a view to a provision by will, he cannot, after the death of his father, support a claim against his estate, for compensation for his services. 3 R. 243. 5 W. & S. 513. 2 H. 201. The law implies no contract in such case between the parent and the child. 5 C. 369, 465. 6 C. 473.

A request by a father to a physician to attend his son, then of full age and sick at his father's house, raises no implied promise on the part of the father to pay for the services rendered by the physician. 4 W. 247.

When actual force is used upon the person of a child, trespass *per quod servitium amittit* [by which the service of the child has been lost] lies by the father. 7 W. 62.

If an injury be inflicted upon a child while living with and in the service of his father, he may maintain trespass; but if at the time he be hired to, and in the service of another, trespass on the case is the proper remedy. 8 W. 227.

The law raises no implied promise to pay, from the mere fact of a mother's maintenance of her child; the presumption is, that it was furnished gratuitously. Ibid. 366.

A guardian stands in relation to his ward, *in the place of the parent*, and may maintain an action on the case and recover damages for her seduction. 3 W. & S. 416.

A step-father is not entitled by law to the custody or services of the children of his wife by a former husband, nor is he bound to maintain them. 3 N. Y. 312. 4 Ibid. 38.

A parent may relinquish his right to the services of his minor child, so that he cannot re-assert that right as against the child or third persons. 3 Am. L. J. 506. And he may do so, by parol. 2 Leg. Gaz. 179.

The emancipation of the son from the control of the parent, may be as perfect, while living under the same roof, as if they were separated. 3 C. 220.

If a father have relinquished his parental control over a minor child, he cannot maintain an action against a justice of the peace or clergyman, to recover the penalty for marrying such minor without the parent's consent, or publication of banns. 10 C. 324.

Partnership.

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| I. Statutes relating to partners and partnership. | the other. |
| II. What constitutes a partnership. | VI. Dissolution of a partnership. |
| III. The different kinds of partners. | VII. Of actions between partners. |
| IV. Of dormant partners. | VIII. Of actions by and against partners. |
| V. How far the acts of one partner bind | IX. Limited partnership. |

I. ACT 6 APRIL 1830. Purd. 776.

SECT. 1. In all suits now pending, or hereafter to be brought in any court of record of this commonwealth, against joint and several obligors, copartners, promissors, or the indorsers of promissory notes, in which the writ or process has not been, or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process or judgment, shall not be a bar to recovery in another suit against the defendant or defendants, not served with process.

SECT. 2. In all cases of amicable confession of judgment by one or more of several obligors, copartners or promissors, or the indorsers of promissory notes, such judgment shall not be a bar to recovery, in such suit or suits as may have to be brought against those who refuse to confess judgment.

ACT 14 APRIL 1838. Purd. 776.

SECT. 1. No action now pending on a writ of error, or otherwise, or hereafter to be brought by partners or several persons, against partners or several persons, shall abate, or the right of such partners or several persons plaintiffs, to sustain their action, be defeated by reason of one or more individuals being or having been members of both firms, or being or having been of the parties plaintiffs and also of the parties defendants, in the same suit, nor shall the judgment rendered therein, if still pending on a writ of error, be affirmed against the right of such plaintiff or plaintiffs to sustain such action, nor reversed for the purpose of defeating such right; but the same shall proceed to trial and judgment as though the parties plaintiffs and defendants were separate and distinct persons, and the acts and declarations of the partner or persons so being of both the parties plaintiffs and defendants, shall be evidence to affect each party, respectively, in like manner and to the same extent as the acts and declarations of the other partners or persons plaintiffs or defendants, would affect the respective firms or parties: *Provided*, That no act or declaration of the party shall be given in evidence in his own favor, to the prejudice of others.

ACT 11 APRIL 1848. Purd. 776.

SECT. 3. Where a judgment shall hereafter be obtained against two or more copartners, or joint or several obligors, promissors or contractors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone.

SECT. 4. In any suits or suits which may hereafter be brought against the executors or administrators of a deceased copartner, for the debt of the firm, it shall not be necessary to aver on the record, or prove on the trial, that the surviving partner or partners is or are insolvent, to enable the plaintiff to recover.

SECT. 5. Where a judgment shall be hereafter recovered against one or more of several copartners, or joint and several obligors, promissors or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded, are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits against any person or persons, who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably or by adversary process.

ACT 14 APRIL 1851. Purd. 776.

SECT. 13. From and after the tenth day of August next, all persons who are now doing business in a partnership capacity in this commonwealth, shall file or cause to be filed in the office of the prothonotary in the county or counties where the said partnership is carried on, the names and location of the members of such partnership, with the style and name of the same; and as often as any change of members in said partnership shall take place, the same shall be certified by the members of such new partnership as aforesaid; and in default or neglect of such partnership so to do, they shall not be permitted in any suits or actions against them in any court, or before any justice of the peace or alderman in this commonwealth, to plead any misnomer or the omission of the name of any member of the partnership, or the inclusion of the names of persons not members of said partnership.

SECT. 14. Hereafter, where two or more persons may be desirous of entering into any business whatever in a partnership capacity, they shall before they engage or enter into any such business as aforesaid, comply with and be subject to all the provisions and restrictions in the next preceding section of this act.

II. WHAT CONSTITUTES A PARTNERSHIP.

Partnership is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business or adventure. Collyer on Part. 2.

The existence of a written agreement of partnership between persons does not preclude proof by the actions or declarations of the parties. 2 B. 249.

The contract of partnership, as existing between the parties themselves, gives them a right of action in their character of partners against third persons.

Persons become liable as partners to third persons, either by contracting the legal relation of partners between themselves, or by holding themselves out to the world as partners; for, by the law, not only he who is actually a partner, but he who lends his name and credit to the firm, is liable for the debts and engagements of the body; no restriction of liability is permitted to any of the partners; all are liable not only to the extent of their interest in the joint stock, but also to the whole extent of their separate property. Collyer on Part. 3.

An agreement between A. and B. that B. shall receive half the profits of the trade, constitutes them partners as regards creditors. 6 S. & R. 259. But the act 6 April 1870, provides that a loan of money, with a reservation of a share of the profits in lieu of interest, shall not be deemed a partnership. Purd. 1625.

Although men may be liable as partners in a question between them and third persons, notwithstanding an agreement between themselves to the contrary; yet, as between themselves, the agreement will govern. Ibid. 333.

Any limitations contained in articles of copartnership cannot affect third persons, to whom they are unknown. 1 D. 269.

The members of an association, if not incorporated, are considered as partners in their relations to third persons; and the property of the association must be appropriated to pay the debts of creditors not members of the association, before it can be applied to the payment of the claims of those who are members. 5 R. 157. 3 P. L. J. 198.

If several persons dine together at a tavern, each is liable for the whole dinner. Collyer on Part. 25 in note. 6 W. & S. 69.

"It is clearly settled that if a man stipulates that, as the reward of his labor, he shall have, not a specific interest in the business, but a given sum of money even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account though having no property in the capital, he is, as to third persons, a partner." Gow on Part. 22, 23. 15 S. & R. 137. 6 W. & S. 139. 1 Barr 255.

A contract to pay a manager, by way of salary, such a sum of money as shall be equal to a certain per-centage on the net profits of the undertaking, does not make him a partner. 5 Eng. L. & Eq. 67. 24 How. 536.

III. THE DIFFERENT KINDS OF PARTNERS.

An *ostensible* partner is he whose name appears to the world as that of a partner.

A *nominal* partner is an ostensible partner having no interest in the firm.

A *dormant* partner is he whose name and transactions as a partner are professedly concealed from the world.

A *general* partner is one who is responsible, without limit, for the contracts and engagements of the firm.

A *special* partner is one who is not liable for the debts of the firm beyond the amount of capital contributed by him.

IV. OF DORMANT PARTNERS.

A dormant partner may withdraw without giving public notice; for, being unknown as a partner, notice of his withdrawal would be useless. 12 S. & R. 315. 6 R. 144.

It is said a dormant partner should not be included as plaintiff, though he may be as defendant. 8 S. & R. 255.

The liability of a dormant partner to creditors may be avoided by proof of fraud in the formation of the partnership, if no part of the funds have been received by such dormant partner. 1 Wh. 381. 2 Ibid. 542.

If A. contract with B. to deliver articles to him at a specified period, and in the intermediate time B. enters into a partnership with C., if credit be given at the time of delivery, it is presumed to be given to the partners, and they are liable, whether the fact of the partnership was or was not known to A. at the time he gave the credit. 3 W. 101.

A dormant partner is not responsible for the debt of the firm contracted after he has ceased to be a partner, but before public notice is given of a dissolution of the partnership. 12 S. & R. 315.

A dormant partner is liable for the contracts of the firm during the time he is actually a partner. 10 H. 68. But he may retire without notice, and thenceforth is no longer liable for debts which the firm may contract. 12 C. 325.

V. HOW FAR THE ACTS OF ONE PARTNER BIND THE OTHER.

In actions against partners, the declarations of any of them respecting the partnership may be given in evidence to establish it as against himself. 1 W. & S. 334. 8 C. 312.

Declarations by one defendant of the existence of a partnership between himself and the other defendant, although not sufficient to charge the latter as a partner, are evidence of the fact as against himself, and may be admitted in evidence in connection with proof of the acts and declarations of the other defendant, that he was a partner. 3 W. 101. 8 W. & S. 257. See 4 Wh. 365. 1 H. 641.

How far one partner can bind another, see the authorities collected in 12 S. & R. 15. 1 Greenl. Ev. § 112.

Partners are bound universally by what is done by each other in the course of the partnership business. Their liability under contracts is commensurate with their rights, and the act of one is the act of all. 12 S. & R. 248. 12 C. 498.

The act of one partner is the act of both; there is a virtual authority to that purpose, mutually given by entering into partnership, and in everything in relation to their usual dealings each must be considered as the attorney of the other. 1 D. 119.

Each partner is liable as a principal, not as a surety, for the transactions of the other, and it is no ground of discrimination which partner actually received the funds which were intrusted to transact the business, or which was ignorant of the state of the debt and credit of the company's books. 4 D. 286.

A partner, whilst employed in transacting the partnership business, may borrow money for the purpose of defraying his expenses, and it will be a charge upon the whole firm. Gow on Part. 58. See 1 Am. L. Cas. 453.

The signature of one partner as the maker of a joint promissory note, or the drawer of a bill of exchange, is binding upon his copartner, and equally binding

is his acceptance of a bill of exchange; for the bill being drawn upon them jointly. the acceptance of a single partner, in the names of both, (or even in his own name.) 5 Day 50, is in legal effect a joint acceptance. So *primâ facie* the indorsement of a bill or note by one partner in the name of the partnership binds all the firm.

A note made by one partner wherein he says, "I promise to pay," &c., but subscribes the partnership name, is binding on the firm. 11 Johns. 544. 7 W. 193.

Even if a bill be accepted in the name of one partner only, and not in that of the firm, yet if the bill be addressed to the firm, all the members of it, whether dormant or not, will be bound by such acceptance. Collyer on Part. 224, 226.

If a member of a club orders goods for the benefit of all, every member who concurs in the order, or afterwards approves of it, is liable, unless it appears that the creditor, at the time of sale, gave credit to that member only. 2 Stark. 416.

A sale of goods on credit to one partner, in the course of the partnership business, is a sale to the firm, unless it be made contrary to an express notice by the other partner not to trust the firm on his account; in which case he alone will be liable who made the purchase, and an action to recover the price cannot be maintained against the firm. 5 W. & S. 564.

If one of two joint partners release to a debtor of the partnership, notwithstanding he had no authority to release more than his own moiety of the debt, the action is gone against the debtor. 4 B. 375.

If one partner convert property which came into the possession of the firm, on partnership account, it is the conversion of all, and makes them all liable in trover. 4 R. 120.

One partner cannot bind another by giving a note in the partnership name for his own private debt. 4 S. & R. 397. 4 H. 399. But, a note signed by one partner, or by the clerk in the name of a firm, is *primâ facie* evidence that it was given for the debt of the firm. 2 P. R. 160. 8 C. 115.

If, however, a note be given by one partner, in the name of the firm, for his own private debt, and the other partner, upon being informed of the transaction, do not dissent or give notice to the payee, that he will not be liable, he shall be bound. Ibid. 2 W. & S. 152. See 4 H. 399.

One partner cannot bind his copartner by deed, although it be given in a transaction in the course of the business of the firm, and the benefit of the contract be received by the firm. 1 P. R. 285. But a deed sealed by one partner in the partnership name may be good, if the others assent. 4 W. C. C. 471. 6 W. & S. 165. The subsequent assent of the other partner may be shown by parol. 6 C. 84.

If one partner sign and seal an instrument in the firm's name, and the other partner be present assenting to it, he is as much bound by the instrument as if he had signed and sealed it. Any evidence which tends to establish the fact of his having assented to it is admissible. 5 W. 159. 1 P. R. 285. 7 W. 331. 2 C. 458.

One partner may transfer the whole stock in trade of the firm; and if possession be delivered, and the transaction be *bonâ fide*, it matters not whether the instrument be under seal or otherwise. Ibid. 23. See 3 Am. L. J. 489.

On mature reflection my opinion is, that one partner may fairly enter into an agreement to refer, by writing under seal, any partnership matter, and this would bind the whole firm. I do not say that one partner can bind the others, where there is an express dissent communicated to the party litigant. 12 S. & R. 251.

Two partners holding a judgment, one of them assigned it to a third person, and guarantied the payment thereof, in the partnership name: Held, that an action could not be supported against the firm on such guaranty, without proof that it was in the course of their business to give such guaranties, or that both partners assented to the making of it, or knowing it, did not dissent. 2 P. R. 177. The promise of one partner that the firm will pay the debt of a third person is not binding on his copartners. 11 C. 517.

A partner has no power to bind his copartner by a confession of judgment against the firm; but if such a judgment be confessed, it will bind the partner who did it, and be void as to the other. 1 W. & S. 340. Such judgment, however, will bind the firm property. 1 C. 430. See 12 C. 458.

A judgment entered upon a warrant, sealed by a partner, in the name of his firm, binds no one but himself; but a subsequent revival of it by the attorney of all the partners cures the irregularity. 1 W. & S. 519. 7 W. 331.

A firm cannot be charged with a debt contracted by one of the partners before the partnership was constituted, although the subject-matter which was the consideration of the debt has been carried into the partnership as stock. Nor can the firm be charged with rent which accrued upon a lease to one of the partners. 5 W. 196.

One partner cannot, without the consent of the other, introduce a stranger into the firm, nor can he, without such consent, make the other partner a member of another firm; but such consent may be implied from the acquiescence and acts of the parties; and if such other partner be made acquainted with the facts, he ought to dissent from the arrangement; otherwise he will be bound by it. 1 Wh. 381. See 2 Wh. 542. 1 Am. L. R. 34.

If a partner borrow money and give his individual note for it, it does not become a partnership debt, by reason of the application of the money to partnership purposes. 5 W. 454.

A partnership is entitled to recover its assets, applied by one partner to the payment of his debt, whether or not he acted in bad faith towards his copartner, in making such application; and a recovery may be had, though such partner be a plaintiff; and this, *it seems*, even at law. 6 Barr 492.

VI. DISSOLUTION OF A PARTNERSHIP.

It seems, that a partnership formed by articles for a definite period, may be dissolved by either partner, before the termination of the period. 1 Wh. 381.

Simple insolvency does not work a dissolution of the partnership, nor divest the partners of their dominion over the partnership property. 4 C. 279.

The death of a partner works a dissolution of the partnership so effectually, that want of notice of it does not have the effect of making the estate of the deceased partner liable to debts contracted by the surviving partners, or for their misconduct. 1 R. 212.

If, however, contracts have been made and engagements entered into which have not been completed at the death of the partner, the partnership is to be considered as existing for such purpose. *Ibid*.

If a contract be made with a firm to do a particular work, which is begun in the lifetime of a deceased partner, though not finished till after his death, his estate is liable if the surviving partner be insolvent. *Ibid*.

Notice of the dissolution of a partnership, given in a newspaper printed in the city or county where the partnership business is carried on, is of itself notice to all persons who have had no previous dealings with the firm. 4 Wh. 482.

But as to persons who have had dealings with the firm, general newspaper notice is not sufficient. It must be shown that actual notice of the dissolution was communicated to the party in some way or other. 2 H. 469. 12 C. 114.

The dissolution of a partnership cannot affect the rights of third persons. 4 Y. 337.

The dissolution of a firm, and an arrangement between them, by which the debts were to be paid by one of them, does not affect the liability of either to third persons who knew of the arrangement. 8 W. 485.

After a dissolution of partnership, one of the partners cannot bind the others by using the name of the firm; but if, by the agreement and terms of the dissolution, it be provided that the firm name shall be used in winding up the business, and for the renewal of any notes given in banks, then all the partners will be bound by the use of it in a transaction connected with their business. 2 W. & S. 172. See 3 *Ibid*. 345. 5 *Ibid*. 210.

After the dissolution of a partnership by agreement, the partner authorized to settle the estate, may borrow money on the credit of the firm, to pay the debts of the firm; and if the credit be given in good faith, though with a knowledge of the dissolution, and the money faithfully applied to the liquidation of the joint debts, the creditor has a claim against the firm, and is not to be considered as a creditor merely of the borrowing partner. 5 Wh. 530. 4 Barr 242.

After a dissolution of copartnership, one cannot confess a judgment against one who were partners, without the express authority of those not signing the confession, even although for a debt *bonâ fide* due by the late copartnership. 2 M. 436.

After dissolution of a partnership, one of the firm has not power to make a voluntary assignment of the effects of the partnership for the benefit of creditors against the express consent of his copartner. 3 W. & S. 454.

After the dissolution of the partnership, one partner cannot, by his acknowledgment of a subsisting debt, deprive the other partner of the benefit of the statute of limitations. 17 S. & R. 126. 2 N. Y. 523. 1 P. R. 138. The admissions of a partner, after dissolution of the copartnership, bind no one but himself; unless he be the agent of the firm, in winding up its concerns. 10 C. 344.

After the dissolution of a partnership, either of the late partners has authority to receive a debt due to the firm, and to discharge their debtor. 8 C. 412.

When one of two partners retires, relinquishing to the other all his interest in the partnership property, the remaining partner has the same dominion over it as if it had always been his own property. 2 C. 108.

The purchaser of the interest of one of several partners, has no right to interfere personally in the affairs of the partnership; and a refusal of the remaining partners to permit him to do so will not entitle him to the interference of a court of equity, by injunction, or the appointment of a receiver. 1 Am. L. R. 34.

A surviving partner is not entitled to compensation for winding up the partnership business. 7 H. 516.

ACT 22 MARCH 1862. Purd. 1282.

SECT. 1. Whenever any copartnership firm shall be dissolved by mutual consent or otherwise, it shall and may be lawful for any one or more of the individuals who was or were embraced in such copartnership firm, to make a separate composition or compromise with any one or all of the creditors of such copartnership firm; and such composition or compromise shall be a full and effectual discharge to the debtors or debtors making the same, and to them only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred, by reason of his or their connection with such copartnership firm, according to the terms of such compromise.

SECT. 2. Every such debtor or debtors making such composition or compromise, may take from the creditor or creditors with whom he may make the same, a note or memorandum in writing, exonerating him or them from all and every individual liability incurred by reason of such connection with such copartnership firm, which note or memorandum may be given in evidence by such debtor or debtors, in bar of such creditor's right of recovery against him or them; and if such liability shall be by judgment in any court of record in this state, then on a production to and filing with the clerk of such court, the said note or memorandum in writing, lawfully acknowledged, such clerk shall discharge such judgment of record, so far as the said compromising debtor or debtors shall be concerned.

SECT. 3. Such composition or compromise with an individual member of a firm, shall not be so construed as to discharge the other copartners, nor shall it impair the right of the creditor to proceed against the members of such copartnership firm as have not been discharged; and the member or members of such copartnership firm so proceeded against, shall be permitted to set off any demand against said creditor or creditors, which could have been set off had such suit been brought against all the individuals composing such firm; nor shall such compromise or discharge of an individual of such firm prevent the other members from availing themselves of any defence that would have been available had not this act passed, except that they shall not set up the discharge of one individual as a discharge of the other copartners, unless it shall appear that all were intended to be discharged: *Provided*, That the discharge of any such copartner shall be deemed a payment to the creditor equal to the proportionate interest of the partner discharged, in the partnership concern, unless he shall have paid more than his proportioned interest, in which event the full amount paid by such discharged debtor shall be credited.

SECT. 4. Such compromise or composition of an individual of a firm, with a creditor of such firm, shall in nowise affect the right of the other copartners to call on

the individual making such compromise for his rateable portion of such copartner-ship debt, the same as if this law had not been passed.

SECT. 5. The above provisions in reference to copartners of a firm shall extend to joint debtors, who are hereby authorized, individually, to compound or compromise for their joint indebtedness, with the like effect in reference to creditors and joint debtors of the individuals so compromising as is above provided in reference to copartners.

VII. OF ACTIONS BETWEEN PARTNERS.

If two be jointly concerned in an adventure, and one acting fairly, and for the best, according to his judgment, produce a loss, he is not answerable to the other. 2 W. C. C. 224.

One partner cannot sustain assumpsit against another, after the partnership is dissolved, unless the balance be struck, or a promise to pay be made, either expressly or by keeping, for a considerable time, a stated account, sent to him by the other, and not objecting. 1 Ibid. 435. 4 W. & S. 14.

One partner cannot maintain assumpsit against the executor or administrator of the other, for the proceeds of a partnership adventure, unless they have settled their accounts, and struck a balance. 4 D. 434. 9 S. & R. 241. 11 P. F. Sm. 258.

This balance must have been struck by themselves by agreement. It is not sufficient that it may be deduced from the partnership books. 9 S. & R. 241.

If an agreement of settlement between partners be set aside in an action upon it, the parties are thereby restored to their original rights and liabilities; and an action of account render will afterwards lie by one against the other. 1 W. & S. 342.

Contribution may be obtained in an action of assumpsit, by one partner against another, for money laid out to its use. Cary on Part. 26. 6 W. & S. 235.

One partner may maintain an action for money had and received against the other partner, for money received to the separate use of the former, and wrongfully carried to the partnership account. 2 T. R. 199.

Where a surviving partner administers to the estate of his deceased copartner, the balance due to the decedent, upon a settlement of the partnership accounts, is assets in his hands, as administrator; and the settlement of his administration account necessarily draws into investigation the partnership transactions, for the purpose of ascertaining the amount so due to the decedent. Purd. 280, n.

One partner cannot maintain account render against his two copartners *jointly*, without showing a *joint* liability to account. Partners are liable to account to each other *severally*, but not *jointly*; each of them is to account to every other for himself, and not for his copartner. 8 C. 202. 15 S. & R. 153.

VIII. OF ACTIONS BY AND AGAINST PARTNERS.

Partners in actions instituted to enforce contracts made with them must all join; or if one or more of them be dead, the survivors must join.

If a house, consisting of several acting partners, carry on business in the name of one, he cannot, alone, maintain an action for goods sold by the house, though the contract was made with him only, nor can the names of the others be added, after the action is brought. 8 S. & R. 53.

It is not requisite to the maintenance of an action commenced by the real members of a firm, that its nominal members should be joined, if it appear that such nominal members have not any interest in the concern. 2 Johns. Cas. 374.

And the proof that the ostensible partner is not really a partner, lies on the plaintiff. 1 C. & P. 89. 14 East 210.

In the event of the death of one or more of the partners, to whom the cause of action accrued, the legal remedy vests in the surviving partners, and not in them jointly with the executors or administrators of the deceased partner. 1 D. 248. 5 S. & R. 86. 1 W. & S. 240.

In an action brought against a partnership firm, on a partnership contract, all those who were partners at the time of the contract ought to be joined as defendants. Collyer on Part. 420.

If one of several partners die, the action must be brought against the *survivors*,

and if the executor or administrator of the deceased partner be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue. *Ibid.* 428. 3 P. L. J. 378.

Upon the death of the last surviving partner, an action on the partnership account must be brought against his executors or administrators only, without joining the executors or administrators of the other partners. *Ibid.* 428.

An action for a partnership debt may be maintained in this state against the executor (or administrator) of a deceased partner, the other partner being alive, but a certificated bankrupt before action brought. 1 B. 123. 7 S. & R. 365.

After bankruptcy of a partner, he cannot be joined as plaintiff with his copartner; but where such action is brought into the common pleas, by appeal from a magistrate, the assignee may be substituted. 3 Barr 433.

A plea of non-joinder, in abatement, need not aver a compliance with the act of 14th April 1851; an omission thereof must be set up by way of replication. 3 Phila. R. 148.

The act of 14th April 1838, allowing the same person to be plaintiff and defendant in a cause, is restricted to cases in which the same individual is a member of two distinct copartnerships. Hence, one partner cannot bring assumpsit against himself and his copartners, instead of account render against them. 3 P. L. J. 225. 5 W. & S. 468. 10 C. 331. 27 Leg. Int. 4.

A judgment obtained by one firm against another, each of which is constituted, in part, of the same members, some of them being both plaintiff and defendant, cannot be executed by a levy upon the separate property of an individual member of the defendant firm. 6 W. & S. 465.

A judgment in favor of one firm, against another, one of the partners being a member of both firms, is a lien upon the *separate* real estate of such partner; but such separate estate cannot be seized in execution until the accounts are taken, and the equities settled between the parties. 1 Am. L. J. 208.

The act of 6th April 1830 applies to proceedings before a justice of the peace. 3 W. 203. It is a remedial statute, and to be liberally construed. 5 Barr 401. 1 J. 394.

It is applicable to cases, not only of joint contract, but also of joint action. 6 Wh. 260. It does not, however, extend to the case of a defendant dying pending the action. 2 W. 204. 1 W. & S. 112.

The original process should be issued against all the defendants. 5 Barr 402. The second writ should be issued only against the defendant not served. 6 W. 528. And from the same forum; otherwise, it will not take the case out of the statute of limitations. 2 H. 313.

The acts of 6th April 1830 and 11th April 1848, were intended to obliterate the common law distinctions, in Pennsylvania, between instruments joint and those joint and several, in the classes of cases provided for by those statutes. 3 C. 244. 3 Gr. 52.

The act of 1848 renders the deceased partner's estate liable in the first instance, whether the survivor be solvent or insolvent. 8 C. 115. 10 C. 411. And a partnership debt is recoverable against the executors of a deceased partner, even pending a suit against the survivors. 18 Leg. Int. 124.

The judgment recovered against the surviving partner, it seems, is not evidence against the representatives of the deceased partner, for they were no parties to it. 10 C. 411.

The 2d section of the act of 6th April 1830 has reference to subsequent separate actions against the parties. If, in a joint action, the plaintiff accept a confession of judgment from one of the defendants, it is a bar to further proceedings against the others. 2 T. & H. Pr. 632. See 3 Gr. 302.

The sheriff, or constable, in an execution upon a judgment against one of two partners, cannot deliver to the purchaser any of the partnership goods; but can sell only the contingent interest of the debtor partner in the stock, after settlement of the partnership accounts, and payment of the partnership debts. 8 H. 228. 11 C. 432. Such sale only passes the defendant's interest in the chattels actually seized under the writ, and not his interest in the choses in action or credits of the partnership. 27 Leg. Int. 148.

But a sale under separate executions upon several judgments against the partners, individually, will pass a title to the partnership property. 4 H. 59.

IX. LIMITED PARTNERSHIP.

Act 21 March 1836. Purd. 658.

SECT. 1. Limited partnerships for the transaction of any agricultural, mercantile, mechanical, mining and transporting of coal, or manufacturing business, within this state, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed; but the provisions of this act shall not be construed to authorize any such partnership for the purpose of banking or making insurance.

SECT. 2. Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute in actual cash payments, a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital.

SECT. 3. The general partners only shall be authorized to transact business and sign for the partnership, and to bind the same.

SECT. 4. The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain:—

1. The name or firm under which such partnership is to be conducted.
2. The general nature of the business intended to be transacted.
3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence.
4. The amount of capital which each special partner shall have contributed to the common stock.
5. The period at which the partnership is to commence and the period at which it will terminate.

SECT. 5. The certificate shall be acknowledged by the several persons signing the same, in the manner, and before the same persons, that deeds are now acknowledged, and the said acknowledgment shall be certified in the same manner as the acknowledgment of deeds are now certified.

SECT. 6. The certificate so acknowledged and certified, shall be recorded and filed in the office of the recorder of deeds of the proper county, in which the principal place of business of the partnership shall be situated, and shall also be recorded by him at large in a book to be kept for that purpose open to public inspection: If the partnership shall have places of business situated in different counties, a transcript of the certificate and of the acknowledgment thereof, duly certified by the recorder in whose office it shall be filed, and under his official seal, shall be filed and recorded in like manner in the office of the recorder of every such county.

SECT. 7. At the time of filing the original certificate, with the evidence of the acknowledgment thereof, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating the sums specified in the certificate to have been contributed by each of the special partners to the common stock, and to have been actually, and in good faith, paid in cash.

SECT. 8. No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged and filed, and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners.

SECT. 9. The partners shall publish the terms of the partnership, when registered, for at least six weeks immediately after such registry, in two newspapers, to be designated by the recorder of deeds of the county in which such registry shall be made, and to be published in the county or counties in which their business shall be carried on; and if such publication be not made, the partnership shall be deemed general.

SECT. 10. Affidavits of the publication of such notice by the printers of the newspapers in which the same shall be published, may be filed with the recorder, directing the same, and shall be evidence of the facts therein contained.

SECT. 11. Every renewal or continuance of such partnership beyond the time

originally fixed for its duration, shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership.

SECT. 12. Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and every such partnership which shall in any manner be carried on after any such alteration shall have been made, shall be deemed a general partnership, unless renewed as a special partnership, according to the provisions of the last section.

SECT. 14. Suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners.

SECT. 15. No part of the sum which any special partner shall have contributed to the capital stock, shall be liable for any debts previously contracted by the general partners, nor shall any part of such sum be withdrawn by him, or paid or transferred to him in the shape of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital, and if after the payment of such interest, any profits shall remain to be divided, he may also receive his portion of such profits.

SECT. 16. If it shall appear that by the payment of interest or profits to any special partner, the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital, with interest.

SECT. 17. A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management, but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney or otherwise; if he shall interfere contrary to these provisions, he shall be deemed a general partner.

SECT. 18. The general partners shall be liable to account to each other and to the special partners, for the management of their concern, both in law and equity, as other partners now are by law.

SECT. 19. Every partner who shall be guilty of any fraud in the affairs of the partnership, shall be liable civilly to the party injured, to the extent of his damage.

SECT. 20. Every sale, assignment or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created or security given by any such partner under the like circumstances and with the like intent, shall be void as against the creditors of the partnership.

SECT. 21. Every such sale, assignment or transfer of any of the property or effects of the general or special partner, made by such general or special partner when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own or of the partnership a preference over creditors of the partnership, and every judgment confessed, lien created or security given by any such partner under the like circumstances and with the like intent, shall be void as against the creditors of the partnership.

SECT. 22. Every special partner who shall violate any provision of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner.

SECT. 23. In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied.

SECT. 24. No dissolution of such partnership by the acts of the parties, shall take place previous to the time specified in the certificate of its formation, or in the

certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the recorder's office in which the original certificate was recorded, and published once in each week for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business.

Resolution 10 April 1838. Purd. 661.

A general partner in any limited partnership may, with the assent in writing of his partner, by deed duly acknowledged and recorded, or by last will and testament, in writing, sell, assign, dispose of or bequeath his interest in such limited partnership; and when such general partner dies without having disposed of his interest in such limited partnership, his administrator or executor may, in like manner, sell, assign and transfer his interest therein for the benefit of his estate; and on every such sale, transfer or bequest, a corresponding alteration shall be made in the name or firm under which the business of such partnership is conducted, and the same shall be forthwith acknowledged, certified, recorded and published, in the same manner as is provided by law in the case of the original formation of the partnership.

A special partner, with the assent of his partner, in writing, first had and obtained, may sell or assign his interest in a limited partnership, without causing thereby a dissolution of the partnership.

The insolvency of any special partner shall not cause a dissolution of the limited partnership, but his interest therein shall be sold by his assignees for the benefit of his creditors.

When any special partner shall die, without having disposed of his interest in the limited partnership, his executor or administrator may either continue his interest therein for its unexpired term, for the benefit of his estate, or may sell the same at public auction, under the direction of the orphans' court of the county in which the principal place of business of such partnership may be, in the same manner as the estates of intestates are now by law sold; testamentary depositions, in writing, of the interest of special partners may also be made; the decease of special partners shall not dissolve such limited partnership, unless, by the agreement between the parties, it is provided that such decease shall have that effect.

Every alteration in such limited partnership, according to the provisions of this resolve, shall be notified to the general partner, and shall be duly acknowledged, certified and recorded, as in the case of the original formation of such partnership.

Act 21 April 1858. Purd. 659.

SECT. 1. The terms of the partnership required to be published by the 9th section of the act to which this is a further supplement, shall consist of

1. The name of the firm under which such partnership shall be conducted.
2. The general nature of the business intended to be transacted.
3. The names of the general partners, and their respective places of residence.
4. The aggregate amount of capital contributed by the special partners to the common stock.
5. The period at which the partnership is to commence, and the period at which it will terminate.

SECT. 2. The consent of the partners to a sale or transfer, by either the general or special partners, of their respective interests in the partnership, in pursuance of the resolution of the 16 April 1838, may be given in advance, either in the original articles of partnership or other like instrument; and a sale or transfer of any part or share of the interest in the firm of any partner, if made in pursuance of the articles of copartnership, or previously expressed consent of the partners as aforesaid, shall be equally valid as a sale of the whole interest of any one or more of the partners; and it shall further be lawful for the general partner or partners, or either of them, to purchase part or the whole of the interest or shares of one or more of the special partners.

SECT. 3. The capital of the firm may be increased either by taking in new special partners, or new subscriptions of capital from the partners previously in the firm; such increase being made in pursuance of the consent of the partners, as expressed in the original articles of partnership, or in any subsequent instrument of writing.

SECT. 4. Every such increase of capital shall be duly acknowledged, certified and recorded; but no neglect in recording the certificate of any such increase of capital, or of any sale or transfer of the interests or shares of the special partners, or any of them, shall be construed to operate as a dissolution of the firm, or to make the special partners liable as general partners.

ACT 30 MARCH 1865. Purd. 1400.

SECT. 1. It shall and may be lawful for any special partner to make his contribution to the common stock of any limited partnership, he may become a member of, in cash, goods or merchandise: *Provided*, That when such contributions are made in goods or merchandise, the same shall first be appraised, under oath, by an appraiser, who shall be appointed by the court of common pleas of the county in which such partnership is to be carried on: *And provided also*, That in the certificate now required by law, the nature and value of the said goods shall be fully set forth and described.

SECT. 2. The business of the partnership shall be conducted under a firm, in which the names of all the general partners shall be inserted, except, that when there are more than two general partners, the firm name may consist of either two of such partners, with the addition of the words "and company;" but the said partnership shall put up, upon some conspicuous place on the outside, and in front of the building, in which it has its chief place of business, some sign, on which shall be painted in legible English characters, all the names, in full, of all the members of said partnership, stating who are general, and who are special partners.

ACT 21 FEBRUARY 1868. Purd. 1513.

SECT. 1. The firm name of any limited partnership may consist of the name of any general partner, with the addition of the words "and company," notwithstanding the name of such general partner may be common to him and any special partner; but the said partnership shall put up the sign required by the 2d section of the act approved the 30th of March, 1865, to which this is a supplement.

A LIMITED PARTNERSHIP may be formed to buy for a single adventure—as a drove of cattle; which done, the power of one partner to bind the other by additional purchases ceases when the drove is started. 3 B. Monroe 263.

In New York, a publication of the terms of a limited partnership within three days after the registry thereof, is a compliance with the statute. 24 Wend. 496.

So, the statute is complied with, if the terms of the partnership are published in a daily paper once in each week for six successive weeks; each publication being deemed to represent seven days. *Ibid*.

In the publication of the certificate of the terms of a limited partnership, a mistake in the publication of the names of the partners—as Argale for Argall—will not vitiate the publication; whether or not the mistake tended to mislead, should be left to the jury. *Ibid*.

A mistake of the printer in giving notice of a special partnership, stating that \$5000 had been put in, instead of \$2000, renders the special partners general. 6 Hill 479. 3 Denio 436.

The plaintiff, in such case, need not prove that he was misled by the notice. *Ibid*.

In an action to charge special partners as indorsers, it appeared that the published notice stated that the partnership would commence 16 November 1837, whereas the certificate filed stated 16 October 1837: *held*, that unless the error of the publication was designed to deceive, or the indorsement made *before* 16 November 1837, the special partners were not liable. 5 Hill 309.

A special partner, transacting any business for the firm, becomes a general partner, and liable for the debts of the firm. *Ibid*. But this does not make him liable in trespass, for the act of an agent of the firm. 8 Wr. 156.

Where evidence is given to show, *prima facie*, that the special partner did not pay in the amount specified by the affidavit filed pursuant to the statute, such affidavit is not even *prima facie* rebutting evidence. *Ibid*.

Where a third person enters the firm as a general partner, the special partnership is dissolved; and if there be a renewal, and not a new cash payment by the former and continuing special partner, but the cash paid into the former special partnership remains with the new firm, and constitutes the cash paid into the new firm by the special partner, he becomes a general partner of the renewed firm. 10 Barr 47.

In such cases, knowledge, by creditors, of the existence of the special partnership agreement at the time the contracts are made, does not discharge the special partner from his general liability. *Ibid.*

A judgment confessed by one partner to another, to secure the amount of the capital stock advanced by such partner, who had agreed to enter into a special partnership, but became a general partner, by reason of non-compliance with the requisitions of the act of assembly, is valid against a separate creditor of the partner who confessed the judgment. 6 Barr 490.

The capital contributed by the special partner must be paid in actual hard cash; it cannot be in a stock of goods. 2 Wr. 153. But, it seems, that a payment in the checks of third persons (conceded to represent cash, and which actually went into the firm business,) is not such a violation of the provision requiring an actual cash payment, as will render the special partner liable as a general one. 10 C. 344.

A loan made by the firm to the special partner, and repaid with interest, is not a violation of that provision which prohibits a withdrawal by any special partner, of any portion of the sum contributed by him to the stock of the company. 10 C. 344.

The articles of copartnership cannot stipulate that the general partner shall sign no note or other money obligation without the knowledge and approval of the son of the special partner. 2 Wr. 153.

The special partner may wind up the affairs of the firm, on a dissolution, without rendering himself liable as a general partner. 3 Phila. 122. But he cannot claim as a creditor, if the firm be insolvent. 8 Wr. 150.

A voluntary assignee of a limited partnership cannot avoid an assignment made contrary to the provisions of the 21st section of the act of 20th March 1836. Such assignee represents only the assignor, and not the creditors. 2 C. 108.

Where a limited partnership is dissolved, by agreement, before the period fixed by the original certificate, it continues as to persons crediting the firm, without actual notice, until the notice required by the statute has been filed, recorded and published for four weeks, as therein prescribed. 11 N. Y. 97.

And if any alteration be made in the capital or shares, and the partnership be in any manner thereafter carried on before the publication is completed, the special partner becomes liable as a general partner. *Ibid.*

But an alteration by the *general* partner, without the knowledge of the *special* partner, in the nature of the business provided for in the articles of copartnership, will not convert the special partner into a general partner, so as to render him personally liable to the creditors of the firm. 4 Phila. 312. 8 Wr. 145.

Party Wall.

No action will lie to recover the moiety of the cost of a party wall, under the act of 1721, (see *Purd.* 778,) until the second house is actually begun. If it be begun, and a breach be made in the wall before payment, the first builder may maintain trespass, or, *it seems*, he may waive the trespass, and bring assumpsit for money paid, laid out, &c. 1 D. 346.

The moiety of the cost of a party wall is a *personal* charge against the builder of the second house, and not a *lien* on the house itself. 5 S. & R. 1.

Therefore, the purchaser of the second house is not liable to the claim of the first builder, who has neglected or declined to insist upon the payment before the wall was broken into, (1 D. 346,) and on payment of the moiety, by the owner of the adjoining lot, to the first builder, the claim is satisfied, and a purchaser from the first builder cannot afterwards recover the amount, when a second building is erected, although he has no notice of the payment, and no instrument acknowledging the payment has been put on record. 5 S. & R. 1.

The first builder upon adjoining lots, in a town, is bound to use suitable materials, and build them skilfully, in the foundation and wall of partition; for if, upon the excavation for and construction of a house upon the adjoining lot, notwithstanding the use of proper and ordinary care and diligence, the first walls should fall, in consequence of their defects, it must be regarded as *a loss without injury*. 7 W. 460.

A party wall must be built without openings or windows overlooking the adjoiners. It must be a solid wall. 24 Leg. Int. 140. 11 P. F. Sm. 118.

On the completion of a building, the party wall is the property of the owner of the house, and not of the contractor. 2 Am. L. J. 191. *Ibid.* 326.

The party by whose order a house is erected is the builder, and liable for the value of the party wall, although the house was erected under a contract for a gross sum, "including party walls," which had been paid. 9 Barr 501.

The right to compensation for a party wall is personal to the first builder: *hence*, where a house was erected on land conveyed to husband and wife, and the heirs of the wife, the husband and his creditors are entitled to the compensation. *Ibid.*

A court of equity will restrain a builder from using his neighbor's party wall, before payment of a moiety of the cost thereof, by injunction. 2 Am. L. J. 327. 1 P. 494.

In all conveyances of houses and buildings, the right to and compensation for, the party wall built therewith, shall be taken to have passed to the purchaser, unless otherwise expressed; and the owner of the house for the time being, shall have all the remedies in respect of such party wall, as he might have in relation to the house to which this is attached. Act 10th April 1849, § 5. *Purd.* 782.

By this act the party wall is created real estate, and passes by a conveyance of the land, unless excepted in the deed. 6 C. 372. 15 Leg. Int. 270. The act, however, is not retrospective in its operation, and does not operate on deeds executed before its passage. 2 H. 435. 5 H. 363.

The decision of the surveyor directing the removal of an insufficient party wall is conclusive, and no appeal lies from it to the common pleas. 11 H. 34.

A city surveyor has no right to enter upon property which has been enclosed by a fence for upwards of twenty-one years, in order to settle or regulate a disputed line between adjoining owners. 27 Leg. Int. 117.

Pawns or Pledges.

I. Act of assembly.

II. Judicial authorities.

I. ACT 16 JUNE 1836. Purd. 432.

SECT. 23. Goods or chattels of the defendant in any writ of *feri facias*, which shall have been pawned or pledged by him as security for any debt or liability, or which have been demised, or in any manner delivered or bailed, for a time, shall be liable to sale, upon execution as aforesaid, subject, nevertheless, to all and singular the rights and interests of the pawnee, bailee or lessee, to the possession or otherwise, of such chattels or goods, by reason of such pledge, demise or bailment.

II. The contract of pledge is a bailment or delivery of goods and chattels by one man to another, to be holden as a security for the payment of a debt, or the performance of an engagement, and upon the express or implied understanding, that the thing deposited is to be restored to the owner as soon as the debt is discharged, or the engagement have been fulfilled. Addison on Contracts 319. 1 Ruth. Inst. b. I. ch. 4, § 5.

Possession of the property is essential to the existence of a pledge, but the possession may be according to the nature of the subject. 2 N. Y. 443. Bright. R. 52. And, after a sale of the goods, under an execution against the pawnor, the pawnee is entitled to the possession, until redeemed by the purchaser. 1 N. Y. 20. Purd. 432, n.

A pawnee has a special property in the pledge, and may assign it, and the assignee may consequently assert his title to it, against the owner, or one standing in his place. 4 W. 414.

When the goods are pledged for an *indefinite* period of time, the pawnee cannot sell them without notice to the person by whom they were pledged. 1 Br. 174.

A pledge for a loan of money to be repaid at a *fixed* time, may be sold by the pledgee, after the time for redemption has gone by, and a demand for repayment duly made; provided reasonable notice be also given to the pledgor, of the time and place of the intended sale. And the law is the same, where the pledge is a promissory note of a third person, which will not mature until long after the time fixed for repayment of the loan. 7 Am. L. R. 483. 3 Wr. 243.

The pawnee of goods may recover their full value, in trespass, against a stranger who takes them away, although they are pledged to him for less, being answerable for the excess. 5 B. 457.

A pawnee or lessee of goods may maintain trespass against the owner of the goods, as well as against a stranger, for taking them away during the existence of his property in them. 3 Wh. 258.

If the pawn be laid up, and the pawnee robbed, through the want of ordinary care on his part, he is answerable, otherwise he is not; though if the pawnee useth the thing, as a jewel, watch, &c., that will not be the worse for wearing, which he may do, it is at his peril, and if he is robbed, he is answerable to the owner, as the using occasions the loss, &c. 3 Salk. 268. 1 Bulst. 181.

Although a pawnee use the pawn tortiously, yet he is answerable by action only; he does not thereby forfeit his lien. Ibid.

If a man put a chattel into the possession of a mechanic, for the purpose of repair, and the mechanic pledge it, the owner may maintain *trover* against the pawnbroker, without previously tendering the sum for which it was pledged. 1 Br. 43.

Where property is pledged to which the pledgor has no title, and which the pledgor has no right to pledge, the pledgee, in the absence of a special contract to the contrary, may restore it to the true owner; and in an action by the pledgor may set up the right of the real owner as a defence. 4 Eng. L. & Eq. 438.

A livery-stable keeper has no property, as pawnee, in a horse at livery, which makes him liable to an attachment. He has a lien, which does not prevent a levy upon execution against the owner of the horse. 3 Phila. R. 219.

Penalties.

ALL actions, suits, &c., which shall be brought for any forfeiture upon any penal act of assembly, whereby the forfeiture is limited to the commonwealth only, shall be brought within two years after the offence was committed; and where the benefit of any forfeiture is limited to the commonwealth and to the prosecutor, all actions, suits, &c., shall be brought within one year after the offence was committed; and in the latter case, in default of any person prosecuting, then the same may be prosecuted for the commonwealth, any time within one year after that year ended. *Purd.* 657. [See "Limitation of Actions."]

In an action of debt for penalties, the general evidence for the plaintiff is proof of the commission of the act upon which the penalty has accrued, and if a time be limited by the statute for bringing the action, that the action was brought within that time, and, where the *venue* is local, that the action is brought in the proper county. *Roscoe's Ev.* 321.

Where an act of assembly, creating an offence, provides "that the person so offending, on conviction thereof before a justice of the county, shall pay a fine of five dollars for every such offence, to be recovered, as debts of equal amount are by law recovered, by any person who may sue for the same," the offender need not be convicted, either by indictment or by a summary process, before the justice, but simply in an action of debt, by a judgment for the penalty, if proved guilty of the offence. *10 W.* 382.

But where an act of assembly imposes a penalty, and gives authority to justices of the peace to take cognisance of the violation, but prescribes no method or form for the prosecution, the conviction must be in accordance with the rules of the common law. *2 P.* 265. [See "Summary Convictions."]

The act of 7th May 1857 provides that for all breaches of ordinances of the city of Philadelphia, the original process shall be the same as in cases of surety of the peace; reserving, however, the remedy by writ of *certiorari*. *P. L.* 426. But by act of 15th March 1858, where the penalty demanded is \$50, and upwards, actions of debt shall be brought in the corporate name of the city. *P. L.* 114.

Where an offence made penal by statute is in its nature *single*, and cannot be severed, there the penalty shall be only single, though several persons may join in the commission of it: but when the offence is in its nature *several*, there every offender is separately liable for the penalty. *Cowp.* 610. *Esp. on Penal Actions* 69.

Where two are sued jointly for violation of an ordinance, it must appear that both were connected in the act complained of. *2 Phila. R.* 44.

When a penal action is to be brought within one year, the day of committing the offence is inclusive. *Hob.* 139.

The record must show a title in the plaintiff under some clause in the statute under which he sues; but where there is also an exception, or clause amounting to an exception from the penalty, from some particular circumstances, the rule, as to where it is necessary to set it out, and where not, is this:—If the exception be part of the enacting clause itself which gives the penalty, there it must be negatived; but where the exception is by another and distinct clause in the statute, or where it arises under another statute, then it need not be set out, but must be used by the defendant as matter of defence. *1 T. R.* 144. *7 T. R.* 27. See *2 P.* 232, 289.

Every record of a judgment against a defendant for the violation of an ordinance, must show—1. That the magistrate had jurisdiction of the subject-matter: 2. The section of the ordinance violated: 3. That the penalty imposed conforms to the fine: 4. That evidence was adduced in support of the charge, or that the defendant confessed it: 5. That witnesses were sworn or affirmed: 6. That the offence was committed within the city or borough, enacting the ordinance: 7. That judgment was duly entered against the defendant. If the record omit to show any of these findings, the judgment will be reversed on *certiorari*. *4 Phila.* 145. *1 Ibid.* 518. *2 Ibid.* 43.

If the ordinance impose a penalty upon the doing of an act "wantonly and without reasonable cause," the record must show that the defendant did the act complained of "wantonly and without reasonable cause." 1 Phila. 517. Every essential ingredient of the offence must be set out by the magistrate, or his judgment will be reversed. 4 Phila. 148. See 11 H. 521.

Perjury and Subornation of Perjury.

I. Provisions of the Penal Code.

II. Judicial authorities and definitions.

III. Form of an information, and warrants for perjury and subornation of perjury.

I. ACT 31 MARCH 1860. Purd. 219.

SECT. 14. If any person shall wilfully and corruptly commit wilful and corrupt perjury, or shall by any means procure or suborn any person to commit wilful and corrupt perjury, on his or her oath or affirmation, legally administered, either before any committee of the legislature of this commonwealth, or in any judicial proceeding, matter or cause which may be depending in any of the courts thereof, or before any judge, justice, mayor, recorder, alderman or other magistrate, or before any arbitrator, prothonotary, clerk, notary public, commissioner or auditor, appointed by any court of this commonwealth, or in any deposition taken pursuant to the laws of this commonwealth, or the rules, orders and directions of any court, arbitrator or judge thereof, or preparatory and for the purpose of obtaining any rule or order of court, or of a judge or arbitrator; or if any person in taking any other oath or affirmation required, or that may hereafter be required by any act of assembly of this commonwealth, shall be guilty of wilfully and corruptly making a false oath or affirmation; or if any person shall procure or suborn any other person to make any such false oath or affirmation; every person so offending shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years, and shall be for ever disqualified from being a witness in any matter in controversy.

II. The object of the 14th section of the Penal Code was to put at rest the nice distinctions that have been raised, whether perjury can only be committed in a court of justice or in the course of justice, or whether a given oath has been taken in a judicial proceeding properly so called, or otherwise. These captious objections are removed by defining precisely the kinds of oath which, if false, constitute perjury. The extension of the crime to any person taking an oath required by an act of assembly, who shall be guilty of making a false oath, supersedes much past, and obviates the necessity of any future, legislation on the subject. Report on the Penal Code 14.

Perjury consists in swearing falsely and corruptly, contrary to the belief of the witness; and not in swearing rashly and inconsiderately, according to his belief. 1 Bald. 370.

A prosecution for perjury alleged to have been committed in an affidavit of defence in a civil action, cannot be instituted until after final judgment therein. 5 P. L. J. 164.

There must be two witnesses, upon an indictment for perjury; one alone is not sufficient, because there is in that case only one oath against another. Whart. C. L. § 802. 6 Barr 170. For the qualifications of this rule, see 1 Greenl. Ev. § 257. 14 Pet. 440. And the testimony of a single witness is sufficient to prove that the defendant swore as charged in the indictment. 12 Met. 225.

Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal. 4 Bl. Com. 187.

III. INFORMATION OF A WITNESS IN A CASE OF PERJURY.

UNION COUNTY, ss.

THE information of A. B., of Beaver township, in the county of Union, yeoman, taken upon oath before J. R., one of the justices of the peace in and for the said county, the tenth day of June, A. D. 1860, who saith that on the 12th day of May last, at about eight o'clock in the morning, he set out in company with a certain C. D. from Selin's Grove, and arrived that same day, towards evening, at Danville, in Columbia county, and remained there all that evening and night.

(Signed,) A. B.

Signed and subscribed, June 10th, A. D. 1860, before J. R., Justice of the Peace.

WARRANT FOR PERJURY.

UNION COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of Beaver, in the County of Union, greeting:

WHEREAS, a certain C. D., of the township of Beaver, in the county of Union, currier, being duly summoned to appear before J. R., one of our justices of the peace in and for the said county, to give evidence in a certain action depending before our said justice, wherein G. H. was plaintiff, and H. J. defendant, did appear accordingly, on the 22d day of May last, at the office of our said justice, in the county aforesaid, and then and there being duly sworn by our said justice to say the truth, the whole truth, and nothing but the truth, the said C. D., among other things, did depose and say that he was present at New Berlin, on the 12th day of May last, at about noon, and saw G. H. pay to H. J. twenty dollars, which the said H. J. said was in full of all demands which the said G. H. had against the said H. J. And, whereas, A. B., of Beaver township aforesaid, yeoman, hath made oath before our said justice, that on the said 12th day of May last, about eight o'clock in the morning, he set out in company with the said C. D. from Selin's Grove, and arrived that same day, towards evening, at Danville. And, whereas, there are strong grounds to suspect that the aforesaid C. D. hath been guilty of wilful and corrupt perjury by swearing falsely in the said cause: you are, therefore, hereby commanded to take the said C. D. and bring him before the said J. R., forthwith, to answer the said charge, and further to be dealt with according to law. Witness the said J. R., at Selin's Grove aforesaid, the 11th day of June, A. D. 1860.

J. R., Justice of the Peace. [SEAL]

WARRANT FOR SUBORNATION OF PERJURY.

LEBANON COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of B——, in the County of Lebanon, greeting:

WHEREAS, a certain J. D., of the township of H——, in the county of Lebanon, farmer, being duly summoned to appear before J. R., esquire, one of our justices of the peace in and for the said county, to give evidence in a certain action depending before our said justice, wherein J. W. is plaintiff, and J. B. defendant, did appear accordingly on the first day of June instant, at the office of our said justice in the borough of Lebanon, in the county aforesaid, and then and there being duly sworn by our said justice, to declare the truth, the whole truth, and nothing but the truth, the said J. D. did depose and say, that he was present at Lebanon, on the twenty-ninth day of December last, at about noon, and saw J. B. pay J. W. twenty dollars, which the said J. W. said was in full of all demands: AND WHEREAS J. L., of H—— township aforesaid, farmer, hath made oath before our said justice, that on the said twenty-ninth day of December last, at about eight o'clock in the morning, he set out in company with J. W. from Lebanon, and arrived that same day towards evening at Lancaster: AND WHEREAS, there are strong grounds to suspect that the aforesaid J. D. hath been guilty of wilful and corrupt perjury, by swearing falsely in the said cause; and that the said J. D. hath been suborned to commit the said wilful and corrupt perjury, by his master the said J. B.: These are therefore to command you to take the said J. B., and bring him before the said J. R., forthwith, to be examined in the premises, and further to be dealt with according to law. Witness the said J. R., at Lebanon aforesaid, the first day of July, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL]

Physicians.

I. Act of assembly.

II. Judicial decisions.

I. ACT 15 APRIL 1869. Purd. 1582.

SECT. 1. It shall be unlawful for any person to commence or continue the practice of medicine or surgery in the counties of York, Indiana, Perry, Juniata, Adams, Bucks, Northampton, Lehigh and Elk, except Ridgway and Ridgway township, (a) who has not graduated with the degree of doctor of medicine, and received a diploma from a chartered medical college, or other institution authorized to grant diplomas: *Provided*, That the provisions of this section shall not apply to persons who have been eight years in continuous regular practice, though they may not have graduated as aforesaid, nor to persons who are reading or have read medicine under the instruction of a physician or surgeon who has the qualification to practise prescribed by this section, when such person has the assent of such preceptor to practise. (b)

SECT. 2. Any person who shall practise or attempt to practise medicine or surgery, or shall prescribe for any sick person, or perform any surgical operation, for fee or reward, in violation of section one of this act, shall be deemed guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction, shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the court, one-half of said fine to be for the use of the informer, and one-half for the county in which such fine shall be imposed.

SECT. 3. Any person who shall attempt to practise medicine or surgery by opening a transient office in any of the aforesaid counties, or who shall, by handbill or other form of written or printed advertisement, assign such transient office or other place to meet persons seeking medical or surgical advice, or prescription, shall, before being allowed to practise as aforesaid, appear before the clerk of the courts of the proper county, and shall furnish satisfactory evidence to such clerk of the courts that the provisions of section one of this act have been complied with, and shall, in addition, take out a license for one year, by payment of a license fee, for the use of the proper county, of two hundred dollars: (c) *Provided*, That the provisions of this act shall not apply to druggists or dentists: *And provided further*, That physicians commencing practice in any of the counties aforesaid, with the intention of residing permanently therein, shall not be subject to the provisions of section three of this act.

In England physicians cannot sue for fees. But in Pennsylvania the law is held differently; and this difference is founded on practice and acts of assembly. 5 S. & R. 416.

Medicine furnished and medical attendance given during the last illness of deceased [the person deceased], to be paid first by executors, &c. Purd. 284.

In taking an inquisition of death, *super visum corporis*, the coroner, as a public agent, has authority to order a *post mortem* examination at the public charge; and the physician or surgeon employed by him, to perform such service, is employed by the county, and is entitled to a reasonable compensation from the county, for his services. 3 Barr 462.

(a) The act is extended to Crawford and Erie counties by act 4 March 1870. P. L. 353. And to Berks county, by act 14 April 1870. P. L. 1156. And see act 11 April 1866, for a similar enactment as to Lycoming county, Purd. 1440; act 29 March 1870, as to Warren, Crawford and McKean counties, P. L. 659; and act 31 March 1870 as to the counties of Dauphin, Chester, Carbon, Luzerne, Mercer, Erie, Blair, Bradford, Sullivan, Crawford, Beaver, Monroe, Washington, Venango, Lycoming, Huntingdon, Schuylkill, Lawrence, Somerset, Phila-

delphia, York, Union and Adams. Purd. 1625.

(b) See act 14 April 1870, as to Berks county. P. L. 1156.

(c) By act 31 March 1870, a violation of this section (except in Perry and Indiana counties) is to be deemed a misdemeanor, and punished by a fine of not less than \$200 nor more than \$500, one-half to the use of the informer, and one-half to the use of the county, or in default thereof, by imprisonment for not less than six months nor more than one year, at the discretion of the court. Purd. 1625.

Poisons.

ACT 31 MARCH 1860. Purd. 229.

SECT. 70. No apothecary, druggist or other person, shall sell or dispose of, by retail, any morphia, strychnia, arsenic, prussic acid or corrosive sublimate, except upon the prescription of a physician, or on the personal application of some respectable inhabitant of full age, of the town or place in which such sale shall be made; and in all cases of such sale, the word poison shall be carefully and legibly marked or placed upon the label, package, bottle or other vessel or thing in which such poison is contained; and when sold or disposed of, otherwise than under the prescription of a physician, the apothecary, druggist or other person selling or disposing of the same, shall note in a register, kept for that purpose, the name and residence of the person to whom such sale was made, the quantity sold, and the date of such sale; any person offending herein, shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding fifty dollars.

SECT. 86. If any person shall unlawfully apply or administer to another, any chloroform, laudanum or other stupefying and overpowering drug, matter or thing, with intent thereby to enable such offender or any other person, to commit, or with the intent to assist such offender or other person, in committing any felony, every such offender shall be guilty of a felony, and, being convicted thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate and solitary confinement at labor, not exceeding five years.

The 86th section of the Penal Code punishes the administration of stupefying mixtures, with criminal intent, whether the object of the offender has been consummated or not; inasmuch as the condition in which the party injured is placed by the administration of the drug, renders the conviction of the consummated crime always difficult, and sometimes impossible. Report on the Penal Code 25. See Wharton & Stillé's Med. Jur. § 443.

Poor Laws.

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|----------------------------------------------|----------------------------|
| I. Relief and employment of the poor. | VI. Desertion. |
| II. Settlements. | VII. Duties of overseers. |
| III. Orders of removal. | VIII. Fines and penalties. |
| IV. Appeals. | IX. Forms of orders, &c. |
| V. Persons liable for the support of others. | |

I. RELIEF AND EMPLOYMENT OF THE POOR.

It shall be the duty of the overseers of every district, (a) from time to time, to provide as is hereinafter directed, for every poor person within the district having a settlement therein, who shall apply to them for relief. (b) Act 13 June 1836, § 1. Purd. 795.

If such poor person be able to work, but cannot find employment, it shall be the duty of the overseers to provide work for him, according to his ability, and for this purpose they shall procure suitable places and a sufficient stock of materials. Ibid. § 2.

(a) Each township annually to elect two overseers: act 28th February 1835, § 9; Purd. 964. They are a corporation by act 9th March 1771, § 16. 1 Sm. 388. See 9 Barr 219. They are not jointly liable for money collected by each other in their official capa-

city. 8 W. & S. 367.

(b) And to pay the funeral expenses of such destitute person, after his decease. 8 W. & S. 94. It is an indictable offence to sell the keeping of paupers to the lowest bidder. 9 Barr 48-9. Digitized by Google

It shall be lawful for the overseers of any district, with the concurrence and under the directions of the supervisors of the township, to employ such poor person, being a male of sufficient ability, in opening or repairing any road or highway within the district. Ibid. § 3.

If such poor person, by reason of age, disease, infirmity or other disability, be unable to work, it shall be the duty of the overseers to provide him with the necessary means of subsistence. Ibid. § 4.

It shall also be the duty of the overseers of every district to furnish relief to every poor person within the district, not having a settlement therein, who shall apply to them for relief, until such person can be removed to the place of his settlement. (a) Ibid. § 5.

No person shall be entered on the poor book of any district, or receive relief from any overseers, before such person, or some one in his behalf, shall have procured an order (b) from two magistrates (c) of the county for the same, and in case any overseer shall enter in the proper book or relieve such poor person without an order, he shall forfeit a sum equal to the amount or value given, unless such entry or relief shall be approved of by two magistrates as aforesaid. (d) Ibid. § 6.

It shall be lawful for the overseers of every district to contract with any person (e) for a house or lodging for keeping, maintaining and employing such poor persons of the district as shall be adjudged proper objects of relief, and there to keep, maintain and employ such poor persons, and to receive the benefit of their work and labor, for and towards their maintenance and support, and if any poor person shall refuse to be kept and employed in such house, he shall not be entitled to receive relief from the overseers during such refusal. Ibid. § 7.

It shall be lawful for the overseers of every district, with the approbation and consent of two or more magistrates of the same county, (g) to put out as apprentices all poor children whose parents are dead, or by the said magistrates found to be unable to maintain them, (h) so as that the time or term of years of such apprenticeship, if a male, do expire at or before the age of twenty-one years, and if a female, at or before the age of eighteen years. Ibid. § 8.

The word "district" in this act, shall be construed and taken to mean "township" and "borough," and every other territorial or municipal division, in and for which officers charged with the relief and support of the poor are directed or authorized by law to be chosen; (i) but nothing in this act contained, shall be taken to repeal or otherwise interfere with any special provision made by law for any city, county, township, borough or other territorial or municipal divisions. Ibid. § 45.

(a) They are bound to maintain every poor person within their district not having a settlement therein, who shall apply to them for relief, until he can be removed to the place of his last settlement; and if, in an attempt so to remove him, he be left in a township not legally chargeable with his support, he may be returned to the township where he first became chargeable. 5 W. & S. 535. 9 Barr 46.

(b) In cases of emergency, relief must precede the order of maintenance, and the township would be liable without such order. 12 S. & R. 292. 9 Barr 47. A physician may recover for medical services rendered to a pauper, in case of emergency, without a previous order of relief, if such order be subsequently obtained. 8 C. 178. And an order obtained two years afterwards is not too late. 2 Wr. 160. No appeal lies from an order of maintenance. 2 Y. 164. See 2 W. 43. By act 25th January 1853, this section is repealed as to the cities of Pittsburgh and Allegheny; and the guardians and directors of the poor in said cities are authorized to relieve without an order. P. L. 12.

(c) Orders for relief may be made by a single justice, in the counties of Northampton, Schuylkill and Somerset, by act of 4th March 1850. Purd. 659.

(d) By acts 30 April 1855, and 6 March

1860, no order of relief may be granted in Washington, Greene, Fayette, and Bradford counties, until proof is made to the satisfaction of the justices, by the oaths of two reputable citizens of the proper county, that such person is entitled to the relief prayed for; and the names of the said citizens are to be set forth in the order granted by the justices. Purd. 795 n.

(e) By act 15th April 1845, § 20, the overseers of York county are forbidden to sell any provisions of their own raising, to the almshouse and hospital of said county, under a penalty of \$100. Purd. 795 n.

(g) The assent of the parent is not necessary; nor that the infant should join in the indenture. 3 S. & R. 158. The directors of the poor in Washington county may bind without the approbation of two justices. Purd. 796. And so may those of Delaware county, by act 1 March 1867. P. L. 319.

(h) If there be grandparents of sufficient ability to maintain the children, a binding by the overseers is void. 16 Pitts. L. J. 272.

(i) Where a pauper was chargeable to the township, which was divided, it was held, that the overseers of the township which maintained him after the division, might maintain ~~an~~ assumpsit against the other township for a rateable proportion of the expense. 3 S. & R. 117.

II. OF SETTLEMENTS.

A settlement may be gained in any district: (a)

1. By any person who shall come to inhabit in the same, and who shall for himself and on his own account, execute any public office, being legally placed therein, during one whole year.

2. By any such person who shall be charged with and pay his proportion of any public taxes or levies for two years successively. (b)

3. By any person who shall *bond fide* take a lease (c) of any real estate of the yearly value of ten dollars, (d) and shall dwell upon the same, for one whole year, (e) and pay the said rent. (g)

4. By any person who shall become seised of any freehold estate within such district, and who shall dwell upon the same, for one whole year. (h)

5. By any unmarried person not having a child, who shall be lawfully bound or hired as a servant within such district, and shall continue in such service during one whole year. (i)

6. By any person who shall be duly bound an apprentice by indenture, and shall inhabit in the district with his master or mistress for one whole year.

7. By any indentured servant, legally and directly imported from Europe into this commonwealth, who shall serve for the space of sixty days in the district into which he shall first come: *Provided*, That if such servant shall afterwards duly serve in any other district for the space of twelve months either with his first employer or his assignee, he shall obtain a legal settlement in such other district. (k) *Ibid.* § 9.

8. By any mariner coming into this commonwealth, and by any other healthy person coming directly from a foreign country into the same, if such mariner or other person shall reside for the space of twelve months in the district in which he shall first settle and reside. *Ibid.* § 9.

Every married woman shall be deemed, during coverture, and after her husband's death, to be settled in the place where he was last settled; (l) but if he shall have no known settlement, (m) then she shall be deemed, whether he be living or dead, to be settled in the place where she was last settled before her marriage. *Ibid.* § 10.

Every illegitimate child shall be deemed to be settled in the place where the mother was legally settled at the time of the birth of such child. (n) *Ibid.* § 11.

(a) The place of settlement of the father is that of the children until the latter acquire a new settlement. 3 H. 145. 8 Wr. 60. 12 Wr. 402. 17 Pitts. L. J. 34. An idiot *a nativitate* can acquire no settlement. 5 H. 38. See 3 Wh. 71.

(b) Payment of an United States tax is not sufficient. 10 S. & R. 179. But a county tax is within the act. 5 S. & R. 417.

(c) Such lease need not be in writing. 1 J. 254. A widow by leasing property may acquire a settlement. 17 Pitts. L. J. 34.

(d) Increased to ten pounds in Philadelphia, by act of 25th May 1840. *Purd.* 797.

(e) The fraction of a day is not to be regarded in the computation. 18 Eng. L. & Eq. 309. See 3 Lux. Leg. Obs. 310.

(g) Payment by a surety is sufficient. 6 Barr 262. And such payment need not be in money; it may be in labor or otherwise, if of the value of \$10 per annum. 1 J. 254.

(h) A pauper gains a settlement by contracting for a lot, under a yearly rent-charge, and building and residing thereon, though he obtain no deed for it. 2 Y. 51.

(i) It is not necessary that the hiring, but only that the service, should be for a year. 5 Wh. 430. 2 Ash. 9. But the service must be by virtue of a hiring: service alone, without hiring, will not gain a settlement. 5 Barr 283-5. To constitute a hiring, the consideration need not be paid in money. 8 W. 431. See 2 W. 43. 5 B. 81. But a contract that

one shall provide a shop, loom and tackle, and the other shall perform the labor of weaving, and that each shall receive one-half of the profits, constitutes a partnership, and not a hiring within the statute. 2 W. 342. See 1 Leg. Gaz. 42.

(k) An indentured servant gains a settlement where he first serves sixty days, either with the master to whom he was indentured, or with his assignee; and it is of no consequence that the assignment is voidable by the servant, provided he perform his service under it. Although the assignment may be absolutely void, yet a service performed to the assignee in one township, with the consent of the master in another, is a service with the master in the township of the assignee, and obtains a settlement there. 5 B. 86.

(l) She will not lose her husband's settlement by a divorce. 3 H. 182-4. And though she has a legal settlement in the township where her husband was settled at the time of his death, this does not prevent her from acquiring a new settlement by her own act, after his decease. 6 H. 17.

(m) An order removing a married woman to the place where she was last legally settled before her marriage, is not defective, because it omits to state that her husband had no known legal settlement; the court will not presume that he had any such settlement. 5 B. 81.

(n) See 12 Wr. 402. Google

If the last place of settlement of any person who shall have become chargeable, shall be in any township which shall have been divided by the authority of the laws, such person shall be supported by that township within the territory of which he resided at the time of gaining such settlement. (a) Ibid. § 12.

It shall be the duty of every housekeeper who shall receive into his house any person who has not gained a legal settlement in some part of this commonwealth, (all mariners coming into this commonwealth, and every other healthy person coming from a foreign country immediately into this commonwealth, only excepted,) within ten days after receiving such person, to give notice thereof in writing to the overseers of proper district. (b) Ibid. § 13.

If any housekeeper shall fail to give notice as aforesaid, and if the person so received shall become poor and unable to maintain himself, and cannot be removed to the place of his last legal settlement in any other state, if any such he hath, such housekeeper shall be obliged to provide for and maintain such poor person, and in case of the death of such poor person without leaving wherewithal to defray the expense of his funeral, such housekeeper shall pay the overseers so much as they shall reasonably expend for such purpose. Ibid. § 14.

If such housekeeper shall refuse to pay the charges aforesaid, the overseers shall assess upon him the amount necessary to maintain such poor person, weekly, or such sum as shall be necessary to pay such funeral charges, and shall have power to collect the same by warrant of distress, but if such delinquent shall have no goods or chattels liable to distress, he may be committed to jail, there to remain until he shall have paid the same, or shall be otherwise legally discharged. Ibid. § 15.

If any person shall bring, or cause to be brought, any poor person from any place without this commonwealth to any place within it, where such person was not last legally settled, and there leave, or attempt to leave such person, he shall forfeit and pay the sum of seventy-five dollars for every such poor person, to be sued for and recovered by the overseers of the district, into which such poor person may have been brought, and moreover, shall be obliged to convey such poor person out of the commonwealth, or support him at his own expense. Ibid. § 25.

III. ORDERS OF REMOVAL.

On complaint made by the overseers of any district to one of the magistrates of the same county, (c) it shall be lawful for the said magistrate, with any other magistrate of the county, where any person has or is likely to become chargeable to such district into which he shall come, by their warrant or order, (d) directed to such overseers, to remove such person, at the expense of the district, to the city, district or place where he was last legally settled, (e) whether in or out of Penn-

(a) The settlement of the father is that of the child, until the latter acquires a new one; and if the township in which the father was settled be divided after his death, the place of settlement of the child is in the township in the territory of which the father resided at his death. 3 H. 145. And that territory is to maintain the pauper, whether he had been chargeable to the parent township or not. 2 J. 92. See 3 S. & R. 117.

(b) See 12 S. & R. 292-6.

(c) Justices of the peace are incompetent, on the ground of interest, to grant an order of removal from their own township. 2 D. 213. 1 Y. 250. 3 W. & S. 548. 5 W. & S. 434. The aldermen of Pittsburgh have authority to grant orders of removal. 6 W. & S. 522. A township cannot be made chargeable with the expense of maintaining a pauper otherwise than by the previous order of two justices. 2 W. 280.

(d) The order must state that the complaint was made by the overseers, and an adjudication that the pauper was likely to become chargeable. 1 Y. 366. But it need not set forth the evidence. 1 D. 28. And no intend-

ment will be made against the order. 5 B. 81. The pauper himself is not a party. 7 W. 173. But he cannot be removed whilst so ill that his life will be endangered by it. 5 W. & S. 536.

(e) A pauper cannot be removed except to his last place of legal settlement. 10 Pitts. L. J. 115. If an unmarried indented female servant become pregnant, and be removed by her mistress into another township, for the purpose of lying-in, the expenses of which the mistress is able and agrees to pay, the overseers of that township may, notwithstanding, before the birth of the child, remove her to the place of her last legal settlement. 6 S. & R. 562. Where children under the age of seven years are sent to the place of their mother's settlement for nurture, the expense of their maintenance is to be borne by the place from which they are removed, and not by that to which they are sent. 1 S. & R. 387. The settlement of a pauper can only be decided by two justices or in a court of quarter sessions, on appeal; it cannot be collaterally determined in an action before a single justice or in a court of law. 2 R. 26. An order of removal, followed by an ineffectual attempt to appeal, after

sylvania,(a) unless such person shall give sufficient security to indemnify such district to which he is likely to become chargeable as aforesaid. Ibid. § 16.

Provided, That it shall not be lawful, by virtue of any order of removal, to separate any wife from her husband. Ibid. § 17.

It shall be the duty of the guardians or overseers of the city or district to which such poor person may be removed, by warrant or order as aforesaid, to receive such poor person, and if any such guardian or overseer shall refuse or neglect so to do, he shall forfeit for every such offence the sum of twenty dollars, to be recovered as hereinafter provided, and applied to the use of the poor of the district from which such poor person may be removed as aforesaid.(b) Ibid. § 18.

Provided always, That any person aggrieved by any such order of removal, may appeal(c) to the next court of quarter sessions,(d) for the county from which such poor person may be removed, and not elsewhere; and if there be any defect of form in such order,(e) the said court shall cause the same to be amended,(g) without cost to the party, and after such amendment, if the same be necessary, shall proceed to hear and determine the cause upon its truth and merits;(h) but no such cause shall be proceeded in, unless reasonable notice shall have been given by the party appellant, to the overseers of the district from which the removal shall have been made, the reasonableness of which notice shall be determined by the said court, at the session to which the appeal may be made, and if it shall appear to them that reasonable notice was not given, they shall adjourn the appeal to their next session, and then determine the same. Ibid. § 19.

If any magistrate shall refuse to grant a warrant or order of removal as aforesaid, it shall be lawful for the overseers aggrieved by such refusal, to appeal to the next court of quarter sessions of the county in which such magistrate resides, who shall thereupon hear and finally determine the same. Ibid. § 24.

IV. APPEALS.

For the more effectual preventing of vexatious removals and frivolous appeals, the court of quarter sessions, upon every appeal in a case of settlement, or upon proof being made before them of notice thereof, as aforesaid, (though the appeal be not afterwards prosecuted,) shall, at the same session, order to the party in whose behalf such appeal shall be determined,(i) or to whom such notice did appear to have been given, such costs and charges as the said court shall consider reasonable and just, to be paid by the overseers or other person against whom such appeal shall be determined, or by the person that gave such notice; and if the court shall determine in favor of the appellant, that such poor person was unduly removed, they shall at the same session, on demand, award to such appellant, so much money as shall appear to them to have been reasonably paid, by the city or district appellant,

the time has elapsed for that purpose, is conclusive evidence of his place of settlement, in a subsequent proceeding for that purpose. In such case it is most proper to proceed on the first order of removal. 10 C. 231. See 8 Wr. 481, 484.

(a) See 8 Wr. 60.

(b) See 8 Wr. 481.

(c) If the justices have no jurisdiction, an appeal does not lie. 6 W. & S. 522. No appeal lies from an order, vacating one of two justices for the removal of a pauper. 7 P. F. Sm. 495.

(d) The appeal must be taken to the next court, whether notice of the order were given or not. 16 Pitts. L. J. 249.

(e) An informality in the proceedings of the justices cannot be taken advantage of, after an appeal, and decision on the merits. 2 W. 43. The quarter sessions is to decide on the merits, without regard to defects in the order. 5 B. 81.

(g) This is to receive a liberal construction. 1 C. 463.

(h) It must be decided on legal evidence. 7 W. 171. 1 J. 97. The order may be confirmed in part, and quashed in part. 1 S. & R. 387. An order confirmed, is conclusive against the appellant in favor of all the world; an order discharged is conclusive between the parties litigant; an order quashed, is conclusive on neither. 8 Barr 177. 1 J. 95. The decision is conclusive upon a new township subsequently created by a division of one of them. 2 S. & R. 422. On a *certiorari*, the supreme court is confined to a revision of the regularity of the proceedings. 7 W. 527-9. 5 H. 38. 10 C. 231. 7 P. F. Sm. 495. 8 Ib. 209. There is no mode by which the facts can be legitimately before that court. 1 H. 390. And, therefore, no appeal lies. 6 H. 17. 9 H. 46.

(i) Where the order is in part confirmed, and in part quashed, neither party is entitled to costs. 1 S. & R. 387. And if the order be quashed for want of jurisdiction in the justices, it is error to make any decree as to the costs. 6 W. & S. 522.

towards the relief of such poor person, between the time of such undue removal and the determination of such appeal, with costs, as aforesaid.(a) Ibid. § 20.

If any person, ordered to pay costs or charges as aforesaid, other than overseers as aforesaid, shall live out of the jurisdiction of such court, it shall be the duty of any magistrate of the county in which such person shall reside, on request to him made, and on the production of a copy of such order, certified under the seal of such court, to issue his warrant to levy the same by distress, and if no sufficient distress can be had, to commit such party to the common jail, there to remain without bail or mainprise, until such costs or money be paid, or until he be otherwise legally discharged. Ibid. § 21.

If any overseer be ordered to pay costs or charges as aforesaid, and the township liable therefor be out of the jurisdiction of such court, it shall be the duty of the court of quarter sessions of the county in which such township is situate, on request to them made, and on the production of a copy of such order, certified under the seal of the court making the same, to compel payment of such costs and charges, according to law. Ibid. § 22.

V. PERSONS LIABLE FOR THE SUPPORT OF OTHERS.

The father and grandfather.(b) and the mother(c) and grandmother, and the children and grandchildren of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the court of quarter sessions of the county where such poor person resides shall order and direct, on pain of forfeiting a sum not exceeding twenty dollars for every month they shall fail therein, which shall be levied by the process of the said court, and applied to the relief and maintenance of such poor person.(d) Ibid. § 28.

If any person shall bring or cause to be brought into this commonwealth any black or colored indented servant, such person, his or her heirs, executors, administrators and assigns, shall respectively be liable to the guardians or overseers of the city or district to which such black or colored person shall become chargeable, for such necessary expenses as such guardians or overseers may be put to for his or her maintenance, support and interment, together with the costs thereon. Ibid. § 26.

Every person in whom the ownership or right to the service of any negro or mulatto slave shall be vested, shall be liable(e) to the overseers of the district in which (such) negro or mulatto shall become chargeable,(g) or all expenses which such overseers may be put to for the maintenance, support and interment of such negro or mulatto, with the costs thereon. Ibid. § 27.

VI. DESERTION.

If any man shall separate himself from his wife,(h) without reasonable cause,(i) or shall desert his children, or if any woman shall desert her children, leaving them a charge upon the district,(k) in any such case it shall be lawful for any two(l)

(a) A district accepting a pauper so removed is liable to the district removing, for costs and charges, to the same extent as if the case had been determined against said district. *Purd.* 1472.

(b) See 6 P. L. 433, as to the liability of a grandfather, whilst the father is living. And see 7 H. 56. 8 Wr. 399.

(c) The liability of a surviving mother, if of sufficient ability, for the support of her minor children, is co-extensive with that of a father. 17 Pitts. L. J. 34.

(d) This does not relieve the township from their liability. 5 W. & S. 536.

(e) One who has used the services of a negro as a reputed slave is liable to the township for her support when she becomes chargeable as a pauper. 9 Barr 217. See 2 W. 180-2.

(g) A slave has a settlement in the town-

ship where his master resides, which is bound in the first instance to support him. 3 B. 22. 6 S. & R. 103.

(h) The wife, in such case, is a competent witness to prove the marriage. 2 Brewst. 149. A husband who, by cruel usage, compels his wife to withdraw from his habitation, is liable to proceedings for desertion. 3 P. L. J. 304.

(i) The reasonable cause which relieves a husband from a warrant, is only such as will relieve him from the legal duty of maintenance; and he can only be relieved from the maintenance of his wife, for reasons or causes that would entitle him to a divorce. 2 Gr. 162.

(k) It is not necessary that a wife and child should be declared paupers in due form of law, to authorize proceedings against the husband for maintenance. 2 Gr. 162.

(l) Proceedings may be had before one

magistrates of the county, upon complaint made by the overseers of the district (a) to issue their warrant (b) to such overseers, therein authorizing them to take and seize so much (c) of the goods and chattels, (d) and receive so much of the rents and profits of the real estate of such man or woman as, in the judgment of the said magistrates, shall be sufficient to provide for such wife, and to maintain and bring up such children, which sum or amount shall be specified in such warrant; but if sufficient real or personal estate cannot be found, (e) then to take the body of such man, (or woman,) and bring him (or her) before such magistrates, at a time to be specified in such warrant. Ibid. § 29.

It shall be lawful for such magistrate, (g) on the return of such warrant, to require security from such man or woman, for his or her appearance at the next court of quarter sessions of the county, (h) there to abide the order of the court, and for want of such security, to commit such person to the jail of the county. Ibid. § 30.

The warrant aforesaid shall be returned to the next court of quarter sessions of the county, when it shall be lawful for the said court to make an order (i) for the payment of such sums as they shall think reasonable for the purpose aforesaid, (k) and therein authorizing the overseers to dispose of the goods and chattels aforesaid (l) by sale or otherwise, and to collect and receive the rents and profits aforesaid, or so much of either as, in the judgment of the court, shall be sufficient for the purpose aforesaid, but if there be no real or personal estate, it shall be lawful for the court to commit such person to the jail of the county, there to remain until he or she comply with such order, give security for the performance thereof, or be discharged by due course of law. (m) Ibid. § 31.

The courts of quarter sessions in the several counties of this commonwealth shall have power to hear, determine and make orders and decrees, in all cases arising under the 28th section of the act of 13th June 1836, either upon the petition of the overseers of the poor, or of any other person or persons having an interest in the support of said poor person or persons, and either with or without an order of relief having been first obtained. Act 15th April 1857, § 1. Purd. 799.

In addition to the remedies now provided by law, (n) if any husband or father, being within the limits of this commonwealth, has or hereafter shall separate him-

magistrate in Philadelphia, by act 14th April 1853, § 8. P. L. 418.

(a) The complaint must be made by the overseers, not by the wife. 2 Barr 138. 2 Br. 212. 2 S. & R. 363. 11 P. F. Sm. 105. The proceedings may be instituted on an information made by a single overseer. 2 Gr. 162.

(b) The law considers such desertion as an offence. 4 S. & R. 506. And the defendant is not entitled to notice previous to the seizure of his property. 2 S. & R. 363.

(c) The warrant must direct how much is to be seized. 1 S. & R. 239.

(d) This does not include "choses in action," which are not liable to seizure under the warrant. But a lease for years is a chattel real and may be seized. 2 Gr. 162. See act 1 April 1870, as to Schuylkill county. Purd. 1626.

(e) To justify a warrant of arrest, it must appear that sufficient real or personal estate of the defendant could not be found. 2 Barr 142. 11 P. F. Sm. 105. See 4 P. L. J. 249.

(g) The right to hold to bail given to one magistrate is auxiliary to the proceedings before two justices. 2 Barr 138.

(h) In Philadelphia, one judge may act in desertion cases, by act 26 March 1846. P. L. 173.

(i) The defendant has a right to prove that he had not deserted his wife, but she had deserted him. 2 S. & R. 363. The decree does not affect the rights of creditors. 5 S. & R. 387. The proceedings are subject to the revision of the supreme court on *certiorari*.

2 S. & R. 363. But not until after final decree. 5 Barr 124. Such decree is not affected by a subsequent discharge under the insolvent laws, which will only apply to payments then due. 5 Wh. 82.

(k) It is error for the quarter sessions, upon the hearing of a defendant, who was bound over to answer a charge of deserting his wife, to order payment of a weekly sum for the support of his wife, and a further weekly sum for the support of his child. The order must be limited to the original charge. 3 Pitts. Leg. J. 420. It is too late, after a hearing on the merits, to set aside the warrant for a mere defect of form. 2 Gr. 162.

(l) They cannot order the sale of stock held by the wife as administratrix. 5 S. & R. 112.

(m) The act of 31st March 1812, 5 Sm. 381, relating to the city of Philadelphia, &c., is not hereby repealed. 4 P. L. J. 249. 2 Barr 138. And see act 11th April 1848, relating to the city of Pittsburgh. P. L. 532.

(n) See act 26 March 1846, as to Philadelphia county, P. L. 173; acts 3 May 1844, Purd. 1372, and 4 March 1865, Purd. 1406, as to Berks county; act 22 March 1865, as to Allegheny county, Purd. 1406; act 4 April 1866, as to Lehigh and Greene counties, Purd. 1441; acts 27 February 1867, Purd. 1524, and 15 April 1869, Purd. 1583, as to Lancaster, Crawford, Erie, York, Delaware and Potter counties; act 27 February 1867, as to Lawrence and Luzerne counties, Purd. 1524; act 1 April 1870, as to Schuylkill county. Purd. 1626.

self from his wife, or from his children, or from wife and children, without reasonable cause, or shall neglect to maintain his wife or children, (a) it shall be lawful for any alderman, justice of the peace or magistrate of this commonwealth, upon information made before him, under oath or affirmation, by his wife or children or either of them, or by any other person or persons, to issue his warrant to the sheriff or to any constable, for the arrest of the person against whom the information shall be made as aforesaid, and bind him over, with one sufficient surety, to appear at the next court of quarter sessions, there to answer the said charge of desertion. Act 13 April 1867, § 1. *Purd.* 1472.

The information, proceedings thereon, and warrant shall be returned to the next court of quarter sessions, when it shall be lawful for said court, after hearing, to order the person against whom complaint has been made, being of sufficient ability, to pay such sum as said court shall think reasonable and proper, for the comfortable support and maintenance of the said wife or children, or both, not exceeding one hundred dollars per month, and to commit such person to the county prison, there to remain until he comply with such order, or give security by one or more sureties to the commonwealth, and in such sum as the court shall direct for the compliance therewith. *Ibid.* § 2.

The costs of all proceedings by virtue of this act, shall be the same as are now allowed by law in cases of surety of the peace, to be imposed in like manner; and all proceedings shall be in the name of the commonwealth; and any wife, so deserted, shall be a competent witness on the part of the commonwealth, and the husband shall also be a competent witness. *Ibid.* § 3.

Should any such person abscond, remove or be found in any other county of the commonwealth than the one in which said warrant issued, he may be arrested therein, by the said warrant being backed by any alderman or justice of the peace of the county in which such person may be found, as is now provided for backing warrants, by the third section of the act of the 31st of March 1860. *Ibid.* § 4.

VII. DUTIES OF OVERSEERS.

If any person shall come out of any city or district in this commonwealth, into any other district, and shall happen to fall sick (b) or die before he have gained a settlement therein, so that he cannot be removed, the overseers of such district shall, as soon as conveniently may be, give notice to the guardians or overseers of the city or district where such person had last gained a settlement, or to one of them, of the name, circumstances and condition of such poor person, and if the guardians or overseers to whom such notice shall be given, shall neglect or refuse to pay the moneys expended for the use of such poor person, and to take order for relieving and maintaining him, or in case of his death before such notice could be given, shall, on request made, neglect or refuse to pay the moneys expended in maintaining and burying such poor person, in every such case it shall be the duty of the court of quarter sessions of the county where such poor person was last settled, upon complaint to them made, to compel payment by such guardians or overseers, of all such sums of money as were necessarily expended for such purpose, in the manner directed by law, in the case of a judgment obtained against overseers. (c) Act 13 June 1836, § 23. *Purd.* 796.

It shall be lawful for the directors of the poor of any county, and for the overseers of any district, as the case may be, in which any person shall have become chargeable, to sue for and recover any real or personal estate belonging to such person, and to sell or otherwise dispose of the personal property, and to collect and receive the rents and profits of the real estate, and to apply the proceeds, or so much thereof as may be necessary to defray the expenses incurred in the support and funeral of such person, and if any balance shall remain, the same shall be paid over to the legal representatives of such person after his death, upon demand made

(a) If the father be really able and willing to maintain his children at home, he is entitled to their custody. 27 *Leg. Int.* 28.

(b) If a person suddenly fall sick, and after an order for his relief, die, the township of his legal settlement is liable for the expenses of his maintenance and burial. 7 *W.*

527. The township where a person, not having any legal settlement in the state, first becomes disabled by a hurt, is liable for his maintenance. 10 *W.* 360.

(c) The remedy hereby given must be pursued; an action of assumpsit will not lie in the common pleas. 27 *Leg. Int.* 67.

and security being given to indemnify such directors or overseers from the claims of all other persons. Ibid. § 38.

It shall be the duty of the directors of the poor of the several counties in which poor-houses are or may be erected, once in every year, after the accounts shall have been audited and settled, to make out a full and correct statement of their receipts and expenditures for the preceding year, together with a statement of the number of poor persons supported, specifying their sex, age or infirmity, if any, and of the profits arising from all farms under their directions; and it shall be the duty of such directors, annually in the month of March, to publish such accounts and statement, at least twice, in two or more newspapers printed in such county, the expense of which shall be paid out of the county treasury, and forthwith transmit a copy of such accounts and statement to the governor, to be by him transmitted to the legislature. Ibid. § 34.

If any overseer shall neglect or refuse to perform any duty enjoined upon him by law, and not otherwise provided for, he shall be liable to an indictment for a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, at the discretion of the court, to be recovered by the process thereof. Ibid. § 42.

All gifts, grants, devises and bequests, hereafter to be made, or any houses, lands, tenements, rents, goods, chattels, sum or sums of money, not exceeding in the whole, including all gifts, grants, devises and bequests, heretofore made, the yearly value of five hundred pounds, to the poor of any borough or township within this province, (except the townships as before excepted,) or to any other person or persons for their use, by deed, or by the last will and testament of any person or persons, or otherwise howsoever, shall be good and available in law, and shall pass such houses, lands, tenements, rents, goods and chattels, to the overseers of the poor of such borough or township, for the use of their poor respectively. Act 9 March 1771, § 15. Purd. 796.

If any action shall be brought against any overseer or other person, who in his aid and by his command shall do anything concerning his office, he may plead the general issue, and give this act and any special matter in evidence; and if the plaintiff shall fail in his action, discontinue the same, or become nonsuit, he shall pay double costs. Ibid. § 33.

VIII. FINES AND PENALTIES.

It shall be the duty of every justice who shall, by virtue of any law of this commonwealth, receive any fine, penalty or forfeiture appropriated by law for the use of the poor, forthwith to enter at length on his docket, the name of the person convicted, the offence committed, the amount of such fine, penalty or forfeiture, and the time when the same was paid, and forthwith to deliver a correct transcript of such entry to a constable of the township, and such justice shall, on demand, pay over the same to the overseers of the poor lawfully entitled thereto, and shall annually, if required, exhibit his docket to the inspection of the township auditors. Act 13 June 1836, § 35. Purd. 800.

If any justice shall wilfully neglect or refuse to perform the duties enjoined on him as aforesaid, touching any fine, penalty or forfeiture appropriated to the use of the poor, he shall, on conviction thereof in the court of quarter sessions of the proper county, be deemed guilty of a misdemeanor in office, and fined, for the use of the poor of the township in which he shall reside, any sum not exceeding twenty dollars, and if he shall be convicted of neglecting or refusing to pay over on demand to the proper overseers any money which he shall have received as aforesaid, he shall be fined over and above the last-mentioned sum, any sum not exceeding double the amount which he shall have received as aforesaid, which sums shall be recovered by process of said court. Ibid. § 36.

It shall be the duty of the overseers of every district to demand from every justice the amount of any fine, penalty or forfeiture that may have been received by him for the use of the poor, and if the same be not paid to them within twenty days, to proceed to recover the same by suit against such justice, in the manner that debts of the like amount are or may be by law recoverable. Ibid. § 37.

It shall be the duty of the clerk of every court by whom any fine shall be imposed, which by law is to be appropriated, in whole or in part, to the use of the poor, forthwith to deliver a written notice of the same to a constable living in or near the township in which the person fined resides, for which service such clerk

shall receive the sum of twenty five cents from the proper overseers, and no more. Ibid. § 38.

It shall be the duty of the constable to whom any transcript or certificate shall be delivered by a justice of the peace or clerk of the court as aforesaid, under a penalty of ten dollars, to be recovered before any other justice of the proper county, to deliver such transcript or certificate to one of the overseers of the district to which such fine, penalty or forfeiture belongs, and for such service such constable shall be entitled to receive from such overseers the sum of twenty-five cents, and no more. Ibid. § 39.

It shall be the duty of every sheriff who shall have received any fine, penalty or forfeiture which by law may be appropriated to the use of the poor, to pay the same on demand to the proper overseers, and if he shall fail to do so within ten days after demand, he shall, on conviction thereof in the court of quarter sessions of the proper county, be fined and pay to the use of the poor of the proper district, any sum not exceeding double the amount received by him, to be recovered by the process of the said court. Ibid. § 40.

In all cases where there are no poor persons supported at the expense of a district, or where there shall remain in the hands of the overseers, at the end of the year, an unexpended balance, arising from fines, penalties or forfeitures received for the use of the poor, it shall be the duty of the overseers to pay all such fines, penalties and forfeitures as may have been received by them, and such unexpended balance, to the supervisors of the highways, to be applied to the repairs of the public roads in such district, unless the township auditors shall judge it necessary that the whole or part thereof should be retained as a fund for the use of the poor. Ibid. § 41.

The several fines, forfeitures and penalties, and other sums of money imposed or directed to be paid by this act, and not herein directed to be otherwise recovered, shall be levied and recovered by distress and sale of the goods and chattels of the delinquent or offender, by warrant, under the hand and seal of any one magistrate of the city or county where such delinquent or offender dwells, or where such goods and chattels may be found, and after satisfaction made of such fines, forfeitures and penalties, and sums of money, together with the legal charges, on the recovery thereof, the overplus, if any, shall be returned to the owner of such goods and chattels, his executors or administrators. Ibid. § 43.

If any person shall be aggrieved by the judgment of any one or more magistrates, in pursuance of this act, he may appeal to the next court of quarter sessions for the county in which such magistrates reside, (except in cases hereinbefore specially provided for,) whose decision in all such cases shall be final and conclusive. Ibid. § 44.

IX. MISCELLANEOUS PROVISIONS.

Any public officer in the city of Philadelphia, and county of Allegheny, having charge thereof, or control over the same, shall give permission to any physician or surgeon of the same city and county, upon his request made therefor, to take the bodies of deceased persons, required to be buried at the public expense, to be by him used, within the state, for the advancement of medical science, preference being given to medical schools, public and private, and said bodies to be distributed to and among the same equitably, the number assigned to each being proportioned to that of its students: *Provided however*, That if the deceased person, during his or her last sickness, of his or her own accord, shall request to be buried, or if any person, claiming to be, and satisfying the proper authorities that he is of kindred to the deceased, shall ask to have the body for burial, it shall be surrendered for interment, or if such deceased person was a stranger or traveller, who died suddenly, the body shall be buried, and shall not be handed over as aforesaid. Act 18 March 1867, § 1. Purd. 1525.

Every physician or surgeon, before receiving any such dead body, shall give to the proper authorities, surrendering the same to him, a sufficient bond that each body shall be used only for the promotion of medical science, within this state; and whosoever shall use such body or bodies for any other purpose, or shall remove the same beyond the limits of this state, and whosoever shall sell or buy such body or bodies, or in any way traffic in the same, shall be deemed guilty of a misdemeanor, and shall, on conviction, be imprisoned for a term not exceeding five years, at hard labor, in the county jail. Ibid. § 2.

IX. FORMS OF ORDERS.

MERCER COUNTY, ss.

To the Overseers of the Poor of the District of —, in the County of Mercer:

WHEREAS, complaint hath been made unto us, two of the justices of the peace in and for the said county of Mercer, by — of — aforesaid, Esquire, that a certain —, on the tenth day of May, instant, came to the complainant's house, in — aforesaid, and there fell dangerously ill, and that the said — is a poor and impotent person, and unable to provide for herself, and hath not gained a settlement in the said district. These are, therefore, to authorize and require you to receive the said — forthwith into your care, and make suitable provision for her until she can be removed to the place of her last legal settlement. Given under our hands and seals, at — aforesaid, the 12th day of May, A. D. 1860.

E. F., Justice of the Peace. [SEAL.]
G. H., Justice of the Peace. [SEAL.]

MERCER COUNTY, ss.

To the Overseers of the Poor of the District of —, in the County of Mercer, greeting:

WHEREAS, information hath been given unto the subscribers, two of the justices of the peace in and for the county aforesaid, by — of the said township, farmer, that —, of the same township, laborer, was yesterday, being the 13th day of March, instant, thrown from a horse and so much hurt that his life was despaired of, and that the said — is so poor as to be unable to procure the necessary assistance. You are, therefore, hereby authorized and required to take charge of the said — if you find his circumstances to be as represented, and furnish him such medical and other relief as his distressed situation may call for, charging your expenses herein in your account against the said district. Given under our hands and seals, the 14th day of March 1860.

E. F., Justice of the Peace. [SEAL.]
G. H., Justice of the Peace. [SEAL.]

SUMMONS FOR A DELINQUENT OVERSEER.

LUZERNE COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of B., in the County of Luzerne, greeting:

WHEREAS, information hath been made before J. R. and B. Q., Esquires, two of our justices of the peace in and for the county of Luzerne, by J. W., of the borough of L., in the said county, blacksmith, (one of the overseers of the poor of the said borough,) that J. D., of L. aforesaid, saddler, on the twenty-fifth day of March last past, at L. aforesaid, being duly appointed overseer of the poor of the said borough, did neglect or refuse to take upon him the said office, [or refuses to perform a certain duty which by law he was bound to perform,] contrary to the act of general assembly in such case made and provided: You are therefore hereby commanded to summon the said J. D. to appear before our said justices at the office of the said J. R., at L. aforesaid, on Friday, the eleventh day of April, instant, at ten of the clock in the forenoon of that day, then and there to answer to the said information. And be you then there. Hereof fail not. Witness the said J. R. and B. Q. at L. aforesaid, the fifth day of April, in the year of our Lord one thousand eight hundred and sixty.

J. R. [SEAL.]
B. Q. [SEAL.]

FORM OF CONVICTION IN SUCH CASES.

LUZERNE COUNTY, ss.

Be it remembered that on the 5th day of April, in the year of our Lord one thousand eight hundred and sixty, at the borough of L., in the county of Luzerne, J. W., of L. aforesaid, blacksmith, (one of the overseers of the poor of the said borough,) cometh before us, J. R. and B. Q., Esquires, two of the justices of the commonwealth of Pennsylvania, assigned to keep the peace of the said commonwealth, in and for the county of L., and then and there giveth us to understand and be informed that J. D., of L. aforesaid, saddler, on the twenty-fifth day of March last past, at L. aforesaid, being duly appointed overseer of the poor of the said borough, did neglect or refuse to take upon him the said office, contrary to the act of general assembly in such case made and provided, [or refused to perform certain duties which by law he was bound to perform.] And afterwards, upon the eleventh day of April, in the year aforesaid, at L. aforesaid, the said J. D. having been previously summoned in pursuance of our summons issued for that purpose to appear before us the said justices, upon the said eleventh day of April, at ten of the clock in the forenoon of that day, at the office of the said J. R., at L. aforesaid, to answer the matter of complaint contained in the said information, he the said J. D. appears before us the said justices, to answer and make defence to the matters contained

in the said information, and having heard the same, the said J. D. is asked by us the said justices, if he can say anything for himself why he should not be convicted of the premises above charged upon him in form aforesaid. And because the said J. D. hath nothing to say, nor can say anything in his own defence touching and concerning the premises aforesaid, but doth freely and voluntarily acknowledge and confess all and singular the said premises to be true in manner and form, as the same are charged upon him in the said information; and because all and singular the premises being heard and fully understood by us the said justices, it manifestly appears to us the said justices that the said J. D. is guilty of the premises charged upon him by the said information: It is therefore considered and adjudged by us the said justices, that the said J. D., according to the form of the act of general assembly aforesaid, be convicted, and he is accordingly convicted of the offence charged upon him by the said information. And we do hereby adjudge that the said J. D. for the said offence hath forfeited the sum of twenty dollars, to be appropriated as the act of the general assembly directs. In witness whereof, we, the said justices to this present record of conviction as aforesaid, have set our hands and seals at L. aforesaid, the 11th day of April, in the year of our Lord one thousand eight hundred and sixty.

J. R. [SEAL.]
B. Q. [SEAL.]

Principal and Agent.

THE relation of principal and agent takes place, whenever one person authorizes another to do acts or make engagements in his name. Paley on Agen. 1.

A *hired agent* is bound to possess such a degree of skill as would, in general, be adequate to the service; a *gratuitous agent* is not bound to possess such skill, but is only liable by proof of gross negligence, or of having omitted to use that skill which, from his situation, office or profession, he cannot but be supposed to have. Ibid. 72.

If a man promises as an agent, he is not personally bound. A. 140.

The acts of a servant bind his master only when done in the course of the business committed to him, or within the scope of an authority specially delegated to him. 4 W. 222.

A promissory note, signed by a clerk in a store, for his employer, does not bind the latter, without proof of special authority. Ibid.

If an agent exceed his authority in making a contract, he thereby binds himself individually, but his principal is not bound. 1 W. & S. 222.

A party who wishes to avail himself of the acts of an agent, must, in order to charge the principal, prove the authority under which the agent acted. 4 C. 505. An agent specially employed to receive the amount of an account, or take a note for it, has no authority to dispose of the note, when taken; he cannot depart from his authority. 7 W. 524. So also, an agent employed to make sales on credit is not authorized subsequently to collect the price in the name of his principal. 6 C. 513.

The authority of a general agent to contract so as to bind his principal, is only limited to the usual and ordinary means of accomplishing the business intrusted to him. 7 C. 461.

If the agent do an act within the scope of his authority, and at the same time does something more which he was not authorized to do, and the two matters be not so connected as to be inseparable, even though both may relate to the same subject; that which he had authority to do is alone binding, and the other is void. 2 Greenl. Ev. § 59.

Parties who have entered into a contract with one, as the agent of others, are estopped from contesting the agent's authority to bind his principal. 6 C. 84.

The acts of an agent or an attorney after the death of his principal, of which he was ignorant, are binding upon the parties. 4 W. & S. 282.

Whenever confidence is reposed, the law forbids that it shall be abused. (7 W. 387.) It is a rule of law which does not admit of dispute, that an agent is bound to keep his principal informed of all material occurrences in the agency; if he fail

to do so, it is negligence, and a palpable violation of duty, for which the factor is clearly liable to a suit. 4 R. 229. 4 W. & S. 805.

An agent appointed to collect money, who buys a note of his principal, at a discount, cannot retain the nominal amount of the note out of the money collected. He can set off only the amount which he actually paid. 2 P. R. 525.

Where an agent, (as an attorney,) rightfully receives money for his principal, which ought to be paid over by the principal to a third person, such third person cannot maintain an action against the agent for its recovery; he is liable to account only to his principal. 1 Am. L. R. 30.

Declarations made by an agent, at the time of paying money, showing on whose account and behalf the money was paid, are admissible as part of the *res gestæ*. 4 Wh. 130. 1 Greenl. Ev. § 113.

Admissions by an agent, when he is about the doing of some act within the scope of his delegated authority, are evidence against the principal; but naked declarations which are not part of any *res gestæ*, are not admissible. 1 C. 393.

On the hiring of an agent for a year, the principal is liable to him for the wages of the year, if he dismiss the agent before its termination. 5 W. & S. 210.

Whenever a person acts as agent *for the public*, he is not personally liable for contracts made by him in that capacity. 1 Mass. 208.

Nor will it make any difference if the services, &c., were performed at the special instance and request of the person so acting as agent. Ibid.

A public agent of government, contracting for the use of the government, is not, *personally*, liable, *although the contract be under his seal*. 1 Cr. 343.

A public agent, though known to be such, is personally liable in his contract for things for the use of the government, *unless* he make it in his official capacity, and the party contracted with appears to have looked to government alone for compensation. 3 Caines 69.

Privilege.

- I. Of the privileges of suitors and witnesses.
- II. Of the privileges of freeholders.

- III. Of the privileges of foreign ministers.
- IV. Of the privileges of other persons.

I. OF SUITORS AND WITNESSES.

PRIVILEGE is an exemption from some duty, burden or attendance, to which certain persons are entitled, from a supposition of law that the stations they fill, or the offices they are engaged in, are such as to require all their care, and that, therefore, without this indulgence, it would be impracticable to execute such offices to that advantage which the public good requires. Bac. Abr.

A party attending in court is privileged from the service of a *summons*, as well as from an arrest. 1 B. 77.

A suitor, who was served with a *summons* after the lapse of a day from the delivery of the verdict, on his motion, was discharged from the action. 2 Y. 222.

There is no privilege from the service of a *subpœna*. 4 D. 341.

A witness attending before a magistrate, for the purpose of having his deposition taken, under a rule of court, is privileged from arrest, *cundo, morando et redeundo*, [whilst going, remaining and returning.] 9 S. & R. 147. 1 Greenl. Ev. § 317.

The privilege of a suitor does not hold when he has been surrendered by his bail in another case, and is in actual custody at the time of arrest. 3 Y. 387.

The privilege of a witness from arrest does not extend throughout the term at which the cause was marked for trial, nor will it protect him while the witness is engaged in transacting private business, after he is discharged from the obligation of the *subpœna*. 4 D. 329. 1 Greenl. Ev. § 316.

A suitor in a court of one county, who comes into another county, to attend to the taking of a deposition in the pending suit, in pursuance of its rules, is privi-

leged from the service of a *summons* in the latter county, although in consequence of circumstances happening after his coming into the county, the deposition has not been taken. 1 M. 237.

A refusal to discharge a defendant on the ground of his having been arrested while attending as a party or witness, is a matter of discretion with the court below, the propriety of which cannot be reviewed in the supreme court. 5 Wh. 313.

Where a person is a suitor in one court, and, while so, is served with process issued by another, the general practice is, that the party must apply to the court, in which he is suitor, to be discharged from the process issued by the other. 2 M. 200. 6 P. L. J. 330. 3 Am. L. J. 134. 1 Greenl. Ev. § 316.

Either court may, however, discharge the party and give him the benefit of his privilege, but the court from which the process issues will not exercise the power of discharging the party, except under special circumstances. Ibid.

The protection given to suitors and witnesses is now extended to every case where the attendance is a duty, in conducting any proceedings of a judicial nature. 9 S. & R. 151.

The privilege from arrest is confined to parties in civil proceedings, unless it appear, that the arrest on the criminal charge was a contrivance to get the defendant into custody on the civil suit. 6 P. L. J. 330. 10 Wend. 636. 1 Ad. & E. 378.

II. FREEHOLDERS.

The privilege of freeholders to be sued by summons, extends to actions of trespass *vi et armis*. 1 D. 310.

But if a freeholder unite in a joint and several bond or commit a joint trespass with one who is not a freeholder, he may be arrested upon a joint *capias* issued against both. 2 B. 135. 1 D. 305.

A judgment obtained *before a justice of the peace* is sufficient ground to defeat the privilege of a freeholder. 1 D. 436.

The court will abate a *capias* which has been issued against a freeholder, although the value of his freehold be less than the amount of the plaintiff's demand, if no incumbrance exist on his land *at the time the writ issued*. 1 S. & R. 363.

If a defendant freeholder, who seeks to avail himself of the privilege arising from his freehold, neglects to suggest it, it would justify the issuing of an execution against him; but on the *payment of costs* accrued on the execution, the magistrate should supersede it, and give the defendant the privilege secured by law. 1 Ash. 407.

A freeholder is an inhabitant in any part of this province, who hath resided therein for the space of two years, and has *fifty acres* of land, or more, in fee-simple, well seated, and *twelve acres* thereof, or more, well cleared or improved, or hath a dwelling-house worth *fifty pounds* current money of America, in some city or township within this province, clear estate, or hath unimproved land to the value of *fifty pounds* like money. Purd. 35.

The second section of the act of 14th April 1838, relating to the commencement of actions, &c., revived the act of 20th March 1725, which exempted freeholders, in certain cases, from arrest. 1 P. L. J. 47.

III. FOREIGN MINISTERS AND CONSULS.

An ambassador or foreign minister is not amenable to the laws of the nation to which he is sent. 1 N. & M. 217. The recognition by the president of a foreign minister is conclusive upon the judiciary. 4 W.C. C. 153. A secretary of legation is entitled to all the immunities of a minister, and is privileged against any prosecution civil or criminal. 1 W. C. C. 232.

An attaché to a foreign legation is a public minister within the statute of 1790. 1 Bald. 240. A foreign minister cannot waive his privilege or immunities, and his submission or consent to an arrest is no justification. Ibid.

The *chargé d'affaires* of a foreign government, whose official functions in that capacity ceased on the arrival of the minister of his government, but who was delayed in this country by circumstances, was *held* not to be amenable to process in a civil suit. 4 D. 321.

A foreign consul is not privileged from prosecution for a misdemeanor, by virtue of his consular appointment. 2 D. 299, *in note*.

And it seems, that a consul-general is not protected by the law of nations, from a prosecution and indictment for a rape. 5 S. & R. 545.

But the state courts have no jurisdiction in such case, the exclusive jurisdiction being vested in the courts of the United States. *Ibid*.

IV. OTHER 'PERSONS.

A member of assembly is privileged from arrest, summons, citation or other civil process, during his attendance on the public business confided to him, (4 D. 107,) and it seems his suit cannot be forced to trial during the session of the legislature. *Ibid*. But this latter point is denied by GRIER, J., in 1 Wall. Jr. 189. See 1 Bouv. Inst. 281. 1 Chicago Leg. News 245.

A member of a state convention is privileged from a summons or arrest during the sitting of the convention, and for a reasonable period before and after the session. *Ibid*. 296.

An attorney at law is not privileged in Pennsylvania from arrest on a *copias*. 1 Y. 350.

The claim of privilege must be made at a proper time; after judgment obtained it is too late. 4 D. 107.

Process.

I. Provisions of the Penal Code.

II. Judicial decisions and authorities.

I. ACT 31 MARCH 1860. Purd. 218.

SECT. 7. If any sheriff, coroner or keeper of a jail, constable or other officer, shall wilfully and without reasonable cause, refuse to execute any lawful process directed to him, requiring the apprehension or confinement of any person charged with, or convicted of, a criminal offence; or shall wilfully and without reasonable cause, omit to execute such process, by which such person shall escape; he shall be guilty of a misdemeanor, and, on conviction, be sentenced to an imprisonment not exceeding two years, and a fine not exceeding five hundred dollars.

SECT. 8. If any person shall knowingly, wilfully and forcibly obstruct, resist or oppose any sheriff, coroner or other officer of the commonwealth, or other person duly authorized, in serving or attempting to serve or execute any process or order of any court, judge, justice or arbitrator, or any other legal process whatsoever; or shall assault or beat any sheriff, coroner, constable or other officer or person, duly authorized, in serving or executing any process or order as aforesaid, or for and because of having served or executed the same; or if any person shall rescue another in legal custody; or if any person being required by any sheriff, coroner, constable or other officer of the commonwealth, shall neglect or refuse to assist him in the execution of his office in any criminal case, or in the preservation of the peace, or in apprehending and securing any person for a breach of the peace; such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to an imprisonment not exceeding one year, and to pay a fine not exceeding one hundred dollars, or either, or both, in the discretion of the court.

II. BLACKSTONE considers *process*, in civil cases, as the means of compelling the defendant to appear in court. This is sometimes called *original process*, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the first, upon some collateral or interlocutory matter; as to summon juries, witnesses and the like. Finch 436. *Mesne process* is sometimes put in contradistinction to *final process*, or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit. 2 Bl. Com. 19.

Though process issued by a justice may be altered *by his direction*, yet a general authority by him to a constable or any other person, to alter dates or to fill up or alter process, is not only imprudent and indiscreet, but *void*. 10 Johns. 245.

Proceedings of a justice, in an action of debt, were set aside, because the summons stated no day of appearance. A. 272.

The judgment of a justice was reversed; first, because the summons was made returnable on the next day; second, because the summons was to answer a debt under 40s., and the judgment was for a greater sum. 1 D. 405.

A warrant by a justice, not directed to any particular person in office, is bad. A. 376.

But a warrant directed to ———, constable, is good, if executed by the constable of the district. 6 B. 124.

In *criminal cases*, a justice is not bound to issue his warrant whenever it is applied for; he is to use a legal discretion, and determine, on a mature deliberation of all the circumstances, whether a warrant should issue. 1 Y. 74.

A justice who backs a warrant should be satisfied, by oath, that it is the handwriting of the justice mentioned in the warrant. Purd. 249.

The warrant of a justice is not returnable at any particular time, but continues in force so long as the justice shall live. Peake N. P. 234.

A warrant shall be issued (if a criminal warrant) on oath, &c., and *name* or *describe* the individual to be arrested; otherwise it is unconstitutional, and the officer cannot justify an arrest under it. 3 B. 43.

The word "process" in the 11th sect. of the 5th article of the constitution of Pennsylvania, which provides that the style of all process shall be *The Commonwealth of Pennsylvania*, was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that *judicial power*, which is established and provided for in the article of the constitution, and forms exclusively the subject-matter of it. 3 P. R. 99.

The provision in the 11th sect. of the 5th article of the constitution of Pennsylvania, that "all prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania," and conclude, "against the peace and dignity of the same," has never been considered as extending to prosecutions other than those carried on by indictment, found in some of the courts referred to in the said 5th article, and where, anterior to the Revolution, it was the rule and practice to conclude such prosecutions against the peace, &c., of the king. Ibid.

A justice of the peace may authorize any citizen to execute a warrant of arrest in a *criminal case*; but no private person, and no other than the constable of the place where it is to be executed, can be compelled to execute it. 1 Ash. 183.

The offence of obstructing process, consists in refusing to give up possession, or in opposing or obstructing the execution of the writ, by threats of violence, which it is in the power of the party to enforce. 2 W. C. C. 169. And if the defendant resist the execution of process for his arrest, by refusing to accompany the officer, it is not necessary, to complete the offence, that he should use or threaten violence. 3 Ibid. 335. Any obstruction to the free action of the officer, or his lawful assistants, wilfully placed in his or their way, for the purpose of thus obstructing him or them, is sufficient. 2 Curt. C. C. 639.

Profaneness.

I. Punishment of blasphemy.
II. Penalty for profane swearing.

III. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 222.

SECT. 30. If any person shall wilfully, premeditatedly and despitefully blaspheme, or speak loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth, such person, on conviction thereof, shall be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding three months, or either, at the discretion of the court.

II. ACT 22 APRIL 1794. Purd. 810.

SECT. 3. If any person of the age of sixteen years or upwards, shall profanely curse or swear by the name of God, Christ Jesus, or the Holy Ghost, every person so offending, being thereof convicted, shall forfeit and pay the sum of sixty-seven cents for every such profane curse or oath; and in case he or she shall refuse or neglect to pay the said forfeiture, or goods and chattels cannot be found whereof to levy the same by distress, he or she shall be committed to the house of correction of the proper county, not exceeding twenty-four hours, for every such offence of which such person shall be convicted; and whosoever, of the age of sixteen years or upwards, shall curse or swear by any other name or thing than as aforesaid, and shall be convicted thereof, shall forfeit and pay the sum of forty cents for every such curse or oath; and in case such offender shall neglect or refuse to satisfy such forfeiture, or no goods or chattels can be found whereof to levy the same by distress, he or she shall be committed to the house of correction of the proper county, not exceeding twelve hours for every such offence.

SECT. 4. The justices of the supreme court, severally, throughout this state, every president of the court of common pleas within his district, every associate judge of the courts of common pleas, and every justice of the peace within his county, the mayor and aldermen of the city of Philadelphia, and each of them, within the limits of said city, and each burgess of a town corporate, within his borough, are hereby empowered, and authorized, and required to proceed against and punish all persons offending against this act; and every person who shall profane the Lord's day, or who shall profanely curse or swear, or who shall intoxicate him or herself, as mentioned in the next preceding section of this act; and for that purpose each of the said justices or magistrates, severally, may and shall convict such offenders, upon his own view and hearing, or shall issue, if need be, a warrant, summons or capias, (according to the circumstances of the case,) to bring the body of the person accused as aforesaid, before him; and the same justices and magistrates respectively, shall, in a summary way, inquire into the truth of the accusation, and upon the testimony of one or more credible witnesses, or the confession of the party, shall convict the person who shall be guilty as aforesaid, and thereupon shall proceed to pronounce the forfeiture incurred by the person so convicted, as hereinbefore directed; and if the person so convicted refuse or neglect to satisfy such forfeiture immediately, with costs, or produce goods and chattels whereon to levy the said forfeiture, together with costs, then the said justices or magistrates shall commit the offender, without bail or mainprise, to the house of correction of the county wherein the offence shall be committed, during such time as is hereinbefore directed, there to be fed upon bread and water only, and to be kept at hard labor; and if such commitment shall be in any county wherein no district house of correction hath been erected, then the offender shall be committed to the common jail of the county, to be therein fed and kept at hard labor, as aforesaid; and every such conviction may be in the following terms, viz.: "Be it remembered, that on the — day of —, in the year of —, A. B., of — county, laborer, (or otherwise, as his or her rank, occupation or calling may be,) is convicted before me, being one of the justices of the —, (or one of the aldermen or burgesses of the city or borough

of —, in the county of —,) of swearing profane oaths, by the name of —, (or otherwise, as the offence and case may be,) and I do adjudge him (or her) to forfeit for the same, the sum of — cents. Given under my hand and seal, the day and year aforesaid:” *Provided always*, That every such prosecution shall be commenced within seventy-two hours after the offence shall have been committed.

SECT. 12. One moiety of the forfeitures in money, accruing and becoming due for any offence against this act, shall be paid to the overseers of the poor of the city, borough or township wherein the offence shall be committed, for the use of the poor thereof; and the other moiety to the person or persons who shall prosecute and sue for the same; and the inhabitants of such city or other place, shall, notwithstanding, be admitted witnesses to testify against any person who shall be prosecuted for any offence by virtue of this act: *Provided always*, That no person shall be prosecuted or convicted for any offence against this act, unless such prosecution be commenced within thirty days after the offence has been committed.

III. Christianity is part of the law of Pennsylvania, and maliciously to revile it is an indictable offence. 11 S. & R. 894.

But fairly and conscientiously to promulgate religious opinions is not criminal. *Ibid*.

In an indictment under that act it is necessary that the words should be laid to have been spoken *profanely*. *Ibid*.

It *seems* also, that the indictment should state the very *words* spoken, and that it is not sufficient to state that the defendant spoke in *substance*, &c. *Ibid*.

The form of conviction, given by the 4th section of the act of 22d April 1794, for the prevention of vice and immorality, is directory merely, and under that act the justice is not bound to send up the evidence given before him. 1 Ash. 410.

In a summary conviction under the 2d section of the act of 22d April 1794, for profane swearing, the judgment must ascertain not only the amount of fine inflicted, but also the alternative duration of imprisonment; and if it do not the proceedings are void, and the defendant cannot be held in prison. 8 P. L. J. 59.

Several offences may be contained in one conviction. *Ibid*. 265.

A summary conviction must agree with, and cannot exceed the charge in the information: *therefore*, where the information charged the defendant with swearing twenty-five oaths, and the conviction and penalty was for twenty-nine oaths, the proceedings were reversed on *certiorari*. *Ibid*. 265.

Promissory Notes.

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|--------------------------------------------------|------------------------------------------|
| I. Definition of a promissory note. | V. Of the consideration. |
| II. Liability of the maker of a promissory note. | VI. Protest and notice. |
| III. Liability of the indorser. | VII. Notes payable in specific articles. |
| IV. Of the negotiability of a note. | VIII. Of actions on promissory notes. |

I. A PROMISSORY NOTE is defined to be a promise or engagement in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or his order, or to the bearer. The person who makes the note is called the maker, and the person to whom it is payable the payee, and the person to whom he transfers the interest by indorsement the indorsee. Chit. on Bills 324.

All the parties to a note are liable for the amount due, although only one satisfaction can be recovered; and executions for costs may be issued in all the suits. 2 D. 115.

A note signed by more than one person, and beginning, "I promise," &c., is several as well as joint. Byles on Bills 6. 11 Johns. 544.

The receipt of a negotiable promissory note operates as an extinguishment of a prior existing debt, if so intended between the parties; and this is a question of fact upon the evidence. 8 C. 493. But the law raises no implication, from the mere acceptance of a promissory note for a pre-existing debt, of an agreement to give time for payment of the original debt, until the maturity of the note, so as to operate as a discharge to a surety; to have that effect there must be an express binding agreement not to sue until the maturity of the note. 3 Wr. 226.

II. LIABILITY OF THE MAKER.

An alteration in the date or amount of a promissory note by the payee, in any material respect, avoids it, although in the hands of an innocent indorsee, for a valuable consideration. 3 Y. 391. 7 S. & R. 508. 2 W. & S. 438. 7 H. 119. 10 Wr. 259. So will the addition of a particular place of payment. 11 C. 80. But not the addition of an indorser's place of residence. 5 Wr. 214. And see 11 P. F. Sm. 69.

If the indorser of a note sign a general release to the maker, before the note becomes due, of all actions, causes of action, and demands, which he then had, or might in future have against the maker, by reason of any act, matter, cause or thing, prior to the date of the release, he cannot, if he pay the note afterwards, maintain an action against the maker. 1 S. & R. 398.

A bond from a third person is no discharge of the maker or indorser of a note unless it be so agreed. Nor will the forbearance to sue the maker, nor delay to sue the indorser, discharge the latter, provided the time was not given until after the note was protested. 11 S. & R. 179.

If a note be drawn and indorsed for the accommodation of the indorser, and a bond of indemnity be given by the indorser to the maker, the holder does not discharge the maker by giving time to the indorser after the day of payment, although at the time of giving the delay, the holder knows that it was an accommodation note. 9 S. & R. 229.

A note given on *Sunday* is void, and there can be no recovery upon it. 6 W. 231.

The *bond fide* holder, for value, and without notice, of a negotiable note made to A. B. or bearer, is entitled to recover on it against the maker, free from all existing equities between the original parties. 7 W. 328.

The indorsee of an accommodation note may recover the whole amount of it from the maker, although he purchased it from the payee at a greater discount than six per cent. 6 C. 138.

But it is a good defence to an action by an indorsee against the maker of a promissory note, that it was made for the accommodation of the payee, without consideration, and negotiated by him, when over due. 12 C. 285. 12 Wr. 458.

If the maker of a note, payable at a bank, have no funds in the bank when it falls due, demand of payment is unnecessary. 9 C. 134.

An indorsement may be made on the face of the note, or on a separate paper. 8 Wr. 89.

III. LIABILITY OF THE INDORSER.

The indorser of a note is only a security that the maker shall pay the money; if the holder be guilty of neglect, or receive part of the money from the maker, and give time for the rest, the indorser is no longer responsible. 1 D. 252.

A demand of payment of the maker, or due diligence in endeavoring to make a demand, is necessary to charge the indorser. 4 S. & R. 480.

But if the maker has absconded, and is not to be found when the note falls due, a demand of payment is not necessary in order to charge the indorser. Ibid. 1 W. & S. 129.

It is not incumbent on the indorser to show the holder where the maker is to be found. Ibid.

Where the maker of a note has removed into another state or jurisdiction, subsequent to the making of the note, a personal demand on him is not necessary; it is sufficient if presented at his former residence. 9 Wh. 598.

The indorser of a note is not discharged by the holder taking a mortgage from the maker, as security for the debt. 7 S. & R. 219.

Where a promissory note is payable at a particular place, as a bank, and the holder is at the bank until the usual hour for closing the same, on the day on which the note falls due, ready to receive payment, no further demand on the maker is necessary, in order to charge the indorser. 1 R. 335. 4 W. & S. 505.

The holder of a promissory note accepted from the maker a check upon a bank, drawn by a firm composed of the maker and a third person, for the amount of the note, payable in six days, which was agreed to be in full satisfaction for the note, "in case the check was duly honored at its maturity:" *Held*, that the acceptance of the check suspended the remedy of the holder against the maker, and discharged the indorser. 2 Wh. 253.

If one of two payees and indorsers of a note discounted for the accommodation of the maker, die before the note falls due, his representatives are not liable to the holder for any part of the amount. 2 Wh. 344.

The holder of a negotiable note by agreement with the maker, and for a valuable consideration, extended the time for its payment, and afterwards indorsed the same to a third person, without giving notice of such agreement: *Held*, that he was liable to the indorsee, without demand of payment from the maker, protest or notice. 10 W. 111.

The taking of a new note of equal degree, either from the debtor or from a stranger at the instance of the debtor, is not an extinguishment of the first note, nor will it release any indorser of the same, unless the holder agreed to accept the new note in satisfaction, or to give time for the payment of the first note. 9 W. 173.

A delay to sue the *maker* of a note after it becomes due, does not discharge the indorser. 17 Johns. 176. 18 Ibid. 327.

The holder of a promissory note, in order to render the indorser liable, must demand payment of the note from the maker, or in his absence from his clerk or agent, on the last of the days of grace, and give due notice of the non-payment to the indorser. A demand on the maker before the last day of grace must pass for nothing. 8 W. 401. 2 Wh. 377. 6 W. & S. 179.

An indorsement in blank by the payee of a *sealed bill* (note) does not make him liable to the holder. 13 S. & R. 311. 5 Wh. 325.

An indorsement, on a note, without a date, by one not a party to it, is presumed to have been made at its date, and the indorser held liable as an original promisor, and not as a guarantor. 1 J. 482. Ibid. 460.

Where a person indorses an overdue note, he is entitled to notice of demand and non-payment, as much as if it had been indorsed before maturity. It is the duty of the indorsee to present such note to the maker for payment, *within a reasonable time*, and, in case of non-payment, immediately to give notice to the indorser. 6 C. 143.

One who indorses a note to which he is not a party, since the act of 1855, is to be deemed a second indorser and liable as such only. 12 Wr. 113. 9 P. F. Sm. 144. 10 Ibid. 35.

IV. THE NEGOTIABILITY OF A NOTE.

The negotiability of a note is not impaired by an assignment of it under seal indorsed, nor by a receipt indorsed of certain goods received on account. 2 W. 222.

An action may be maintained in the name of the holder of a note, which is payable to bearer. 2 W. 134.

In an action against the maker of a note, made "payable and negotiable" at a particular bank, it is not necessary to aver or prove that it was negotiated at such bank. To make such fact important, the instrument must contain words restricting its negotiability to the place designated. 2 C. 257.

A note made in favor of J. W. M., omitting the words "or order" or "bearer," and "payable and negotiable, without defalcation, at the Kensington Bank," is negotiable only, in the first instance, at the designated place. Not having been discounted or negotiated at the appointed place, a holder to whom it has been indorsed, cannot maintain an action upon it in his own name against the makers. 5 C. 529.

A certificate of deposit, payable to the depositor, or order, in currency, is not a negotiable instrument, and the indorsee thereof cannot maintain an action upon it in his own name. The mere indorsement of such an instrument, is not a legal assignment of it, such as will enable the indorsee to sue in his own name. 12 C. 498.

All bills of exchange, drafts, orders, checks, promissory notes or other instruments in the form, nature or similitude thereof, that shall or may hereafter be made or be drawn or indorsed to order within this commonwealth, upon any person or persons, body politic or corporate, copartnership, firm or institution of or in, or that shall be made payable in any other state, territory, country or place whatsoever, for any sum or sums of money, with the current rate of exchange in Philadelphia, or such other place within this commonwealth where the same may bear date, or in current funds, or such like qualifications superadded, shall be held to be negotiable by indorsement, and recoverable by the indorsee or indorsees in his, her or their own name or names, in the same manner, to all intents and purposes, as bills of exchange and promissory notes, formally drawn and ordinarily in use, and negotiable within this commonwealth, are now by law recoverable therein. Act 5 April 1849, § 11. Purd. 811.

V. CONSIDERATION.

The consideration of a promissory note may be inquired into as between the original parties, and if there be no consideration for the promise, it cannot be enforced by an action. 17 Johns. 301. 3 P. R. 284.

When a promissory note is assigned for a valuable consideration, and in the course of business, the assignee cannot be affected by any transactions between the assignor and the parties to such note, to which the assignee is not privy, and evidence to that effect is not relevant. But such evidence is relevant if it show that the assignee was a trustee, or had notice of the transactions, or did not receive the note in the usual course of business. 6 S. & R. 537. 7 W. 328.

As between the payer and payee of a negotiable note, either want or failure of consideration may be set up as a defence to an action upon it. So also as between the payer and a holder claiming by indorsement or delivery made after the note becomes due. 7 W. 130.

If the payer of a note stand by and see it assigned to a third person without giving the assignee notice of an existing defence, he shall afterwards pay the amount of the note to the assignee, although the consideration thereof should have entirely failed, and whether his conduct proceed from ignorance or design. 1 P. R. 476.

The act of 1797 was intended only to place notes, bearing date in the city or county of *Philadelphia*, on an equal footing with notes in other parts of the commercial world, but not to give the holder of a note the right to receive the whole that appears due on the face of it, under all circumstances. 1 S. & R. 180.

The consideration of a note payable "without defalcation," cannot be inquired into in an action by a *bonâ fide* holder against the maker, though the note be not dated in the city or county of *Philadelphia*, nor discounted by a bank, nor deposited in a bank for collection. 9 S. & R. 193.

In an action by the holder against the indorser of a promissory note, it is competent for the defendant to prove that the note was put into circulation by the maker fraudulently and without his knowledge. In which case he may call upon the plaintiff to show how he came by it, and what he gave for it. 5 B. 469.

The words "without defalcation," in a single bill or note *under seal*, do not preclude the obligee from showing a failure of consideration in an action by an assignee. 2 P. R. 245.

If an indorsee take a note heedlessly and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defence: much more if there be ground to suspect a secret understanding between an indorser and his indorsee, that the latter should be trustee for the former. 3 W. 25.

An advertisement in a newspaper by the maker of a note, cautioning the public against taking it, and stating that he had a legal and just defence, is not evidence to charge an indorsee with notice, although it appear that the latter was a subscriber to the paper, that it was duly sent to him, and that no complaint was made of its not being received. *Ibid.* 20.

The rule undoubtedly is, both here and in England, that where negotiable paper has been stolen or lost, or obtained by duress, or procured or put in circulation by fraud, proof of these circumstances may be given against the holder, and on such proof being given, it is incumbent on him to show himself to be a holder *bonâ fide*, and for a valuable consideration, otherwise he is considered as standing in no better situation than the former holder, in whose hands the instrument received the taint. *Ibid.* 26. 7 Barr 476.

But it is necessary that express notice should be previously given to the plaintiff, that he will be called upon at the trial to show the consideration given by him for the note. *Ibid.* 27.

If a note be given for an entire consideration, part of which is legal and part illegal, the whole contract fails, and there can be no recovery upon the note; but if there be several considerations, each having its own value fixed by a separate contract, some of which are legal and some illegal, it fails in part, and is good as to the residue. 2 W. & S. 285.

The consideration of a note for goods sold may be proved by a third person, without the production of the books in which the goods were charged. *Ibid.* 438.

In an action by an indorser against the maker of a note, the plaintiff is not bound to show what consideration he gave for the note, although notice has been given him to do so, unless the defendant has given evidence tending to show facts which ought to exonerate him, except as against a *bonâ fide* holder for value. 5 Wh. 338.

The indorsee, in a suit against the maker of a promissory note, cannot be called on to prove consideration until the defendant has shown it was obtained or put into circulation by fraud or undue means. 4 W. & S. 445.

In a suit by an indorsee against the maker of a note, the presumption is, that the plaintiff obtained it upon a valuable consideration, in the usual course of business, before it was due; and he may rely on this presumption until the defendant makes out a *primâ facie* case against him, that the note was obtained by fraud, felony or force. 4 C. 294.

If such proof be made, the holder, to entitle him to recover, must show that he was a holder by purchase for value, before the maturity of the note, and without notice of the fraud. *Ibid.*

The maker or indorser of an accommodation note cannot set up want of consideration, as a defence against it, in the hands of a third person, even though it were placed there merely as collateral security by the party entitled to negotiate it. 10 C. 138. 4 P. F. Sm. 398.

If one give a promissory note to another, in order to obtain possession of his

goods, which are wrongfully withheld, it is without consideration between the parties to it. 10 C. 142.

Whenever any value or amount shall be received as a consideration in the sale, assignment, transfer or negotiation, or in payment of any bill of exchange, draft, check, order, promissory note or other instrument negotiable within this commonwealth, by the holder thereof, from the indorsee or indorsees, or payer or payers of the same, and the signature or signatures of any person or persons represented to be parties thereto, whether as drawer, acceptor or indorser, shall have been forged thereon, and such value or amount by reason thereof, erroneously given or paid, such indorsee or indorsees, as well as such payer or payers, respectively shall be legally entitled to recover back from the person or persons previously holding or negotiating the same, the value or amount so as aforesaid given or paid by such indorsee or indorsees, or payer or payers respectively, to such person or persons, together with lawful interest thereon, from the time that demand shall have been made for repayment of the same. Act 5 April 1849, § 10. Purd. 811.

This act is only declaratory of the existing law. Notice of the forgery within a reasonable time after its discovery, and an offer to return the note, are necessary to the maintenance of an action for the recovery of the consideration paid; unless the note be shown to possess no value. 6 C. 145, 527.

VI. PROTEST AND NOTICE.

A protest for non-payment must appear under a notarial seal. 1 D. 193.

Notice of protest ought to be given in a reasonable time; and by not giving it, the holder takes the loss upon himself. 1 D. 234, 270.

No precise form of words is necessary to be used in giving notice of dishonor. It is, however, obvious that it should import that the instrument in question has been dishonored; a mere demand of payment by the holder or his attorney, without any intimation that the acceptor or maker has not paid it, will not suffice. And it has been laid down "that the purpose of giving notice is not merely that the indorser shall know that the note is not paid, for he is chargeable only in the second degree, but to render him liable you must show that the holder looked to him for payment, and give him notice that he did so;" and that the notice must report that the holder considers the indorser liable, and expects payment from him. Chitty on Bills 71. Verbal notice to the indorser of non-payment by the maker is sufficient. 1 R. 335.

It is not necessary that actual notice should be given in every case; but it will be sufficient, and considered *constructive* notice, if it be left at the house of the indorser, or sent by mail, even though the letter should *miscarry*. 5 S. & R. 322. 8 R. 355.

Notice left with the family of a seafaring man, during his absence at sea, is sufficient. 5 B. 542.

Demand and notice may be waived by the indorser. 8 S. & R. 438.

A notice sent through the post-office to the maker of a note is not such a demand as the law requires, when his residence is supposed to be ascertained. 3 Wh. 116.

Where the notary was informed that the maker resided in or near a post town in an adjoining county, it was *held*, that a demand sent through the post-office was not sufficient to charge the indorser. *Ibid*.

A notice of protest sent by mail is sufficient to charge the indorser, but the fact of putting the letter into the post-office must be positively proved, and without such proof it is error to submit it to the jury. 9 W. 273.

A presentment at the maker's usual place of business, during business hours, there being no one there to answer, is a sufficient demand to charge the indorser; for the maker is bound to have a suitable person there to answer inquiries, and pay his notes, if there demanded. 11 C. 250.

If the maker of a note, payable at a bank, have no funds in the bank when it falls due, demand of payment is unnecessary. 9 C. 134.

If the party die before the note becomes due, notice should be given to his executor or administrator, if he has been appointed and qualified himself to act, otherwise it may be left at the dwelling-house of the deceased. 17 Johns. 25.

In case of the death of the indorser of a note shortly before its maturity, if his decease, and the granting of letters testamentary to his executors, be unknown to the holder, it is sufficient, in order to charge his estate, to direct notice of non-payment to the deceased indorser, by name, at the post-office nearest his late place of residence. 10 C. 54.

A notice of the dishonor of a note, indorsed by the testator, given to one named as executor in the will, who had not joined in the probate or qualified as executor, but who had not renounced at the time of the notice, and who did not refuse the notice, is sufficient to charge the estate. 4 C. 459.

The death of the maker of a promissory note, before its maturity, and the granting of letters testamentary to the indorser and another, as his executors, does not dispense with the necessity of giving notice of non-payment to the indorser; and in default of such notice, he is discharged from all personal liability. 7 C. 271.

A tender in gold, made by an acceptor of a bill, to its holder, after it has been handed to a notary for protest, though within the business hours of brokers, is too late to save protest or notarial fees. 1 J. 456.

Payment of all notes, checks, bills of exchange or other instruments negotiable by the laws of this commonwealth, and becoming payable on Christmas day, or the first day of January, the fourth day of July, or any other day fixed upon by law, or by the proclamation of the governor of this commonwealth as a day of general thanksgiving, or for the general cessation of business in any year, (a) shall be deemed to become due on the secular day next preceding the aforementioned days, respectively; on which said secular days demand of payment may be made, and in case of non-payment or dishonor of the same, protest may be made, and notice given in the same manner as if such notes, checks, bills of exchange or other instruments fell due on the day of such demand; and the rights and liabilities of all parties concerned therein, shall be the same as in other cases of like instruments legally proceeded with: *Provided*, that nothing herein contained, shall be so construed as to render void any demand, notice or protest made or given as heretofore, at the option of the holder, nor shall the same be so construed as to vary the rights or liabilities of the parties to any such instruments heretofore executed. Act 11 April 1848, § 3. *Purd.* 811.

VII. NOTES PAYABLE IN SPECIFIC ARTICLES.

The general rule of the common law is, that when no time or place is fixed by the contract for the payment or delivery of specific property, there must be an offer or tender, within a reasonable time, to pay or deliver. 2 P. R. 63.

If the time of delivery be fixed by the contract, but not the place, the debtor must seek the creditor, if within the state, and tender or offer to perform the stipulation contained in the contract; and if the property be portable, it must be taken to the creditor and delivered to him; or at his residence. 2 P. R. 63. 8 W. & S. 295.

Even in such case, however, he is not bound to carry the property about seeking the creditor, in order to tender it to him; but he must ask the creditor to appoint a reasonable place to receive it. 7 C. 265.

If the property be ponderous, then the debtor must call upon the creditor, *a reasonable time before*, and ask him to appoint a time and place, when and where he will receive it. 2 P. R. 63.

If a certain time and place be fixed for the delivery of the articles, it is not necessary that the plaintiff should prove a demand at the time and place; but to defeat the plaintiff's action, the defendant must show that he was ready at the time and place, and continued ready. 7 W. 380.

Such a contract is satisfied, by a delivery of the articles at the time and place appointed, although the plaintiff was not there to receive them. 5 W. 262. 4 Barr 171.

(a) This provision is extended to the 22d February by act 7 May 1864. *Purd.* 1372. And to Good Friday, by act 12 April 1869. *Purd.* 1583. The latter act declares that Good

Friday shall be deemed and proclaimed as a public holiday, and shall be duly observed as such.

A contract to pay a given sum in farm produce, or in manufactured articles, or in store goods, has not the same construction; in such case, the creditor must call upon the debtor and select and demand what he will have. 2 W. 140. 7 C. 268.

A firm, who were large dealers in watches and jewelry, accepted an order on them, to pay "J. M. P. or bearer, \$100 in watches or a watch, as may suit a purchaser:" *held*, that the presumption was that they undertook to pay the order from their stock on hand, when it should be presented; and that the holder had no right to insist on receiving a description of watch which they had not on hand, and which they would be obliged to procure elsewhere. 6 W. & S. 381.

VIII. OF ACTIONS ON PROMISSORY NOTES.

An indorser on a promissory note cannot be sued on and before the full expiration of the last day of grace, although the note has been protested for non-payment at the close of the usual bank hours, and before the writ was issued. 2 M. 353.

The last indorser of a negotiable note having possession of it, has a right of action against the maker, and any of the prior indorsers. 4 Wh. 489. 9 W. 139.

A negotiable note, payable to the order of the plaintiff, need not be indorsed by him before suit brought. 1 W. & S. 418.

An action cannot be maintained in the name of an indorsee upon a promissory note payable to A. *only*, and not his order. 2 D. 249.

An action may be maintained in the name of the *holder* of a note which is payable to *bearer*, although it be transferred after it became due. 2 W. 134.

Where an instrument in the form of a promissory note for the payment of a certain sum of money to A. or bearer, is signed by three persons, and a seal affixed at the signature of one of them, a joint action cannot be maintained against the three, and if the seal be affixed afterwards and in the absence of the other two, the instrument is rendered void as to the latter. 5 Wh. 568.

The last indorser of a negotiable note having possession of it, has a right of action against the maker and any of the prior indorsers without a previous resort to the payee, for whose accommodation it had been discounted. 9 W. 96.

In an action by the holder against the indorser of a negotiable note, the maker is an incompetent witness, both on the ground of interest and general policy. 3 W. & S. 557.

Where a promissory note is made expressly payable at a particular place, and is dishonored there, so that the holder is compelled to seek payment elsewhere, he is entitled to the difference of exchange, if there be any. 3 C. 241.

Prothonotary.

A PROTHONOTARY is a chief officer or clerk in a court of law. Cowell.

The prothonotaries and clerks of the several courts of this commonwealth, shall have and exercise respectively, in the courts to which they severally belong, and with full effect in term time and vacation, the powers and authorities following, to wit: They shall have power:

1. To sign and affix the seal of the respective court to all writs and process, and also to the exemplifications of all records and process therein.
2. To take bail in civil actions, depending in the respective court.
3. To enter judgments at the instance of plaintiffs, upon the confessions of defendants.
4. To sign all judgments.
5. To take the acknowledgment of satisfaction of judgments or decrees entered on the record of the respective court.
6. To administer oaths and affirmations in conducting the business of their respective officers. Purd. 818.

The prothonotary may appoint a deputy, who may do all acts that his principal can do; 17 S. & R. 285; as, administer an oath; 5 S. & R. 333; 16 Ibid. 65; 9 Barr 19: attest a writ; 16 S. & R. 65; 9 Barr 19: or take a recognisance; 17 S. & R. 282.

And his deputation will be presumed when it appears on the record that he so acted. 9 Barr 19.

But he cannot execute a power of attorney to the prothonotary to discontinue a suit. 1 R. 341.

The prothonotary has no general power to administer judicial oaths, by virtue of his office; he can only do so where the power is specially conferred upon him by statute. 1 P. R. 14. 5 W. & S. 179. The act 22 March 1859, gives him such general power, (except in Philadelphia); but he is not compellable to administer an oath, except in matters pertaining to the business of his office. Purd. 818.

He is not authorized by the act of 1834, to take a recognisance of bail for stay of execution, without the previous approval of the court. 1 W. & S. 141.

Judgment may be entered by the prothonotary, upon a written order, sent to him by the defendant, confessing judgment in an action of debt, and directing him to enter judgment thereon. 13 S. & R. 196. And a paper authorizing the prothonotary to enter judgment, need not be under seal. 8 S. & R. 567. A defendant may appear before the prothonotary and confess judgment, in person. 4 W. 441.

The prothonotary has no power to receive the amount of a judgment. 4 R. 364. 1 Barr 156. 3 Barr 351. But if the amount for which a judgment has been recovered be claimed by different persons, and the defendant, without any order of court, pay it in to the prothonotary, it will be deemed a payment to him in his official capacity, and his sureties will be liable for his faithful appropriation of the money. 5 W. & S. 342.

A prothonotary as such, is authorized to receive costs due to his predecessor, and his sureties are liable for it. 2 C. 395.

A prothonotary who wilfully neglects any duty which he is bound to perform, is liable upon his official bond, to any one who may be thereby injured. 1 R. 249. 2 J. 227.

An action does not lie by the prothonotary of a court to recover his fees in a cause which is still depending. 4 B. 167.

Where a judgment was obtained against a defendant, and the debt, interest and costs, were arranged by the parties thereto; *held*, that the officers, under the practice which had so long prevailed, might proceed to collect their fees from the defendant, by suing out an execution against him, in the name of the plaintiff, notwithstanding the plaintiff's agreement to pay such fees in exoneration of the defendant. 3 Barr 423.

The party for whom the services are done is responsible to the prothonotary for his fees, and the latter may sue for them like other debts, either before a justice of the peace, or in the proper court when the amount exceeds 100 dollars. But he

has no right to issue an execution for his fees. The fees are not chargeable to the attorney, unless he becomes security. 13 S. & R. 100.

I have always considered it to be the general understanding that the plaintiff is liable to the officers for their fees, in case they cannot be procured from the defendant. 4 B. 172. 16 S. & R. 156.

The general practice, both before and since the revolution, has been, for the prothonotary to receive immediate payment for original writs, writs of removal, subpoenas, searches by the parties, copies of papers in the cause, and rules of court. But for other services, such as the entry ofoyer and special imparlance, filing declarations, entries of pleas, and the like, the costs have been considered as abiding the event of the action. Ibid.

Purchasers at Sheriffs' Sales.

I. Act of assembly.

II. Forms.

I. ACT 16 JUNE 1836. Purd. 450.

SECT. 105. Whenever any lands or tenements shall be sold by virtue of any execution (a) as aforesaid, the purchaser (b) of such estate may, after the acknowledgment of a deed therefor to him, (c) by the sheriff, give notice to the defendant, (d) as whose property the same shall have been sold, or to the persons in possession of such estate under him, by title, derived from him subsequently to the judgment under which the same were sold, and require him or them, to surrender the possession thereof to him, within three months from the date of such notice.

SECT. 106. If the defendant, or any person in possession under him as aforesaid, shall refuse or neglect to comply with the notice and requisition of the purchaser, as aforesaid, such purchaser, or his heirs or assigns, may apply by petition to any two justices of the peace, or aldermen of the city, town or county where such real estate may be, setting forth:

1. That he purchased the premises at a sheriff's or coroner's sale.
2. That the person in possession at the time of such application, is the defendant, as whose property such real estate was sold, or that he came into possession thereof under him.
3. That such person in possession had notice, as aforesaid, of such sale, and was required to give up such estate, three months previously to such application.

SECT. 107. If the applications as aforesaid, shall be verified by the oath or affirmation of the petitioner, or if probable cause to believe the facts therein set forth be otherwise shown, the said justices are hereby enjoined and required, forthwith to issue their warrant, in the nature of a summons, directed to the sheriff of the county, commanding him (e) to summon a jury of twelve men of his bailiwick, to appear before the said justices, at a time and place to be specified, within four days next after the issuing thereof, and also, to summon the defendant, or person in possession, as aforesaid, at the same time to appear before them and the said jury, &c.

(a) An order of sale awarded in an action of partition, is not within the act. *Fitzgibbons v. Keller*, Sup. Court, 31st January 1852. MS. The acts 6 April 1802, (3 Sm. 530,) and 14 March 1814, (6 Sm. 132,) extend to sales under any execution whatever.

(b) By act 9th April 1849, § 16, the like remedy is given to all purchasers of real estate sold under order of the orphans' court.

(c) Such notice cannot be given before the acknowledgment. 5 S. & R. 157. The sheriff's deed is full and conclusive evidence of the purchase. 6 Barr 239.

(d) Such proceedings will lie against a corporation. 6 P. F. Sm. 198. Where the de-

fendant is in possession at the time of the sale and sale, he cannot make any defence against the purchaser; by the purchase under regular process, the purchaser acquires a right, at least, to the possession of the debtor, who alone will support ejectment against him. 2 Barr 275. 2 Barr 27. 2 Y. 443. 8 S. & R. 317. 1 R. 223. 3 W. 227. 6 H. 454. 6 C. 352.

(e) No person but the sheriff himself is competent to perform the duty of selecting jurors; it is a judicial act, requiring judgment and discretion, which cannot be delegated to another. 8 Barr 445, 452.

show cause, if any he has, why delivery of the possession of such lands or tenements, should not be forthwith given to the petitioner.

SECT. 108. If at the time and place appointed for the hearing of the parties, the defendant, or person in possession, as aforesaid, shall fail to appear, the said justices shall require proof, by oath or affirmation, of the due service of such warrant upon him, and of the manner of such service: *Provided*, That such service shall have been made three days before the return.

SECT. 109. If the defendant, or other person in possession under him, as aforesaid, shall be duly summoned as aforesaid, or if he shall appear, the said justices and jury shall proceed to inquire—

1. Whether the petitioner, or those under whom he claims, has, or have, become the purchaser of such real estate, at a sheriff's or coroner's sale, as aforesaid, and a sheriff's or coroner's deed for the same, duly acknowledged and certified, shall be full and conclusive evidence of that fact, before such justices and jury.

2. Whether the person in possession of such real estate was the defendant in the execution under which such real estate was sold, or came into the possession thereof under him, as aforesaid.

3. Whether the person so in possession, has had three months' notice of such sale, previous to such application. (a)

SECT. 110. Upon the finding of the facts as aforesaid, (b) the justices shall make a record thereof, and thereupon, they shall award the possession of such real estate to the petitioner.

SECT. 111. In case of a finding for the petitioner (c) as aforesaid, the jury shall assess such damages (d) as they shall think right, against such defendant, or person in possession, for the unjust detention of the premises, and thereupon, the said justices shall enter judgment for the damages assessed, (e) and reasonable costs, (g) and such judgment shall be final and conclusive to the parties.

SECT. 112. The said justices shall thereupon issue their warrant, directed to the sheriff, commanding him forthwith to deliver to the petitioner, his heirs or assigns, full possession of such lands or tenements, and to levy the costs taxed by the said justices, and the damages assessed by the jury, as aforesaid.

SECT. 113. No *certiorari*, which may be issued to remove such proceedings, shall be a supersedeas, or have any effect to prevent or delay the execution aforesaid, or the delivery of the possession, agreeably thereto. (h)

SECT. 114. If the person in possession (i) of the premises shall make oath or affirmation before the justices—

1. That he has not come into possession, and does not claim to hold the same (k) under the defendant in the execution, but in his own right, or

2. That he has come into possession under title derived to him from the said defendant, before the judgment (l) under which the execution and sale took place,

(a) It is sufficient, if the inquest find that the purchaser gave "due and legal notice" to the defendants. 1 R. 317. The finding is conclusive of the question of notice. 6 P. F. Sm. 198.

(b) If the inquest cannot agree, they may be discharged, and a new jury summoned. 4 W. & S. 120.

(c) In analogous proceedings, under the landlord and tenant law, the landlords are not concluded by the finding of the jury, although the tenants are; they may renew their complaint before other justices. 8 Barr 414.

(d) It is the duty of the jury to assess the damages; and it is error for the justices to do so. 3 Am. L. J. 130.

(e) Such judgment cannot be certified to the common pleas, under the act of 1810, in order to create a lien on real estate. Gault v. McKinney, Common Pleas, Philadelphia, 4th February 1854. MS. But an action of debt may be maintained upon it; 2 Phila. 71: *contra*, 14 S. & R. 162.

(g) The practice is for the justices to give judgment for a gross sum for costs; and the

court, on *certiorari*, will presume that they were duly taxed. 5 W. 17.

(h) A writ of error is the proper remedy for the revision of the judgment of the common pleas. 1 R. 317. A *certiorari* brings into the common pleas nothing but the record of the proceedings of the justices and jury; and on error, nothing else is before the supreme court. 6 P. F. Sm. 198.

(i) The defendant in the execution cannot stay proceedings under this section by making affidavit that he is in possession of a contract with the purchaser at sheriff's sale, on which he has paid a part of the consideration-money. *Cress v. Richter*, Sup. Court, 7th April 1853. MS. He must show either a conveyance or such an equitable right to one, as would sustain a decree on specific performance. 2 Gr. 417.

(k) An affidavit, that he does not hold possession of the whole of the premises under the defendant, is insufficient; he should explain what part he so held. 5 S. & R. 157.

(l) As to what is a sufficient averment of title derived from the defendant before the judgment; see 3 S. & R. 95. 5 W. 17.

and shall become bound in a recognisance, with one or more sufficient sureties, in the manner hereinafter provided, the said justices shall forbear to give the judgment aforesaid. (a)

SECT. 115. If the person in possession of the premises shall make oath or affirmation, before the justices, that he does not hold the same under said defendant, but under some other person, whom he shall name, the said justices shall forthwith issue a summons to such person, requiring him to appear before them, at a certain time therein named, not exceeding thirty days thence following, and if at such time, the said person shall appear, and make oath or affirmation, that he verily believes that he is legally entitled to the premises in dispute, and that he does not claim under the said defendant, but by a different title, or that he claims under the said defendant by title derived before the judgment aforesaid, and shall enter into a recognisance, with sureties, as aforesaid; in such case, also, the justices shall forbear to give judgment.

SECT. 116. The oath or affirmation which shall be administered to such claimant, shall be in the following form, to wit:

I do (swear or affirm) that I verily believe that I am legally entitled to hold the premises in dispute, against the petitioner—that I do not claim the same by, from or under the defendant, as whose property the same were sold (as the case may be)—that I do not claim the same by, from or under the defendant, as whose property the same were sold, by title derived to me subsequently to the rendition of the judgment under which the same were sold, but by a different title, &c.

SECT. 117. The recognisance aforesaid, shall be taken in a sum fully sufficient to cover and secure, as well the value of the rents and mesne profits of such lands or tenements, which may have accrued, and which may be expected to accrue, before the final decision of the said claim, as all costs and damages, with condition that he shall appear at the next court of common pleas or district court, having jurisdiction, and then and there plead to any declaration in ejectment, which may be filed against him, (b) and thereupon proceed to trial, in due course of practice, (c) and in case he shall fail therein, (d) that he will deliver up the said premises to the purchaser, and to pay him the full value of the rents or mesne profits of the premises, accrued from the time of the purchase.

SECT. 118. If such recognisance shall be forfeited, the justices aforesaid shall proceed to give judgment, and cause such real estate to be delivered up to the petitioner, in the manner hereinbefore enjoined and directed.

III. NOTICE.

To E. F.

Philadelphia, February 1st 1860.

SIR,—You are hereby notified and required to quit, remove from and surrender up to me, possession of the premises [*here describe the premises*] which you now occupy, and which I have purchased at sheriff's sale, as it is my desire to have possession of the same.

A. B.

PETITION.

To G. E. and J. C., Esquires, two of the Aldermen of the City of Philadelphia:

THE COMPLAINT of [A. B.] most respectfully sets forth: That he the said [A. B.] on the [first] day of [January,] A. D. 1860, purchased at sheriff's sale, [*here describe the pre-*

(a) It is sufficient if the oath and recognisance are tendered at any time before judgment. 8 S. & R. 95.

(b) Where a cause is certified into court, under this section, it is equivalent to a removal by *certiorari*, to a higher court for trial, and all the proceedings thereafter are part of the same case that was begun before the justices, and not a new cause; and damages for wrongful detention are properly included in the verdict, even though notice of such claim be not given. 6 C. 852.

(c) The issue is sufficiently formed in the proceedings before the justices; and it is, therefore, not error to try the cause without other pleadings. 5 W. 298.

(d) On the trial, the defendant cannot give evidence of title inconsistent with the affidavit and claim before the justices. 1 Barr 188. The only matter in issue is the title averred by the defendant in his affidavit. 2 W. 142. He is bound to show that he has a title to the possession, which he did not obtain under the defendant in the execution; or which he obtained under him before the judgment on which the execution issued. 6 C. 352. He may show a title derived from a sheriff's sale of the land to him as the property of the plaintiff, after the commencement of the proceedings before the justices, and whilst the cause is pending in court, and thus defeat the plaintiff's recovery. 9 W. 149.

wises.] with the appurtenances, and that [E. F.,] now in possession thereof, is the defendant, as whose property the said premises were sold; and that he the said [A. B.,] being desirous to possess himself of the said premises, for that purpose did, on the [first] day of [February] last past, require the said [E. F.] to surrender unto him the said [A. B.,] possession of the said premises so occupied by him, and that the said [E. F.] hath hitherto refused, and still doth refuse to comply therewith; that three months having elapsed since the service of the said notice, he makes this his complaint, that such proceedings may be taken by you, as are directed by the act of assembly in such case made and provided.

A. B.

Sworn before us, this [fourth] day of [May,] A. D. 1860.

G. E., Alderman.

J. C., Alderman.

PRECEPT.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Sheriff of Philadelphia county, greeting:

WHEREAS, a petition, verified by the [oath] of [A. B.,] the petitioner, was this day presented to G. E., Esq., and J. C., Esq., two of our aldermen of the city of Philadelphia, setting forth, That he the said [A. B.,] on the [first] day of [January,] 1860, purchased at sheriff's sale, [here describe the premises,] with the appurtenances; and that [E. F.,] now in possession thereof, is the defendant, as whose property the said premises were sold; that being desirous to possess himself of the premises, for that purpose he the said [A. B.,] did, three months previously to his application to us, require of the said [E. F.] to surrender unto him the said [A. B.,] possession of the said premises so occupied by him. Therefore we command you that you summon twelve men of your bailiwick, so that they be and appear before our said aldermen, at [the house of X. Y., No. 250 North Tenth street, in the said city,] on the [seventh] day of [May,] 1860, at [ten] o'clock in the forenoon of that day; and that you also summon the said [E. F.,] so that they be and appear before our said aldermen and the said jury, at the day and place last aforesaid, to show cause, if any they have, why delivery of the possession of said premises should not be forthwith given to the said [A. B.,] according to the form and effect of the act of the general assembly in such case made and provided;—and this you shall nowise omit. And have you then and there this writ. Witness the said G. E., Esquire, and J. C., Esquire, at the city of Philadelphia aforesaid, the [fourth] day of [May] 1860.

G. E. [SEAL.]

J. C. [SEAL.]

Return of the Sheriff.—To the aldermen within named, I do certify that I have summoned twelve good and lawful men of my bailiwick, and have also summoned the within-named E. F. to be and appear at the day and place within mentioned, as within I am commanded.

So answers,

W. D., Sheriff.

Oath of Jurors.—"You and each of you do swear [or affirm] that you will well and truly inquire of and concerning the premises in this precept mentioned, and assess such damages (if any) as the complainant hath sustained thereby."

INQUISITION.

INQUISITION, taken at [the house of X. Y., No. 250 North Tenth street, in the city of Philadelphia,] on the [seventh] day of [May,] in the year eighteen hundred and sixty, before G. E., Esq., and J. C., Esq., two of our aldermen of the said city, by the oaths of [M. R., S. T., &c.,] and the solemn affirmations of [N. H., O. K., &c.,] twelve good and lawful men of the said city, who upon their oaths and affirmations respectively do say, that [A. B.,] on the [first] day of [January,] in the year one thousand eight hundred and sixty, purchased at sheriff's sale, [here describe the premises,] with the appurtenances, and that [E. F.] is now in possession thereof, and is the defendant, as whose property the said premises were sold; and the said [A. B.,] being desirous to possess himself of the said premises, for that purpose did, on the [first] day of [February,] 1860, demand of and require the said [E. F.] to surrender unto him the said [A. B.,] possession of the said premises so occupied by him, and that the said [E. F.] hath hitherto refused, and still doth refuse to comply with the said demand and requisition to remove from and leave the said premises. And the said jurors do assess damages against the said [E. F.,] for the unjust detention of the said premises, at [one hundred dollars,] besides all costs of suit. Whereupon it is considered by the said aldermen, that possession of the said premises be given to the said [A. B.,] and that he recover of the said [E. F.] his damages aforesaid, together with the costs of suit, amounting to [thirty dollars.]

IN TESTIMONY WHEREOF, as well the said aldermen as the said jurors have hereunto set their hands and seals, the day and year first above written, at the city aforesaid.

M. R., S. T., &c., seals.

G. E. [SEAL.]
J. C. [SEAL.]

RECORD.

BE IT REMEMBERED, that on the [fourth] day of [May.] in the year one thousand eight hundred and sixty, at the city of Philadelphia, due proof was made before us, G. E., Esq., and J. C., Esq., two of our aldermen of the said city, that [A. B.,] on the [first] day of [January.] in the year eighteen hundred and [sixty,] purchased at sheriff's sale, [*here describe the premises,*] with the appurtenances, and that [E. F.,] now in possession thereof, is the defendant, as whose property the said premises were sold; and the said [A. B.,] being desirous to possess himself of the said premises, for that purpose did, on the [first] day of [February] 1860, demand of and require the said [E. F.] to surrender unto him the said [A. B.,] possession of the said premises so occupied by him; and that the said [E. F.] hath hitherto refused, and still doth refuse, to comply with the said demand and requisition to remove from and leave the said premises. Whereupon the said [A. B.,] then, to wit, on the said [fourth] day of [May.] eighteen hundred and [sixty,] at the city aforesaid, prayed us the said aldermen, that a due remedy in that behalf be provided for him, according to the former act of the general assembly of the state of Pennsylvania, in such case made and provided; upon which proof and complaint, the sheriff of the county of Philadelphia is commanded that he summon twelve men of his bailiwick, so that they be and appear before us the said aldermen, at the [house of X. Y., No. 250 North Tenth street,] on [Friday,] the [seventh] day of [May] 1860, at ten o'clock in the forenoon of that day; and that he also summon the said [E. F.,] so that he be and appear before us the said aldermen and the said jury, at the day and place last aforesaid, to show cause, if any he has, why possession of the said premises should not be forthwith made to the aforesaid [A. B.] Afterwards, to wit, on the said [seventh] day of [May] 1860, at the [house of X. Y. aforesaid,] W. D., Esq., sheriff of the county of Philadelphia, appears before us the said aldermen, and returns, that by virtue of the said warrant to him directed, he had summoned twelve good and lawful men, to wit: [M. R., S. T., &c.,] and had also summoned the said [E. F.] to be and appear at this day and place, as by the said warrant he was commanded; and the said jury being called, appear, and are severally sworn and affirmed. And the said [E. F.] also appears; and we the said aldermen and the aforesaid jury proceed to hear and examine the proofs and allegations offered by the said parties, and do find that the said [A. B.,] on the [first] day of [January] 1860, purchased at sheriff's sale, [*here describe the premises,*] with the appurtenances; and that the said [E. F.] is in possession thereof, and is the defendant, as whose property the said premises were sold; and the said [A. B.,] being desirous to possess himself of the said premises, for that purpose did, on the [first] day of [February] 1860, demand of and require the said [E. F.] to surrender unto him the said [A. B.,] possession of the said premises so occupied by him; and that the said [E. F.] hath hitherto refused, and still doth refuse, to comply with the said demand and requisition to remove from and leave the said premises; and the said jury assess the sum of [one hundred dollars,] for the damages of the said [A. B.,] occasioned by the unjust detention of the said premises. Therefore it is considered and adjudged by us the said aldermen, that the said [A. B.,] shall and do recover and have of the said [E. F.,] as well the said sum of [one hundred dollars,] for his damages aforesaid, as [thirty dollars] for his reasonable costs, by him expended in and about this suit in this behalf; concerning which the premises aforesaid we do make this our record.

IN TESTIMONY WHEREOF, we the said aldermen, to this our record, have set our hands and seals, at the city of Philadelphia aforesaid, the [seventh] day of [May,] one thousand eight hundred and [sixty.]

G. E. [SEAL.]
J. C. [SEAL.]

WRIT OF POSSESSION.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Sheriff of Philadelphia county, greeting:

WHEREAS, due proof hath been made before G. E. and J. C., Esquires, two of the aldermen of the said city, and twelve good and lawful men, summoned for that purpose, that [A. B.,] on the [first] day of [January,] A. D. 1860, purchased at sheriff's sale, [*here describe the premises,*] with the appurtenances, and that [E. F.] is now in possession thereof, and is the defendant, as whose property the said premises were sold; and that the said [A. B.,] being desirous to possess himself of the said premises, for that purpose did, on the [first] day of [February] 1860, demand of and require the said [E. F.] to surrender unto him the said [A. B.,] possession of the said premises so occupied by him, and that the said [E. F.] hath hitherto refused, and still doth refuse, to comply therewith;

all which premises being duly found by the said aldermen and jurors, according to the form of the act of general assembly in such case made and provided: We therefore command you, the said sheriff, forthwith to deliver to the said [A. B.] full possession of the premises aforesaid; and we also command you, that of the goods and chattels of the said [E. F.] in your bailiwick, you cause to be levied as well the sum of [one hundred dollars,] which to the said [A. B.] was awarded for his damages sustained by the unjust detention of the premises, as also [thirty dollars,] for his costs and charges by him in and about his suit in that behalf expended, whereof the said [E. F.] is convict. And hereof fail not. Witness the said G. E. and J. C., at the city aforesaid, the [seventh] day of [May,] A. D. one thousand eight hundred and sixty.

G. E. [SEAL.]
J. C. [SEAL.]

Rape.

I. Provisions of the Penal Code.
II. Judicial decisions.

III. Form of a warrant for a rape.

I. ACT 31 MARCH 1860. Purd. 233.

SECT. 91. If any person shall have unlawful carnal knowledge of a woman, forcibly and against her will; or who, being of the age of fourteen years and upwards, shall unlawfully and carnally know and abuse any woman child under the age of ten years, with or without her consent; such person shall be adjudged guilty of felonious rape, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding fifteen years.

SECT. 92. It shall not be necessary, in any case of rape, sodomy or carnal abuse of a female child, under the age of ten years, to prove the actual emission of seed, in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

SECT. 93. If any person shall be guilty of committing an assault and battery upon a female, with intent, forcibly and against her will, to have unlawful carnal knowledge of such female, every such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding five years.

II. Rape is the carnal knowledge of a female, forcibly and against her will. 3 Chit. Cr. L. 570. It is not, however, necessary in order to constitute this offence, that the sexual intercourse should have been actually against the will of the prosecutrix; it is enough that it was obtained without her consent. Thus, where a medical man had sexual connection with a girl of the age of fourteen, who was ignorant of the nature of the act, and made no resistance, solely from the *bona fide* belief that the defendant was, as he represented, treating her medically, with a view to her cure, it was held to be a case of rape. 1 Eng. L. & Eq. 554.

So, it is rape, to have carnal knowledge of a female, whilst in a state of insensibility, and without power over her will, whether that state be caused by the defendant or not; if he knew that she was in such state. 1 Den. C. C. 90. Wh. & St. Med. Jur. § 458-9. 10 Pitts. L. J. 209.

It is also rape to have carnal intercourse with an idiotic or insane woman, though her consent be given, she being incapable of intelligent submission. 10 West. L. J. 501-5. Wh. & St. Med. Jur. § 463, n.

It has been held to be rape, fraudulently to have carnal knowledge of a woman, under circumstances which induce her to suppose it is her husband. 1 Whart. C. L. § 1144. 7 Conn. 54. But the better opinion, both in England and America, would appear to be, that such an act is not rape, where the intention of the defendant was to have connection by fraud, but not by force. R. & R. 487. 29 Eng. L. & Eq. 542. 4 Leigh 648. 2 Swan 394. 30 Ala. 54. When the consent of the

female is obtained, through by fraud or deception, there is no rape. 10 Pitts. L. J. 209.

It must appear that the offence was committed without the consent of the woman; but it is no excuse that she yield at last to the violence, if her consent was forced from her by fear of death or by duress. Nor is it any excuse (for the offender) that she consent after the fact, or that she was a common strumpet; for she is still under the protection of the law, and may not be forced; or that she was first taken with her own consent, if she was afterwards forced against her will; or that she was a concubine to the ravisher, for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment. All these circumstances, however, are material to be left to the jury (and the consideration of the justice) in favor of the accused, more especially in doubtful cases, and where the woman's testimony is not corroborated by other evidence. Ros. Cr. Law 709. See 3 Am. L. J. 318.

A man cannot be himself guilty of a rape on his own wife, for the matrimonial consent cannot be retracted. 1 Hale P. C. 629. But he may be criminal in aiding and abetting others in such a design. 1 Harg. St. Tr. 388.

III. FORM OF WARRANT FOR A RAPE.

COUNTY OF NORTHAMPTON, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said County, greeting :

You are hereby commanded to take the body of [A. B.,] if [he] be found in the said county, and bring [him] before [J. R.,] one of our justices of the peace in and for the said county, to answer the commonwealth upon a charge, founded on the oath of C. D., of having, on the eighth day of this month, May, in the woods at the Cross Roads, two miles from Easton, on the road to Bethlehem, overtaken the defendant, and there feloniously did, by force and violence, ravish and have carnal knowledge of her, the said C. D., against her will, and further to be dealt with according to law. And for so doing, this shall be your warrant. Witness the said [J. R.,] at Easton, who hath hereunto set his hand and seal, the [ninth] day of [June,] in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL]

The proceedings before the justice are similar to what they are in other cases of a criminal nature. But he has no power to admit to bail.

Receipts.

RECEIPTS are acknowledgments in writing of having received a sum of money or other value. A receipt is either a voucher for an obligation discharged or one incurred. Whart. L. Dict. 640.

A receipt is only evidence of a payment and satisfaction, and may be explained by parol or other evidence. 1 W. C. C. 328. 3 N. Y. 88.

A receipt *in full* of all demands is only *prima facie* evidence of what it imports to be; and upon satisfactory proof being made that it was obtained by fraud, or given either under a mistake of facts or an ignorance of the law, it may be inquired into and corrected in a court of law, as well as in a court of equity. 1 Pet. C. C. 182. 5 Gilm. 437.

A receipt in full, on a settled account, is not *conclusive* on the parties, but is merely *prima facie* evidence of what it imports, and may be opened if it be unfairly obtained, or be given under a mistake of facts, or of the legal rights of the party complaining, for the correction of such errors as may be made out by proof. But yet if it be the result of a compromise, it is binding. 4 W. C. C. 562.

Plaintiff paid money for goods sold to him by defendant, and lost the receipt; he was sued and obliged to pay the money over again. After this, he found the receipt, and brought an action to recover the money back. He was nonsuited by Lord KENYON, and a new trial was refused, being applied for on the ground of evidence discovered *after* the trial. 7 T. R. 269.

If the question be whether a receipt, to which there is a subscribing witness, was given, the witness must be called, but the fact of the payment of the money may be proved by any witness. 6 B. 16.

An acknowledgment in the body of a deed, of the payment of purchase-money, and a receipt indorsed for the same, are not conclusive evidence of payment, nor a bar to a suit for such purchase-money. 6 S. & R. 309.

And such receipt is not conclusive of the fact either by plea in bar, as an estoppel, or in evidence to a jury. 3 Ibid. 564. 12 Ibid. 131. It is no evidence whatever of the fact of payment, against a stranger. 4 C. 419.

A receipt for the price of goods, given by an agent of a consignee, is a receipt by his employer, so as to enable the consignor to maintain an action for money had and received, against the consignee. 4 Wh. 526.

A receipt given by a third person, is not competent evidence to establish the payment of money. The fact must be attested by him on oath, in the ordinary way. 4 W. 424.

To the rule that payments to any other person than the party to a suit must be proved by a witness, a payment to a public officer is an established exception. 3 Ibid. 73.

Thus a receipt for taxes, given by a collector of taxes, is admissible, without producing the officer. So of the duplicate of the assessment of a township. Ibid.

A receipt does not exclude parol evidence of the payment. 4 Esp. 213.

It is competent to give parol evidence to explain a written receipt, and show that it was given for a note and not for money. 1 W. & S. 321. In this case, Judge SERGEANT, in delivering the opinion of the court, said, "Receipts are open to explanation by parol evidence of what occurred at the time between the parties, and of the circumstances and conditions under which they were given."

Records.

I. ACT 31 MARCH 1860. Purd. 220.

SECT. 15. If any prothonotary, clerk, register, public officer or other person, shall fraudulently make a false entry in, or erase, alter, secrete, carry away or destroy any public record, or any part thereof, of any court or public office of this commonwealth, such person shall be guilty of a misdemeanor, and, on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years.

II. Every registry or enrolment, directed by law, and preserved for the use of the public, such as the books of the land office and board of property, are protected by this act. 3 S. & R. 207.

Riots, Routs and Unlawful Assemblies.

I. What constitutes a riot, rout and unlawful assembly.

II. Provisions of the Penal Code.

III. How a riot may be suppressed.

IV. Form of a warrant to arrest rioters.

V. Prize-fighting.

I. A **RIOT**, is a tumultuous disturbance of the public peace, by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them; and afterwards putting the design into execution in a terrific and violent manner, whether the object in question be lawful or otherwise. 1 Hawk. P. C. c. 65.

A **ROUT**, is where three or more meet to do an unlawful act, upon a common quarrel; as forcibly to break down fences, &c., upon any claim or pretence of right, &c., and make any advances toward it.

AN **UNLAWFUL ASSEMBLY**, is where three or more do assemble themselves together, to do an unlawful act, as to pull down inclosures, &c., and part without doing it, or making any motion towards it.

II. ACT 31 MARCH 1860. Purd. 220.

SECT. 19. If any person shall be concerned in any riot, rout, unlawful assembly or an affray, and shall be thereof convicted, he shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars, or undergo an imprisonment not exceeding two years, or both, or either, at the discretion of the court; and in case any one is convicted of an aggravated riot, the court may sentence the offender to imprisonment by separate or solitary confinement at labor, not exceeding three years.

SECT. 20. If any persons riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force, demolish or pull down or destroy, or begin to demolish, pull down or destroy any public building, private dwelling, church, meeting-house, stable, barn, mill, granary, malt-house or out-house, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or movable, prepared for or employed in any manufacture or any branch thereof, or any steam-engine or other engine for sinking, working or draining any mine, or any building or erection used in conducting the business of any mine, or any bridge, wagon-way, road or trunk, for conveying minerals from any mine; every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be imprisoned by separate or solitary confinement at labor, or by simple imprisonment, not exceeding seven years.

SECT. 31. If any person shall wilfully and maliciously disturb or interrupt any meeting, society, assembly or congregation, convened for the purpose of religious worship, or for any moral, social, literary, scientific, agricultural, horticultural or floral object, ceremony, examination, exhibition or lecture, such person shall, on conviction, be sentenced to pay a fine not exceeding fifty dollars, and suffer an imprisonment not exceeding three months, or both, or either, at the discretion of the court.

III. The riot acts of England are not in force here, but it is conceived that the common law invests the proper authorities with ample power to suppress riotous assemblies by *violent means*, if rendered necessary to prevent the destruction of property, or injury to the persons or lives of the people. (1 Hale P. C. 495. 1 East P. C. 304.) Our own courts have sanctioned this doctrine, in a charge delivered to the grand jury for the city and county of Philadelphia, by his honor Judge PARSONS, in which the learned judge says:—

“If there be a disturbance of the public peace, or a riot in a ward or township, it is required that the constable suppress it, if possible, by arresting, with or without warrant, those offending, and bringing them before committing magistrates for trial. He may command all persons to aid and assist him in apprehending the offenders, and use all the force necessary to accomplish it. Aldermen and justices of the peace are likewise bound to aid in having those engaged in a violation of the law, or such as are aiding, abetting or assisting, or ready to aid, abet or assist, apprehended and held to bail for their good behavior, or in default of bail, to commit them to prison. If there be not sufficient force in the ward or township to effect their arrest, then those officers should make immediate complaint to the high sheriff of the county, and require aid from him, and if he be informed by those officers, or from any other source, of such violation of law; it is his duty immediately to summon a *posse comitatus*, (if need be,) the whole power of the county, for the suppression of any riot, or the dispersion of a mob, whose object is to commit personal violence upon any citizens, or to destroy property, either public or private.

“If there be reason to believe that the insurgents are armed with hurtful weapons, and an ordinary civil force is not sufficient to arrest them, he should call out a military force for that purpose—the citizen soldiery. All persons possessing physical strength are bound to obey the command of the sheriff—none are exempt. Any one refusing to go is guilty of a crime for such refusal, and on conviction of the offence is liable to a fine and imprisonment. Every officer and soldier is bound to attend the sheriff, armed and equipped if he direct it, and for the occasion is subject to his command.

“The sheriff is then bound to use that *degree of force* which is necessary to suppress the riot, tumult or disturbance of the public peace, and to prevent the destruction of property, or injury to the persons or lives of the citizens.

“It may be asked what *degree of force* can be exercised on such an occasion. On this point I will be explicit. If a great number of persons are assembled together, armed with guns or other hurtful weapons, and their object is manifest to do great personal violence to an individual, or a certain class of individuals, or to destroy public or private property, and they refuse to submit to the law, resist the sheriff or his assistants when they attempt an arrest, and that with violence; when they refuse to disperse after being commanded by that officer, and are fully bent on violence to the persons or property of others, and *all other probable means* for the suppression of the outrage fail, that officer may order his *posse* to take the LIVES of THE INSURGENTS, if necessary. When driven to that impassable strait, when the sheriff must see the property and lives of the community destroyed by violence, without his having the power to avert it, unless by the destruction of human life, he may adopt it as the last alternative, and the law justifies him; upon the same principle that it does for the execution of a criminal condemned by the sentence of a court. Rioters thus assembled and bent on mischief are enemies to the state. They have declared war against the government under which they live, and in a legal point of view are little better than pirates.

“If the sheriff find the whole force of the county insufficient for the suppression of the mob, he should immediately make a requisition upon the governor for a

military force, who is bound to call out the militia of the state, as commander-in-chief; and, if there be too many disaffected in the state, to suppress internal tumult and violence, the executive can make a requisition upon the President of the United States for the forces under his command. Hence we see that our government is sufficiently powerful to control any violence which may arise.

"By an act of assembly, passed the 31st May 1841, if property is destroyed in consequence of any mob or riot, the owner may sue the county for the damage he sustains, and it must be paid out of the county funds. By another section of the act, the owner of such property is required to give notice to the sheriff, &c., of the intention of the mob, if it be known to him, and he has time before it is destroyed. The act also provides, 'and it shall be the duty of the said sheriff, aldermen, constables and justices, upon the receipt of such notice, to take all legal means to protect said property so attacked, or threatened to be attacked.' (a) This statute is in addition to the common law principles which have been stated, and leaves no doubt as to the authority of the sheriff to suppress a riot, or disperse a mob, by the employment of any force necessary to accomplish the object, even at the sacrifice of the life of an assailant.

"This should be done only in the last extremity, when it is apparent no other power will enable the sheriff to protect the persons or property of the community. The lives of the aggressors should not be sacrificed, except under such circumstances as seem to demand it, for the protection of the innocent and unoffending, and when that officer is conscious that peace and good order can in no other way be restored. When the order issues from him for this dernier resort, all who act under it and strictly execute it are justified in what they do in obedience to the same.

"Military officers and soldiers are amenable to a judicial tribunal, if they refuse to obey the orders of the sheriff when so called out by him. A disobedience of the directions of that officer, which would subject soldiers and militia officers to a trial before a court-martial, if they were called into service by the commander-in-chief or a superior officer, would make them criminals in the eye of the law, and they can be tried before a court having criminal jurisdiction.

"They are acting under a civil authority, in the capacity of officers and soldiers, yet as citizens armed and equipped to perform a duty enjoined by the civil power. Any citizens not enrolled in the militia might be armed in the same manner by the orders of the sheriff, and the responsibility of each would be the same. Nay, the sheriff may require all whom he enrolls in his *posse comitatus* to be armed and equipped, if, in his opinion, the occasion demand it for the suppression of an outrage upon the peace of society. It is his duty to bring to his aid at all times a force sufficient to repel the power which a mob have arrayed with a view of destroying property or endangering the persons or lives of unoffending citizens."

In riotous assemblies, all who are present and not actually assistant in their suppression, in the first instance are, in presumption of law, participants; and the obligation is cast upon a person so circumstanced, to prove his actual non-interference. When, however, the sheriff of a county, or other known public conservator of the peace, has repaired to the scene of tumult, and there commanded the dispersion of the riotous assembly, and demanded the assistance of those present to aid in its suppression, *from that instant there can be no neutrals*. The line is then drawn between those who are for, and those who are against, the maintenance of order, and with the one or the other, all who *see fit to remain*, must promptly arrange themselves. Those who continue looking on while the active rioters are resisting the public authorities, are just as much rioters as those most active in the work of violence. 4 P. L. J. 33.

It has been held, that if a justice of the peace find persons riotously assembled, he alone hath not only power to arrest the offenders, and bind them to their good behavior, or imprison them if they do not offer good bail, but that he may also authorize others to arrest them by a bare *parol* command, without other warrant; and that by force thereof the persons so commanded may pursue and arrest the offenders, in his absence, as well as presence. 1 Y. 419. 4 P. L. J. 35.

(a) This act only extends to the city and county of Philadelphia and the county of Allegheny.

ACT 21 APRIL 1858. Purd. 726.

SECT. 11. In case of any breach of the peace, tumult, riot or resistance of process of this state, or apprehension of immediate danger of the same, it shall be lawful for the sheriff of any county, or mayor of any city, to call for aid from the commandant of the military force of said city or county; the duty of the commanding officer to whom such order is given, to order out in aid of the civil authorities, the military force or any part thereof under his command; and such force shall always remain under the command of its own officers; in such case it shall not be necessary for commanding officers of companies to issue written orders or notices for calling out their men, but verbal orders or notices shall be sufficient.

It shall be the duty of the commanding officer of any division, brigade, regiment, battalion or company, in all cases when so called into service, to provide the men of his command so ordered out, with at least the proper ammunition and arms, in complete order for actual service.

Any non-commissioned officer, musician or private, who shall refuse or neglect to obey the orders of his commanding officer, in the case above provided for, shall be liable to a fine of not less than fifteen nor more than twenty dollars, to be prosecuted and recovered in the manner hereinbefore provided in case of commissioned officers.

All non-commissioned officers, musicians and privates, in case of riot, tumult, breach of the peace, resistance to process, or whenever called upon in aid to the civil authorities, shall each receive the compensation of one dollar and fifty cents per day; and all commissioned officers the same compensation as is paid to officers in the army in service of the United States, together with all necessary rations and forage; and for the horses of any mounted men one dollar per day.

IV. WARRANT TO ARREST RIOTERS.

COUNTY OF BERKS, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said County, greeting:

WHEREAS, complaint has this day been made before me, the subscriber, J. R., one of the justices of the peace in and for the said county, upon the oaths of F. C. and J. M., hat on the 8th day of June, instant, C. D., E. F. and G. H., with others unknown, did riotously assemble together, in the town of Reading, with clubs, sticks and stones, and then and there break into the house of the said F. C. and destroy his furniture and windows, to his great damage, and to the great terror of the peaceable citizens of the said place, contrary to the act of assembly in such case made and provided. These are therefore to command you forthwith to apprehend the said C. D., E. F. and G. H., and bring them before me, the said J. R., to answer unto the said complaint, and to be further dealt with according to law. Witness the said J. R., who hath hereunto set his hand and seal, the ninth day of June, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL.]

V. PRIZE-FIGHTING.

ACT 22 MARCH 1867. Purd. 1458.

SECT. 1. Whosoever shall engage, or participate in any prize-fight, within this commonwealth, or any fight or pugilistic contest, on the result of which any money or valuable thing is bet or wagered, shall be guilty of a misdemeanor, and on conviction thereof, shall be fined in a sum not exceeding one thousand dollars, and imprisoned in the penitentiary, or the jail of the proper county, for a period not exceeding two years; and every person being present at such fight, or laying any bet or wager on the result thereof, whether present or not, shall be considered a participant therein, and as giving encouragement thereto, and may, at the discretion of the court, be punished in like manner.(a)

(a) See act 16 March 1866, prohibiting all prize-fighting in the counties of Pike, Schuylkill, Luzerne, Erie and Montgomery, and

authorizing the calling out of the posse comitatus to prevent the same. Purd. 1421.

Roads and Highways.

A TRAVELLER may use the middle or either side of a public road, at his pleasure and is not bound to turn aside for another travelling in the same direction, provided there be convenient room to pass on the one side or the other. 1 W. 360.

If there be not convenient room to pass, it is doubtless the duty of the other to afford it, on request made, by yielding him an equal share of the road, if that be adequate and practicable; if not, the object must be deferred till the parties arrive at ground more favorable to its accomplishment. Should the leading traveller refuse to comply, he would be answerable for it, in due course of law. But the other has no right to effect the passage by a forcible collision. *Ibid.*

Evidence of a custom for the leading carriage to incline to the right, the other making the transit at the same time to the left, held not to control the general law in this case. *Ibid.*

Coaches carrying the mail of the United States are protected by the act of congress from being wilfully and wantonly obstructed or delayed, but in every other respect they are on a footing with all other carriages. *Ibid.*

The driver of a team which is on the left-hand side of a street, in violation of the law of the road, may nevertheless recover damages for an injury sustained by him from a collision with another team, the driver of which, in meeting him, carelessly or recklessly runs against him or his team. 10 Am. L. R. 435.

A traveller on horseback meeting another horseman or a vehicle, is not required to turn in any particular way to avoid collision; he must exercise due care under the circumstances. 24 Wend. 465.

It seems, it is ordinarily the duty of one on horseback to yield the travelled path to one in a vehicle. 2 Chip. 136.

It is the general custom in this country for persons meeting on a highway, to pass to the right, but when a horseman or light carriage meets a heavily laden team, and can pass with safety to the left, it is his duty to give way, and leave the choice of the road to the more unwieldy vehicle. 8 C. 184.

The principle that a footman or horseman cannot compel a teamster who has a heavy load, to turn out of the beaten track of the road, if there be sufficient room for the former to pass, is applicable to the case of a light wagon or carriage with a heavy draught. 11 H. 196.

All persons have a right to walk in a public highway, and are entitled to the exercise of reasonable care of persons driving carriages along it. In 5 C. & P. 467 Lord DENMAN said: "A man has a right to walk in the road if he pleases; it is a way for foot passengers as well as carriages."

It is quite clear, that a foot passenger has a right to cross a highway, and the persons driving carriages are liable if they do not take care, so as to avoid driving against the foot passengers who are crossing the road; and if a person, driving along the road, cannot pull up because his reins break, that will be no ground of defence because he is bound to have proper tackle. 8 C. & P. 691.

This right of the foot passenger, however, does not exempt him from due care of his part. Thus, if a person in a public street in a city, see an omnibus crossing however furiously, and he will be headstrong enough to try to cross the street, and is run over, he cannot recover in an action against the proprietors of the omnibus as no one has a right of action if he meet with an accident which, by ordinary care he might have avoided. 8 C. & P. 373.

Where the plaintiff, who was walking in the middle of the street, instead of the footway, was injured by a sleigh driven rapidly by the defendant, it was *held* to be a question for the jury whether, under all the circumstances, the plaintiff was chargeable with negligence, having left the sidewalk, in not looking behind as well as before, to avoid contact with persons riding or driving in the middle of the street; and that if he was, the defendant would be answerable only for negligence so wanton and gross as to be evidence of voluntary injury. 5 W. & S. 524.

A traveller on the highway, when approaching its intersection with a railroad is bound to look out for approaching trains, and if he fail to do so, is guilty of negligence. 13 Wr. 60.

If the driver of a vehicle, in passing through the streets of a crowded city, injure one lawfully on the highway, and did not use due care and precaution, he is liable criminally therefor. Com. v. Cox, Q. S. Phila. 1850. King, P. J.

In all cases where sidewalks have been constructed in unincorporated towns and villages, or upon any public road, it shall not be lawful for any person to ride, lead or drive any beast of burden thereon; and if any person shall wilfully ride, lead or drive, or cause to be driven, any beast of burden thereon, such person shall, for every such offence, forfeit and pay a sum of not less than five, nor more than ten dollars, to be sued for and recovered as fines and pecuniary penalties are recovered under the provisions of the 75th section of the act of June 13th 1836, (a) entitled "An act relating to roads, highways and bridges:" *Provided*, That this act shall not apply to any person leading, riding or driving any beast of burden over or on any sidewalk constructed upon or abutting on his own property. Act 6 April 1868, § 1. Purd. 1530.

Robbery.

I. Provisions of the Penal Code.

II. Judicial authorities, &c.

III. Examination of a person robbed—a

warrant for robbery—confession of a robber, and a commitment for robbery.

I. ACT 31 MARCH 1860. Purd. 234.

SECT. 100. If any person, being armed with an offensive weapon or instrument, shall rob, or assault with intent to rob another, or shall, together with one or more person or persons, rob, or assault with intent to rob, or shall rob any person, and at the same time, or immediately before or immediately after such robbery, beat, strike or ill-use any person, or do violence to such person, the person so offending shall be guilty of felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.

SECT. 101. If any one shall accuse any person of the abominable crime of sodomy or buggery, committed either with man or beast, or of any assault, with intent to commit such abominable crime, or any attempt or endeavor to commit the same, or of making or offering any solicitation, persuasion, promise or threat to any person, whereby to move or induce such person to commit or permit such abominable crime, with a view and intent, in any of the cases aforesaid, to extort or gain from such person, and shall, by intimidating such person by such accusation or threat, extort or gain from such person any money or property, the person so offending shall be deemed guilty of felony, and, being thereof convicted, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment by separate or solitary confinement at labor, not exceeding ten years.

SECT. 102. If any person shall rob another, or shall steal any property from the person of another, or shall assault any person with intent to rob him, or shall, by menaces or by force, demand any property of another, with intent to steal the same, such person shall be guilty of felony, and, being convicted thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement, not exceeding five years.

SECT. 179. On all convictions for robbery, burglary or larceny of any goods, chattels or other property, made the subject of larceny by the laws of this commonwealth, or for otherwise unlawfully and fraudulently taking or obtaining the same, or of receiving such goods, chattels or other property, knowing the same to be stolen, the defendant shall, in addition to the punishment heretofore prescribed for such offences, be adjudged to restore to the owner the property taken, or to pay the value of the same or so much thereof as may not be restored. And on all convictions on any indictment for forgery, for uttering, publishing or passing an

forged or counterfeit coin, bank notes, check or writing, or any indictment for fraudulently, by means of false tokens or pretences, or otherwise cheating and defrauding another of his goods, chattels or other property, the defendant, in addition to the punishment hereinbefore prescribed for such offences, shall be adjudged to make similar restitution, or other compensation, as in case of larceny, to the person defrauded: *Provided*, That nothing herein shall be so construed as to prevent the party aggrieved, and to whom restitution is to be awarded, from being a competent witness on the trial of the offender.

II. *Robbery from the person*, which is a felony at common law, is thus defined: a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. 2 East P. C. 707.

It must be proved that some property was taken, for an assault with intent to rob is an offence of a different and inferior nature. 2 East P. C. 707. But the value of the property is immaterial; a penny as well as a pound forcibly extorted constitutes a robbery; the gist of the offence being the force and terror. In the following case, it was held that there was no property in the prosecutor so as to support an indictment for robbery. The prisoner was charged with robbing the prosecutor of a promissory note. It appeared that the prosecutor had been decoyed by the prisoner into a room for the purpose of extorting money from him. Upon a table covered with black silk were two candlesticks, covered also with black, a pair of large horse-pistols ready cocked, a tumbler glass filled with gunpowder, a saw with leaden balls, two knives, one of them a prodigiously large carving-knife, the handles wrapped in black crape, pens and inkstand, several sheets of paper and two ropes. The prisoner, Mrs. Phipoe, seizing the carving-knife and threatening to take away the prosecutor's life, the latter was compelled to sign a promissory note for £2000 upon a piece of stamped paper, which had been provided by the prisoner. It was objected, that there was no property in the prosecutor, and the point being reserved for the opinion of the judges, they held accordingly. They said that it was essential to larceny that the property stolen should be of some value, and that the note in this case did not on the face of it import either a general or special property in the prosecutor, and that it was so far from being of any or the least value to him, that he had not even the property of the paper on which it was written, for it appeared that both the paper and ink were the property of Mrs. Phipoe, and the delivering of it by her to him could not, under the circumstances of the case, be considered as vesting it in him; but if it had, as it was a property of which he was never even for an instant in the peaceable possession, it could not be considered as property taken from his person; and it was well settled, that to constitute the crime of robbery, the property must not only be valuable, but it must also be taken from the person and peaceable possession of the owner. 2 Leach 673. 2 East P. C. 599.

In order to constitute a *taking*, there must be a *possession* by the robber. Therefore, if a man have his purse fastened to his girdle, and a thief cut the girdle whereby the purse falls to the ground, that is not taking of the purse, for the thief never had it in his possession. 1 Hale P. C. 533. But if the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, without taking it up again, it would have been robbery, for it would have been once in his possession. Ibid. However short the period of possession, it is sufficient. *Ross v. Cr. Ev.* 732.

III. EXAMINATION OF A PERSON ROBBED.

LYCOMING COUNTY, ss.

THE examination of A. B., of Williamsport, in the county of Lycoming, taken on the 3d day of May inst., before J. R., one of the justices of the peace in and for the said county, who deposes and saith, that on the first of May inst., he was knocked down on the highway leading from Williamsport to Loyalsock Creek by two men, the one a tall slender man of a dark complexion, in a light drab-colored frock-coat, and the other a small thick man below common size, and his face much scarred with the small-pox, who dragged him into a place of wood adjoining the road, and robbed him of two golden eagles, six silver dollars, and small silver, &c. He further saith that the persons who committed the said robbery are unknown to him.

Sworn and subscribed, May 3d 1860, before J. R., Justice of the Peace.

A WARRANT FOR ROBBERY.

LYCOMING COUNTY, ss.

The Commonwealth of Pennsylvania,

To any Constable of said County, greeting:

You are hereby commanded to take the bodies of two men, one a tall, slender white man, in a light drab-colored frock-coat, light trowsers, and a black beaver hat, and the other a small, thick, white man, in a snuff-colored roundabout, drab-colored pantaloons, half-boots, and a drab-colored hat, each of them wearing a light-red bandanna silk handkerchief tied loosely round his neck, if they, or either of them, be found in the said county, and bring him or them before J. R., one of our justices of the peace in and for the said county, to answer the commonwealth upon a charge founded on the oath of A. B., of having robbed him, on the highway, of some gold and silver coin, and other articles, on the first day of May inst., and further to be dealt with according to law. And for so doing this shall be your warrant. Witness the said J. R., who hath hereunto set his hand and seal, the second day of May, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL.]

CONFESSION OF A ROBBER.

LYCOMING COUNTY, ss.

THE voluntary confession of J. S., taken before J. R., one of the justices of the peace, in and for the said county, May 3d, A. D. 1860. The said J. S. being apprehended on suspicion of having committed a robbery upon the person of A. B., of Williamsport, in said county, doth of his own free will and accord confess and declare, that on the great road between Williamsport and Loyalsock Creek, he, together with a certain J. F., robbed the said A. B. of two golden eagles, some silver dollars, and some other money in silver. And further saith not.

(Signed,) J. S.

Taken and subscribed, May 3d, A. D. 1860, before J. R., Justice of the Peace.

A COMMITMENT FOR ROBBERY.

LYCOMING COUNTY, ss.

The Commonwealth of Pennsylvania,

To any Constable of the said County, and to the Keeper of the Prison of the said County of Lycoming, greeting:

THESE are to authorize and require you, the said constable, forthwith to convey and deliver into the custody of the keeper of the said prison, the body of J. S., charged on his own confession and on oath before J. R., one of our justices of the peace of the said county, with having within the said county, in company with a certain J. F., robbed A. B. on the highway, in the said county, of some gold and silver coin and other articles; and you, the said keeper, are hereby required to receive the said J. S. into your custody in the said prison, and him there safely to keep till the next court of oyer and terminer of the said county of Lycoming, or until he shall thence be delivered by due course of law. And for so doing this shall be your sufficient warrant. Witness the said J. R., at Williamsport, who hath hereunto set his hand and seal, the third day of May, Anno Domini 1860.

J. R., Justice of the Peace. [SEAL.]

Sale of Real Estate.

I. Of the nature and requisites of a deed.

II. What passes by a sale of land.

I. WHERE, in a deed, the land sold is said to contain "*about so many acres*" both the grantor and grantee consider these words as a representation of the quantity which the grantor expects to sell and the grantee to purchase. 1 Pet. C. C. 49, 58.

The words "more or less" are intended to cover a reasonable excess or deficit. Ibid.

Where land has been sold for a gross sum, and the deed of conveyance describes it truly, by courses and distances, but the quantity of acres said to be conveyed falls short, and there is no express covenant insuring such quantity, the vendee cannot maintain covenant to recover damages. 6 B. 109. 6 S. & R. 488.

The relation of buyer and seller is not a confidential one, and each party is supposed to judge of his own ability to perform his part for himself. 10 W. 110.

One who bargains for a good title is not bound to pay the purchase-money upon a tender to him of a defective or doubtful one. Ibid. 413.

He who purchases land knowing the title to be defective, takes the whole risk upon himself of losing all his outlays. 6 W. 87.

No title passes to a vendee who is guilty of fraud in procuring it, whether the sale be private or judicial. 7 W. 86.

The purchaser of a fraudulent title must be able to show clearly that he is a *bonâ fide* purchaser, without notice, and that he has actually paid the purchase-money, of which, however, the receipt of the vendor will not be sufficient. 9 W. 188. 5 Barr 145.

One who has offered his advice and assistance to another in the sale of land, will not be permitted to avail himself of the purchase of it, if obtained upon a misrepresentation of its value. 7 W. 386.

II. WHAT PASSES BY A SALE OF LAND.

The rolls of an iron rolling-mill, as well as the iron plates with which the floor of such mill is covered, and which are an indispensable part of it, though not manufactured for that purpose, are part of the realty, and pass by a sale of the mill. 2 W. & S. 390.

The criterion of fixture in a mansion-house is actual and permanent fastening to the freehold, but this is not a criterion of a fixture in a manufactory or mill. Ibid. 116.

Machinery which is a constituent part of the manufactory, to the purpose for which the building has been adapted, and without which it would cease to be such a manufactory, is part of the freehold, and passes with it, though it be not actually fastened to it. Ibid. 3 H. 507.

A conveyance of land conveys the grain growing upon it to the purchaser, and no care of it on the part of the vendee can alter the rights of the parties. 7 W. 378.

The rule that a purchaser of land buys all that is growing on or issuing out of it, belonging to the seller, unless specially excepted, applies to lands sold at a sheriff's sale. 1 Wr. 134.

Sale of Personal Property.

I. The requisites of a valid sale.

II. Of the change of property and of delivery.

III. Of warranty and fraud.

I. A SALE is a transfer of chattels from one person to another for a valuable consideration, and three things are requisite to its validity, viz., the thing sold, which is the object of the contract, the price, and the consent of the contracting parties. The thing sold must have an actual or potential existence to render the contract valid. If A. sells his horse to B. and it turns out that the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. 2 Kent's Com. 367.

A sale is an executed contract. It vests the property in the thing sold in the buyer, and the right to the price in the seller. But when the contract remains executory, there is no sale. It is a condition precedent of a sale for cash, in order to pass the property to the vendee, that payment should be made; clearly so, unless there has been a delivery. Until that is done, the sale is not consummated. The buyer cannot sue for the goods, nor the seller for the price. Yet, even if the contract be for a cash sale, if the thing agreed to be sold, be delivered without payment, the property passes to the vendee. The right of the vendee is converted into a mere chose in action. 8 C. 17.

A sale of personal property, invests even a *bonâ fide* purchaser with no more than the title the vendor had: the exceptions are—1st, money, checks, notes, &c., termed *currency*, which pass by delivery only; 2d, where the true owner confers on the party selling to a *bonâ fide* vendee, the apparent right of property, or of disposal as agent. 2 J. 229.

II. OF CHANGE OF PROPERTY AND OF DELIVERY.

When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the property and the risk of accident to the goods vests in the buyer, even before delivery or payment. The buyer is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or the time of payment. 2 Kent's Com. 387.

But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him. Ibid. 388.

If the vendor rely on the promise of the vendee to perform the conditions of sale, and deliver the goods accordingly, the right of property is changed, although the conditions be not performed. But where performance and delivery are understood by the parties to be simultaneous, possession obtained by artifice and deceit will not change the property. 3 S. & R. 20. See 2 Eng. L. & Eq. 365. 9 H. 559. Ibid. 367.

If one sell goods for cash, and the vendee take them away without payment of the money, the vendor should immediately reclaim them, by pursuing the party; and he may justify the retaking of them by force. 1 Y. 529. 1 H. 146.

If a man sell his goods to another, the property vests in the vendee, though he suffer them to be in the possession of the vendor. A sale of goods is complete upon an order to a wharfinger (or porter) to deliver, communicated and assented to by him. Comyn.

Where, on the sale of a chattel, the purchase-money is paid, the property is vested in the vendee, and if he permit it to remain in the custody of the vendor, he cannot call upon the latter for any subsequent loss or deterioration not arising from negligence. 8 Johns. 13.

When goods are sold, if nothing remains to be done on the part of the seller, as between him and the buyer, the article is to be delivered; the *property has passed*. 14 Johns. 167. But even though a part of the price be paid, if the quantity remain to be ascertained, and there be no actual delivery, the property does not pass to the buyer. 1 C. 208. So long as *anything* remains to be done between the vendor and vendee, for the purpose of ascertaining the amount or price of the article sold, the property remains in the vendor. 7 C. 128.

On a contract for the sale of goods, the vendor, if the goods are bulky, must give notice to the buyer that he is *ready to deliver* them, and on the vendee failing to take them away, the vendor may, on due notice, sell them at public auction, and charge the vendee with the difference of price. 5 S. & R. 19.

A delivery of the key of a warehouse, in which goods sold are deposited, is a sufficient delivery of the goods to transfer the property. 5 Johns. 335. 1 Y. 529.

A delivery of the receipt of the store-keeper, for the goods kept in his store, being documentary evidence of the title, is tantamount to a delivery of the goods. 5 Johns. 335.

On a sale of personal property, if possession remain in the vendor, and he sell to a *bonâ fide* purchaser who is ignorant of the previous sale, the second purchaser will be entitled to hold the property as against the first. 17 S. & R. 99.

An agreement to sell a chattel which is in an unfinished state, to be delivered at a future time when finished, is an executory contract upon which a present property does not pass, though an action will lie for a breach of the agreement. 4 R. 260. 4 W. 121. 5 Ibid. 201.

A transfer of personal property, unaccompanied by a corresponding change of possession, is void as against creditors. 6 W. 126. But if the sale be not fraudulent in fact, it is sufficient if there be such a change of possession as usually attends a transaction of the sort. 12 H. 9. 2 C. 58, 72. See 27 Leg. Int. 93.

Where no time is fixed for the delivery of goods sold, the law makes them deliverable in a reasonable time; if, when a demand is made, there be no objection made as to time, or it were not then made a question by the vendor, the contract will be deemed broken by a refusal. 1 Bald. 331.

In order to make a transfer of personal property available against creditors, or a subsequent assignor, it must be accompanied by a change of possession at the time, or within a reasonable time thereafter. If it have been delayed an unreasonable time, it is not sufficient that the possession was changed before a levy made. 5 W. 483.

In order to vest a title in goods purchased, it is necessary that they should have been separated from the bulk of the other goods, and possession should be delivered with as little delay as is consistent with the nature of the articles bought, otherwise the transaction is fraudulent as to creditors, and the goods may be taken in execution as the property of the vendor. 6 Ibid. 29. 3 H. 528. Where one agrees to deliver to another corn in sacks, furnished by the latter for that purpose, at a designated point, upon the arrival of the grain at the designated place, the property is vested in the purchaser, and the title of the vendor is completely divested. 5 C. 356.

To constitute a valid assignment of personal property against a judgment creditor, there must be a delivery to, accompanied and followed by a continuing possession in the assignee. 2 W. & S. 147.

A party purchasing with notice that the sale is a breach of trust, is *particeps criminis*, and cannot protect himself against the owner, not being a *bona fide* purchaser. 5 C. 154.

III. WARRANTY AND FRAUD IN THE SALE OF CHATTELS.

In every sale of a chattel, as one's own property, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* [let the purchaser beware] applies, and the party buys at his peril. But if the seller have possession of the article, and he sell it as his own property, he is understood to warrant the title. 1 W. & S. 513. A fair price implies a warranty of title, and the purchaser may have a satisfaction from the seller if he sell the goods as his own and the title proves deficient.

But with regard to the *quality* or goodness of the articles sold, the seller is not bound to answer, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he hath made a fraudulent representation concerning them.

This distinction between the responsibility of the seller as to the *title* and as to the *quality* of goods sold, is well established in the English and American law. 2 Kent's Com. 374.

It is well settled that with regard to the *quality* of goods, the vendor is not answerable, unless he expressly warrant them, or there has been a fraudulent representation; an affirmation of a quality known to the vendor to be false. 7 S. & R. 482. 1 Wr. 147.

To constitute an express warranty, it is not necessary that the word "*warrant*" should be used; but the words used must be tantamount, and not dubious or equivocal. Ibid.

An assertion by the vendor to the vendee at the time of selling a mare, that "he is sure she is perfectly safe, kind and gentle in harness," does not amount to an express promise or warranty, so as to render the vendor liable in *assumpsit*, although if made with a knowledge of its falsehood it would be the subject of an action of deceit. Ibid.

An advertisement of property for sale, which gives it a higher character than it deserves, does not amount to a warranty as to the quality, if the purchaser rely upon his own examination. 3 W. C. C. 165.

If one sell a horse to another knowing a material defect, which in equity and good conscience he ought to disclose, but do not disclose it, and it be not known to the buyer, or such as a buyer of common prudence must be presumed to know, this is such a fraud as vitiates the contract, and the buyer may recover back the price. A. 322.

If one sell an unsound horse knowingly, and conceal the circumstance from the purchaser, and receive a sound price, he is liable in damages to the vendee; otherwise if he were ignorant that the horse was unsound. 3 Y. 262.

But if one sell a horse, warranting him to be sound, he is answerable whether he knew the horse to be unsound or not. Ibid. 262. Lofft 146. 2 C. & P. 540.

In all sales of goods, there is an implied warranty that the article corresponds in specie with the commodity sold, unless there be circumstances (of which the jury, under the direction of the court, are to judge) to show that the purchaser took upon himself the risk of determining not only the quality of the goods, but the kind he purchased. 3 R. 23. 7 Barr 293.

Wherefore if the defendant sell, and the plaintiff purchase, an article as "*blue paint*," and it is so described in the bill of particulars, this amounts to a warranty that the article delivered shall be *blue paint*, and not a different article. Ibid.

A sample or description in a sale note, advertisement, bill of parcels or invoice, is equivalent to an express warranty that the goods are what they are described or represented to be by the vendor. 3 R. 37. 2 Sandf. Rep. 89.

In order to sustain an action on an implied warranty, in a contract for the sale of goods, it is not necessary that the plaintiff should, before bringing suit, tender or redeliver the articles to the defendant. 8 R. 23.

The measure of damages in such cases is the difference between the value of the articles delivered and the commodity sold. Ibid.

Though the seller is answerable to the buyer that the article sold shall be in specie, the thing for which it was sold, yet if there be only a partial adulteration, which does not destroy the distinctive character of the thing, the buyer is bound by his bargain; and in doubtful cases, there is perhaps no practical test but that of its being merchantable under the denomination affixed to it by the seller. Ibid. 168.

No implied warranty arises from an unfounded affirmation of soundness in the sale of a chattel, but for a deceitful representation of it the remedy is by action *ex delicto*. 9 W. 58. 1 Wr. 147.

If the sale of a chattel be absolute, with a warranty of soundness, and there be no consent by the vendor to take it back, the vendee cannot rescind the contract, but is put to his action on the warranty, unless the vendor knew of its unsoundness, and the vendee gave him reasonable notice of it. 10 W. 107.

To avoid a contract on the ground of fraud, there must be the concealment of something which the purchaser is bound to communicate, or some misrepresentation on a material matter to the contract, which either does or is calculated to mislead or deceive him. 1 Bald. 337.

A sale and transfer of personal property, made for the purpose of preventing a creditor from obtaining execution of his judgment, is *mala fide*, and void against such creditor. 2 Wh. 302.

And the party claiming against such creditor is bound to remove all doubt of the fairness of the transaction, even if possession have accompanied the transfer. Ibid.

The sale of an unsound horse, without fraud or warranty, though known to be unsound by the seller, is no defence to an action for the purchase-money. 3 P. L. J. 399.

Mere inadequacy of consideration, without warranty or fraud, is no defence to the payment of a note given for the purchase-money of goods. The unsoundness of the article sold amounts neither to want or failure of consideration. In the absence of an agreement by the seller, the purchaser takes at his own risk as to quality. The vendor of a chattel warrants the title, and in some cases the species, but nothing more. 10 C. 236.

A *bona fide* purchaser of a chattel, for a valuable consideration, and without notice, from a fraudulent vendee, takes a title clear of the fraud, whether it be actual or legal. 4 Wr. 417.

Scire Facias.

- I. Judicial decisions relating to *scire facias*. II. Form of a *scire facias* to show cause why execution should not issue.

A *SCIRE FACIAS*, in our practice, is a writ usually founded on some matter of record, as a recognisance, judgment, or a mortgage, by act of assembly, though not a record, requiring the person against whom it issues to show cause why the plaintiff should not have advantage of such record, although in some respects considered as a new action, because the defendant may plead thereto, and because a release of all actions or executions is a discharge to it. 2 P. R. 265.

Yet, in general, it is a judicial writ, which, from its form, and the nature of the proceedings under it, must issue from the court [or justice] where the record remains. 6 S. & R. 574.

Where the object of the *scire facias* is to obtain execution on a judgment or recognisance, &c., it is called a writ of execution. 2 P. R. 265.

When issued against bail, on a mortgage, or the like, it is, in fact, an original proceeding; but when issued to revive a judgment, or upon the death, marriage, &c., of parties; or on a judgment in debt or bond, or on a judgment *quando*, &c., against an executor, it is but a continuation of the original action. In some cases it is merely an interlocutory proceeding, and in the nature of process; as in the case of a *scire facias quare executionem non*. Ibid. 265.

No execution shall be issued on a judgment rendered before a justice of the peace or alderman, after five years from the rendition of such judgment, unless the same shall have been revived by *scire facias*, or amicable confession. Act of 8 May 1854. Purd. 601.

A *scire facias*, to revive a judgment of a justice, of which a transcript has been filed in the common pleas, agreeably to the act of 1810, must be issued from the common pleas, and not by the justice. 8 S. & R. 479.

A *scire facias* against two or more must issue against all the defendants. The plaintiff cannot drop one and go against the others. 4 Wh. 344.

A justice of the peace may issue a *scire facias* as well to introduce new parties as to enforce a recognisance of bail. 5 B. 56.

If one recover a judgment against a single woman and she marry, a *scire facias* must issue against her husband and her, before an execution shall issue. In like manner, if a single woman be plaintiff, and marry after obtaining judgment, a *scire facias* must issue in the name of her husband and self, previously to an execution. Grayd. Just. 418.

An appeal lies from the judgment of a justice of the peace upon a *scire facias*. 3 S. & R. 93.

Where bail for stay of execution reside in another county or city, the *scire facias* against such bail must be issued by an alderman or justice having jurisdiction within the city or county where the bail himself resides. 5 P. L. J. 431.

II. FORM OF A SCIRE FACIAS, TO BE SERVED ON A DEFENDANT BEFORE ISSUING AN EXECUTION, WHERE THE JUDGMENT HAS BEEN RENDERED FIVE YEARS BEFORE ISSUING EXECUTION.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Eighth Ward, or to the next Constable of the said City, most convenient to the defendant, greeting:

WHEREAS, —, on the — day of —, 185—, obtained judgment before the subscriber, J. B., one of the aldermen in and for the said city, against —, for the sum of — debt and — costs. And whereas execution of the said judgment still remains to be made. Therefore, you are hereby commanded to *make known* to the said — that he be and appear before our said alderman, at his office, No. 36, South Sixth street, on the — day of —, 1860, at — o'clock in the — noon, to show cause, if anything he knows, or hath to say, why the said — should not have execution against him of the aforesaid debt and costs, according to the form of the said recovery. Witness our said alderman, at Philadelphia, who hath hereunto set his hand and seal, this — day of —, Anno Domini 1860:

J. B., Alderman. [SEAL.]

Seal.

THE common law intended, by a seal, an impression upon wax or wafer, or some other tenacious substance capable of being impressed. According to Lord COKE, a seal is wax, with an impression. In the eastern states, sealing, in the common law sense, is requisite; but in the southern and western states, from New Jersey inclusive, the impression upon wax has been disused to such an extent as to induce the courts to allow (but with certain qualifications in some of the states) a flourish with the pen, at the end of the name, or a circle of ink or scroll, to be a valid substitute for a seal. 4 Kent's Com. 452. See 1 Bouv. Inst. 344.

In public and notarial instruments, the seal or impression is usually made on the paper, and with such force as to give tenacity to the impression, and to leave the character of the seal upon it. Ibid. (note a.)

In Pennsylvania, a written or ink seal or scrawl is sufficient. 1 D. 63. 1 S. & R. 72.

Whether an instrument of writing be under seal or not, is a question of law to be determined by the court from the inspection of the instrument itself; and ought not to be submitted to the jury. 1 W. 322. See 2 Greenl. Ev. § 296.

A state seal proves itself without the attestation of a public officer. 4 D. 416.

If a written agreement be under *seal*, it is called a *specialty*. The act of limitations does not include instruments under seal, but the law will presume payment after the lapse of 20 years, unless the presumption be repelled by evidence. 1 Y. 344.

Where the written obligation of two parties, which concluded with the words "witness our hands and seals," had but one seal, which was affixed to his name by the person who drew and first executed the same, and nearly opposite to this seal the other party signed his name; it was *held*, that the obligation, on its face, furnished intrinsic evidence, that the party last signing it had adopted the seal as it stood upon the paper. 6 Barr 302.

ACT 12 MARCH 1869. Purd. 1573.

SECT. 1. Every alderman in the cities of Philadelphia and Lancaster shall be provided with a public aldermanic seal, with which he shall authenticate all his acts, instruments and attestations; on which seal shall be engraved the arms of this commonwealth, and shall have, for legend, the name, surname and office of the alderman using the same, and the place of his residence. (a)

SECT. 2. The official acts of the aldermen in and for the cities aforesaid, certified to under their respective hands and official seals, shall and may be received and read in evidence of the facts therein certified, in all suits that now are or hereafter may be depending, without obtaining the certificate of the clerks or prothonotaries of the county courts to their official character.

SECT. 3. For such service they shall be allowed a fee of twenty-five cents.

(a) The act 17 April 1869 validates acknowledgments under their private seals, made prior to that date. P. L. 1144.

Search-Warrants.

I. When to be issued.
II. Proceedings on a search-warrant.

III. Judicial decisions.
IV. Form of a search-warrant.

I. THE right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. Const. of U. S., Art. IV. of Amend.

The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation. Const. of Penn., Art. IX, sect. 8.

II. ACT 31 MARCH 1860. Purd. 249.

SECT. 5. When any person shall be accused before a magistrate, upon oath or affirmation, of the crime of burglary, robbery or larceny, and the said magistrate shall have issued his warrant to apprehend such person or persons, or to search for such goods as have been described, on oath or affirmation, to have been stolen goods, if any shall be found in the custody or possession of such person or persons, or in the custody or possession of any other person or persons, for his, her or their use, and there is probable cause, supported by oath or affirmation, to suspect that other goods, which may be discovered on such search, are stolen, it shall and may be lawful for the said magistrate to direct the said goods to be seized, and to secure the same in his own custody, unless the person in whose possession the same were found shall give sufficient surety to produce the same at the time of his or her trial. And the said magistrate shall forthwith cause an inventory to be taken of the said goods, and shall file the same with the clerk of that court in which the accused person is intended to be prosecuted, and shall give public notice in the newspapers, or otherwise by advertising the same in three or more public places in the city or county where the offence is charged to have been committed, before the time of trial, noting in such advertisement the said inventory, the person charged and time of trial. And if, on such trial, the accused party shall be acquitted, and no other claimant shall appear or suit be commenced, then, at the expiration of three months, such goods shall be delivered to the party accused, and he, she or they shall be discharged, and the county be liable to the costs of prosecution; but if he be convicted of larceny only, and, after restitution made to the owner and the sentence of the court being fully complied with, shall claim a right in the residue of the said goods, and no other shall appear or claim the said goods, or any part of them, then it shall be lawful, notwithstanding the claim of the said party accused, to detain such goods for the term of nine months, to the end that all persons having any claim thereto may have full opportunity to come, and to the satisfaction of the court, prove their property in them; on which proof the said owner or owners, respectively, shall receive the said goods or the value thereof, if from their perishable nature it shall have been found necessary to make sale thereof, upon paying the reasonable charges incurred by the securing the said goods and establishing their property in the same; but if no such claim shall be brought and duly supported, then the person so convicted shall be entitled to the remainder of the said goods, or the value thereof, in case the same shall have been sold agreeably to the original inventory. But if, upon an attainder of burglary or robbery, the court shall, after due inquiry, be of opinion that the said goods were not the property of such burglar or robber, they shall be delivered, together with a certified copy of the said inventory, to the commissioners of the county, who shall indorse a receipt therefor on the original inventory, register the said inventory in a book, and also cause the same to be publicly advertised, giving notice to all persons claiming the said goods to prove their

property therein to the said commissioners; and unless such proof shall be made within three months from the date of such advertisement, the said goods shall be publicly sold, and the net moneys arising from such sale shall be paid into the county treasury for the use of the commonwealth: *Provided always*, That if any claimant shall appear within one year, and prove his or her property in the said goods to the satisfaction of the commissioners, or in the case of dispute, shall obtain the verdict of a jury in favor of such claim, the said claimant shall be entitled to recover, and receive from the said commissioners, or treasurer, the net amount of the moneys paid as aforesaid into the hands of the said commissioners, or by them paid into the treasury of this commonwealth.

III. The search-warrant is not to be granted without *oath*, made before the justice, that the party complaining has probable cause to suspect his property has been stolen, or is concealed in such a place, and showing his reasons for such suspicion. The oath need not positively and directly aver that the property has been stolen. The *warrant* should direct the search to be made in the day time; though it is said that, *where there is more than probable suspicion*, the process may be executed in the night. It ought to be directed to a constable, or other public officer, and not to a private person; though it is fit that the party complaining should be present, and assisting, because he will be able to identify the property he has lost. It should also command that the goods found, together with the party in whose custody they are taken, be brought before some justice of the peace; to the end that, upon further examination of the fact, the goods and the prisoner may be disposed of as the law directs. 1 Chit. Cr. L. 65. 1 Conn. 40. 13 Mass. 286. 5 Met. 98. 5 Iredell 45.

A search-warrant must specify the *place* to be searched, as well as the particular person to be taken. 1 Chit. Cr. L. 66. Kirby 213.

With respect to the mode of executing this warrant:—if the door be shut, and, upon demand, not opened, it may be broken open; and so may boxes, after the keys have been demanded,—and though the goods be not found, the officer will be excused; though, if the party obtaining the warrant acted maliciously, he is liable to a special action on the case, but not to an action of trespass. 1 Chit. Cr. L. 66. 10 Johns. 263. 6 Blackf. 249.

In the execution of criminal process, an officer may break open the doors of a house in the night time, as well as in the day time, after demand of admittance and refusal. 1 N. H. 346. 1 Root 134. Ibid. 83.

To the validity of a search-warrant, description of place, *person* and things, is requisite. 2 J. J. Marsh. 44.

IV. FORM OF A SEARCH-WARRANT.

COUNTY OF BLAIR, ss.

The Commonwealth of Pennsylvania,

To the Constable of E—— township, in the said county, greeting:

WHEREAS, information and complaint have this day been made to J. R., Esquire, one of our justices of the peace in and for the said county, upon the [oath] of A. B., that the following articles, to wit: [*here insert the articles and their value*], were lately stolen and carried away from his house, and that there is just cause to suspect that the said stolen goods, or some part thereof, are concealed in the house of C. D., of the said township, [blacksmith.]. These are therefore to command you to make diligent search, in the day-time, in the house of the said C. D., for the said stolen goods, and if you find the same, or any part thereof, that then you secure the said stolen goods, and bring the person or persons in whose custody you find the same, before our said justice, to be examined concerning the premises, and further to be dealt with according to law.

Witness the said J. R., Esquire, at E—— township aforesaid, the [first] day of [May], in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL.]

Seduction.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 224.

SECT. 41. The seduction of any female of good repute, under twenty-one years of age, with illicit connection under promise of marriage, is hereby declared to be a misdemeanor; and any person who shall be convicted thereof, shall be sentenced to pay a fine not exceeding five thousand dollars, and to undergo an imprisonment, either at labor by separate or solitary confinement, or imprisonment without labor, not exceeding three years, or both, or either, at the discretion of the court: *Provided*, That the promise of marriage shall not be deemed established, unless the testimony of the female seduced is corroborated by other evidence, either circumstantial or positive.

II. To constitute the penal offence of seduction, there must be illicit connection, and the female must be drawn aside from the path of virtue, which she was honestly pursuing at the time the defendant approached her. 4 P. L. J. 136. *Lewis' Cr. L.* 51.

But a single error on the part of the female will not place her beyond the protection of the act, if she has repented her error, and is walking in the path of virtue, and enjoying the esteem of her acquaintance, when she is led astray. *Ibid.* 18 Iowa 88.

A female of bad reputation at the time the defendant obtained connection with her, (whether the reputation was acquired by crime, or imprudence only,) is not within the protection of the act. *Ibid.*

It must appear, to the satisfaction of the jury, that the seduction was accomplished by means of a promise of marriage. A rule has been established in civil cases, which authorizes a jury to infer a promise of marriage, from open, long-continued, particular and exclusive attentions. *Ibid.* 1 J. 318. 1 H. 331.

A conditional promise that if the girl would permit the defendant to have illicit intercourse with her, he would marry her, is sufficient under the statute. 26 N. Y. 203.

Continued attentions to a female for several months, followed by an improper intercourse, is sufficient evidence to warrant the inference of seduction. 2 Wend. 459. But such attentions must be inconsistent with any other intent than that of marriage. 2 Brewst. 489.

In an action for the seduction of a daughter, her reputation for chastity may be impeached by *general* reputation, but not by her reputation among a particular class of people. 2 Stew. 266.

A promise to marry, a request and a refusal, may be proved by circumstances, and are entirely within the province of the jury to determine. 3 Gilm. 202. 12 H. 401.

A female who has been seduced, and, after the birth of a child, married and deserted by her seducer, is not a competent witness against him, on an indictment for seduction. 1 Am. L. J. 551.

Such a marriage, although after seduction, and followed by immediate desertion by the husband, is a defence against an indictment for seduction, under the act of 1843. *Ibid.* But not to a subsequent action for damages by the father of the female seduced. 2 H. 282.

A confederacy to assist a female infant to escape from her father's control, with a view to marry her against his will, or to seduce her, is indictable at common law. 5 W. & S. 461.

On an indictment for seduction, the defendant may be convicted of simple fornication. 5 H. 126.

A minor who has arrived at the age of puberty may be convicted of this offence; it is not necessary that the promise of marriage should be a valid one. 26 N. Y. 204

Shipping.

THE owner of a vessel is responsible in damages for any injury occasioned to another by the negligence or unskilful management of his ship, although she was at the time in charge of a public pilot of the port. 4 D. 206.

And the principle as to the assessment of damages is this, as in other cases of a similar nature, that the compensation should be equivalent to the injury. 4 D. 206.

Not only the ship's husband, but all the real owners of a ship, are liable for work done to the ship after their interest in her was acquired. 1 D. 129.

A shipwright has a lien on a ship for repairs in port. 1 Pet. Adm. 236.

Workmen and material-men, having a lien on a vessel which has been taken in execution and sold under a judgment in favor of the United States, are entitled to payment out of the fund in preference to the United States. 1 Gilp. 1.

The master of a ship arriving at Philadelphia from a foreign port, is not bound by the bill of lading to deliver the goods to the consignee personally. The liability of a ship-owner ceases when the goods are landed at the usual wharf. 1 R. 203.

To prove property in a vessel or cargo, other evidence than the registry, invoice, &c., may be given; such as acts of ownership and the like. 3 W. C. C. 209.

The landing of foreign convicts in this state, is made a penal offence by the act of 31st March 1860. Purd. 230.

Sodomy.

ACT 31 MARCH 1860. Purd. 222.

SECT. 32. If any person shall commit sodomy or buggery, he shall be guilty of felony, and on conviction, be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding ten years.

SECT. 33. If any person shall unlawfully and maliciously assault another with intent to commit sodomy or buggery, or if any person shall wickedly and unlawfully solicit and incite, and endeavor to persuade another, to permit and suffer such person to commit sodomy or buggery with him, such person shall be guilty of a misdemeanor, and being convicted of an assault with the intent aforesaid, or of so inciting another to suffer the act of sodomy or buggery to be committed with him, shall be sentenced to pay a fine not exceeding three hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.

SECT. 92. It shall not be necessary in any case of rape, sodomy or carnal abuse of a female child, under the age of ten years, to prove the actual emission of seed, in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

By the act of 1705, a conviction of this offence, by a married person, entitled the party injured to a divorce. Bradford's Laws (1714) p. 41. And this provision does not appear to have been supplied by any subsequent enactment.

Stamps.

ACT 15 MARCH 1863. Purd 1312.

SECT. 1. All stamp duties required to be paid in any judicial proceeding whatever, shall, when paid, be taxed as part of the costs in the proceeding, and paid by the party required to pay the other costs thereof.

SECT. 2. In all cases of judicial sales made by any sheriff, coroner, executor, administrator, guardian or other trustee, under any order or process issued out of any court of this commonwealth, the stamp duties required to be paid on the deed when executed, shall be taxed with the other costs of the proceeding, and paid out of the proceeds of sale; and the same rule shall prevail in sales for taxes, by the county treasurer or other officers: *Provided*, That the provisions of this section shall only apply to sales made after the first day of April 1863.

SECT. 3. It shall be the duty of every officer authorized to enter or record any instrument required by the laws of the United States to be stamped, to enter on the docket or record that the same was duly stamped as required by law, which shall be *prima facie* evidence thereof, and in certifying a copy of such record or instrument, to certify such entry, which shall have the same force and effect as the original entry.

ACT OF CONGRESS 30 JUNE 1864. 2 Bright. Dig. 371.

SECT. 151. There shall be levied, collected and paid, for and in respect of the several instruments, matters and things mentioned and described in the schedule (marked B) hereunto annexed, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed, by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued. (a) the several duties or sums of money set down in figures against the same respectively, or otherwise specified or set forth in the said schedule.

SECT. 152. It shall not be lawful to record any instrument, document or paper required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed, (b) and cancelled in the manner required by law; and the record of any such instrument, (c) upon which the proper stamp or stamps aforesaid shall not have been affixed and cancelled as aforesaid, shall be utterly void, and shall not be used in evidence. (d)

SECT. 153. No instrument, document, writing or paper of any description, required by law to be stamped, shall be deemed or held invalid and of no effect for the want of the particular kind or description of stamp designated for and denoting the duty charged on any such instrument, document, writing or paper, provided a legal stamp or stamps, denoting a duty of equal amount, shall have been duly affixed and used thereon.

SECT. 154. All official instruments, documents and papers issued by the officers of the United States government, or by the officers of any state, county, town or other municipal corporation, shall be and hereby are exempt from taxation: *Provided*, That it is the intent hereby to exempt from liability to taxation such state, county, town or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity. (d)

SECT. 155. If any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp, die, plate or other instrument, or any part of

(a) An agent authorized to enter into a contract, is empowered to affix the proper stamps. Cedar Rapids and St. Paul Railroad Co. v. Stewart, 25 Iowa.

(b) The appropriate stamp for any instrument must be ascertained by considering its leading character and legal operation; and if other matters are embraced, accessory or inci-

dental, no additional stamp in respect to them will be required. 3 Taunt. 382.

(c) This section has no application to notes and bills. 13 Pitts. L. J. 280; 3 Int. R. Rec. 31.

(d) So amended by act 13 July 1866. 14 Stat. 141.

any stamp, die, plate or other instrument, which shall have been provided, or may hereafter be provided, made or used in pursuance of this act, or shall forge, counterfeit or resemble, or cause or procure to be forged, counterfeited or resembled, the impression or any part of, the impression, of any such stamp, die, plate or other instrument, as aforesaid, upon any vellum, parchment or paper, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment or paper, with any such forged or counterfeited stamp, die, plate or other instrument, or part of any stamp, die, plate or other instrument, as aforesaid, with intent to defraud the United States of any of the taxes hereby imposed, or any part thereof; or if any person shall utter or sell or expose to sale, any vellum, parchment, paper, article or thing, having thereupon the impression of any such counterfeited stamp, die, plate or other instrument, or any part of any stamp, die, plate or other instrument, or any such forged, counterfeited or resembled impression, or part of impression, as aforesaid, knowing the same to be forged, counterfeited or resembled; or if any person shall knowingly use or permit the use of any stamp, die, plate or other instrument, which shall have been so provided, made or used, as aforesaid, with intent to defraud the United States; or if any person shall fraudulently cut, tear or remove, or cause or procure to be cut, torn or removed, the impression of any stamp, die, plate or other instrument, which shall have been provided, made or used, in pursuance of this act, from any vellum, parchment or paper, or any instrument or writing charged or chargeable with any of the taxes imposed by law; or if any person shall fraudulently use, join, fix or place, or cause to be used, joined, fixed or placed to, with or upon any vellum, parchment, paper or any instrument or writing charged or chargeable with any of the taxes hereby imposed, any adhesive stamp, or the impression of any stamp, die, plate or other instrument, which shall have been provided, made or used in pursuance of law, and which shall have been cut, torn or removed from any other vellum, parchment or paper, or any instrument or writing charged or chargeable with any of the taxes imposed by law; or if any person shall wilfully remove or cause to be removed, alter or cause to be altered, the cancelling or defacing marks on any adhesive stamp, with intent to use the same, or to cause the use of the same, after it shall have been once used, or shall knowingly or wilfully sell or buy such washed or restored stamps, or offer the same for sale, or give or expose the same to any person for use, or knowingly use the same, or prepare the same with intent for the further use thereof; or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any washed, restored or altered stamps, which have been removed from any vellum, parchment, paper, instrument or writing; then and in every such case, every person so offending, and every person knowingly and wilfully aiding, abetting or assisting in committing any such offence as aforesaid, shall, on conviction thereof, forfeit the said counterfeit stamps and the articles upon which they are placed, and be punished by fine not exceeding one thousand dollars, or by imprisonment and confinement to hard labor not exceeding five years, or both, at the discretion of the court.(a)

SECT. 156. In any and all cases where an adhesive stamp shall be used for denoting any duty imposed by this act, except as hereinafter provided, the person using or affixing the same shall write thereupon the initials of his name, and the date upon which the same shall be attached or used, so that the same may not again be used.(b) And if any person shall fraudulently make use of an adhesive stamp to denote any duty imposed by this act, without so effectually cancelling and obliterating such stamp, except as before mentioned, he, she or they shall forfeit the sum of fifty dollars.

SECT. 157. The commissioner of internal revenue be and he is hereby authorized to prescribe such method for the cancellation of stamps, as substitute for or in addition to the method now prescribed by law, as he may deem expedient and effectual; and he is further authorized, in his discretion, to make the application of such method imperative * * upon stamps of a nominal value exceeding twenty-five cents each.

(a) So amended by act 13 July 1866. 14 avoid the instrument. 13 Pitts. L. J. 280. Stat. 141. 3 Int. R. Rec. 31. 10 Allen 250.

(b) The want of cancellation does not

SECT. 158. Any person or persons who shall make, sign or issue, or who shall cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, or shall accept, negotiate or pay, or cause to be accepted, negotiated or paid, any bill of exchange, draft or order, or promissory note for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and cancelled in the manner required by law, with intent to evade the provisions of this act, shall, for every such offence, forfeit the sum of fifty dollars (a) and such instrument, document or paper, bill, draft, order or note, not being stamped according to law, shall be deemed invalid and of no effect: (b) *Provided*, That the title of a purchaser of land by deed duly stamped, shall not be defeated or affected by the want of a proper stamp on any deed conveying said land by any person from, through or under whom his grantor claims or holds title: *And provided further*, That hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of making or issuing the said instrument, (c) and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, or if said instrument be lost, to a copy thereof, he or they shall appear before the collector of the revenue of the proper district, who shall upon the payment of the price of the proper stamp required by law, and of a penalty of fifty dollars, and where the whole amount of the tax denoted by the stamp required shall exceed the sum of fifty dollars, on payment also of interest, at the rate of six per centum on said tax from the day on which such stamp ought to have been affixed, affix the proper stamp to such instrument or copy, or note upon the margin thereof the date of his so doing, and the fact that such penalty has been paid; and the same shall thereupon be deemed and held to be valid, to all intents and purposes, as if stamped when made or issued: (d) *And provided further*, That where it shall appear to said collector, upon oath or otherwise to his satisfaction, (e) that any such instrument has not been duly stamped at the time of making or issuing the same, by reason of accident, mistake, inadvertence or urgent necessity, and without any wilful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then and in such case, if such instrument, or, if the original be lost, a copy thereof duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within twelve calendar months after the first day of August 1866, or within twelve calendar months after the making or issuing thereof, be brought to the said collector of revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid, and to cause such instrument to be duly stamped. (g) And when the original instrument, or a certified or duly proved copy thereof, as aforesaid, duly stamped so as to entitle the same to be recorded, shall be presented to the clerk, register, recorder or other officer having charge of the original record, it shall be lawful for such officer, upon the payment of the fee legally chargeable for the recording thereof, to make a new record thereof, or to note upon the original record the fact that the error or omission in the stamping of said original instrument has been corrected pursuant to law; and the original instrument or such certified copy, or the record thereof, may be used in all courts and places, in the same manner and with like effect as if the instrument had been originally stamped: *And provided further*, That in all cases where the party has not affixed the stamp required by law upon any instrument made, signed or issued, at a time when and at a place where no collection district was established, it shall be lawful for him or them, or any party having an interest therein, to affix the proper stamp thereto, or if the original be lost, to a copy

(a) The offence of issuing an unstamped note is punishable by indictment. 26 Law Rep. 22. 16 Am. L. R. 757. 9 Int. R. Rec. 186.

(b) No instrument is rendered void, by the omission of a stamp, unless done "with intent to evade the provisions of the act." 13 Pitts. L. J. 280. 3 Int. R. Rec. 31. 55 Maine 145. The act does not render an unstamped deed absolutely inoperative, except as a matter of

evidence. 6 P. F. Sm. 424.

(c) See 13 Mich. 314.

(d) See 27 Leg. Int. 108.

(e) The collector is the exclusive judge of the intent with which the stamp was omitted. 13 Pitts. L. J. 280. 3 Int. R. Rec. 31.

(g) When this is done, the instrument is valid. 13 Pitts. L. J. 280. 3 Int. R. Rec. 31. 27 Md. 14.

thereof; and the instrument or copy to which the proper stamp has been thus affixed prior to the first day of January 1867, and the record thereof, shall be as valid, to all intents and purposes, as if stamped by the collector in the manner hereinbefore provided. (a) But no right acquired in good faith, before the stamping of such instrument or copy thereof, and the recording thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid. (b)

SECT. 159. The acceptor or acceptors of any bill of exchange or order for the payment of any sum of money, drawn or purporting to be drawn in any foreign country, but payable in the United States, shall, before paying or accepting the same, place thereupon a stamp, indicating the duty upon the same as the law requires for inland bills of exchange or promissory notes, and no bill of exchange shall be paid or negotiated without such stamp; and if any person shall pay or negotiate, or offer in payment, or receive or take in payment any such draft or order, the person or persons so offending shall forfeit the sum of two hundred dollars.

SECT. 160. No stamp duty shall be required on powers of attorney or any other paper relating to applications for bounties, arrearages of pay or pensions, or to the receipt thereof, from time to time, or upon tickets or contracts of insurance, when limited to "accidental" (c) injury to persons * * ; nor on certificate of the measurement or weight of animals, wood, coal or "hay;" (c) nor on deposit notes to mutual insurance companies for insurance, upon which policies subject to stamp duties have been or are to be issued; nor on any certificate of the record of a deed or other instrument in writing, or of the acknowledgment or proof thereof by attesting witnesses; nor to any indorsement of a negotiable instrument; nor on any warrant of attorney accompanying a bond or note, when such bond or note shall have affixed thereto the stamp or stamps denoting the duty required; and whenever any bond or note shall be secured by a mortgage, but one stamp shall be required to be placed on such papers: *Provided*, That the stamp duty placed thereon shall be the highest rate required for said instruments, or either of them.

SECT. 162. It shall be lawful for any person to present to the collector of the district, subject to the rules and regulations of the commissioner of internal revenue, any instrument not previously issued or used, and require his opinion whether or not the same is chargeable with any stamp duty; and if the said collector shall be of opinion that such instrument is chargeable with any stamp duty, he shall, upon the payment therefor, affix and cancel the proper stamp; and if of the opinion that such instrument is not chargeable with any stamp duty, or is chargeable only with the duty by him designated, he is hereby required to impress thereon a particular stamp, to be provided for that purpose, with such words or device thereon as he shall judge proper, which shall denote that such instrument is not chargeable with any stamp duty, or is chargeable only with the duty denoted by the stamp affixed; and every such instrument upon which the said stamp shall be impressed, shall be deemed to be not chargeable, or to be chargeable only with the duty denoted by the stamp so affixed, and shall be received in evidence in all courts of law or equity, notwithstanding any objections made to the same by reason of it being unstamped, or of it being insufficiently stamped.

SECT. 163. No deed, instrument, document, writing or paper required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted or used as evidence in any court, (d) until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law: *Provided*, That any power of attorney, conveyance or document of any kind, made or purporting to be made in any foreign country, to be used in the United States, shall pay the same tax as is required by law on similar instruments or documents when made or issued in the

(a) See 27 Md. 354.

(b) So amended by act 13 July 1866. 14 Stat. 142.

(c) So amended by act 3 March 1865. 13 Stat. 482.

(d) This does not include the state courts.

97 Mass. 452. 9 Int. R. Rec. 129. 2 Ch. Leg. N. 286. 3 Am. L. T. Rep. 32. Congress has no power to establish rules of evidence for the state courts. 15 Pitts. L. J. 61. See 34 Cal. 167. 47 Barb. 187. 53 Barb. 385.

United States; and the party to whom the same is issued, or by whom it is to be used, shall, before using the same, affix thereon the stamp or stamps indicating the tax required.(a)

SCHEDULE B.

Duty.
Dolla. Cts.

Agreement or contract,(b) other than "domestic and inland bills of lading and" (c) those specified in this schedule; any appraisement of value or damage, or for any other purpose; for every sheet or piece of paper upon which either of the same shall be written, five cents	5
<i>Provided</i> , That if more than one appraisement, agreement or contract shall be written upon one sheet or piece of paper, five cents for each and every additional appraisement, agreement or contract.	
Bank check, draft or order for the payment of any sum of money whatsoever, drawn upon any bank, banker or trust company, or for any sum exceeding ten dollars, drawn upon any other person or persons, companies or corporations, at sight or on demand, two cents	2
Bill of exchange (inland), draft, or order for the payment of any sum of money not exceeding one hundred dollars, otherwise than at sight or on demand, or any promissory note (except bank notes issued for circulation, and checks made and intended to be forthwith presented, and which shall be presented to a bank or banker for payment), or any memorandum, check, receipt or other written or printed evidence of an amount of money to be paid on demand, or at a time designated, for a sum not exceeding one hundred dollars,(d) five cents	5
And for every additional hundred dollars or fractional part thereof, in excess of one hundred dollars, five cents	5
Bill of exchange (foreign), or letter of credit, drawn in, but payable out of the United States, if drawn singly, or otherwise than in a set of three or more, according to the custom of merchants and bankers, shall pay the same rates of duty as inland bills of exchange or promissory notes.	
If drawn in sets of three or more: for every bill, of each set, where the sum made payable shall not exceed one hundred dollars, or the equivalent thereof in any foreign currency in which such bills may be expressed, according to the standard of value fixed by the United States, two cents	2
And for every additional hundred dollars, or fractional part thereof, in excess of one hundred dollars, two cents	2
Bill of lading or receipt (other than charter-party), for any goods, merchandise or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents	10
Bill of sale by which any ship or vessel or any part thereof, shall be conveyed to or vested in any other person or persons, when the consideration shall not exceed five hundred dollars, fifty cents	50
Exceeding five hundred dollars and not exceeding one thousand dollars, one dollar	1 00
Exceeding one thousand dollars, for every additional amount of five hundred dollars or fractional part thereof, fifty cents	50
Bond for indemnifying any person for the payment of any sum of money, where the money ultimately recoverable thereupon is one thousand dollars or less, fifty cents	50
Where the money ultimately recoverable thereupon exceeds one thousand dollars, for every additional one thousand dollars, or fractional part thereof, in excess of one thousand dollars, fifty cents	50

(a) So amended by act 13 July 1866. 14 Stat. 143.

(b) A letter in the nature of a substantial instrument, cannot be used to evade the stamp law. 7 P. F. Sm. 98. Where an agreement is made in duplicate, and only one of them is stamped, it is a binding contract between the parties. 22 Iowa 40.

(c) So amended by act 13 July 1866. 14 Stat. 145. Receipts for goods delivered to a common carrier for transportation, are not subject to a stamp duty. 16 Am. L. R. 757. 51 Barb. 69.

(d) The act 13 July 1870, repeals the tax on promissory notes for sums less than \$100.

	Dolls. Cts.
Bond for the due execution or performance of the duties of any office, one dollar	1 00
Bond of any description, other than such as may be required in legal proceedings, or used in connection with mortgage deeds, and not otherwise charged in this schedule, twenty-five cents	25
Certificate of stock in any incorporated company, twenty-five cents	25
Certificate of profits, or any certificate or memorandum showing an interest in the property or accumulations of any incorporated company, if for a sum not less than ten dollars and not exceeding fifty dollars, ten cents	10
Exceeding fifty dollars and not exceeding one thousand dollars, twenty-five cents	25
Exceeding one thousand dollars, for every additional one thousand dollars or fractional part thereof, twenty-five cents	25
Certificate.—Any certificate of damage or otherwise, and all other certificates or documents issued by any port warden, marine surveyor or other person acting as such, twenty-five cents	25
Certificate of deposit of any sum of money in any bank or trust company or any banker or person acting as such—	
If for a sum not exceeding one hundred dollars, two cents	2
For a sum exceeding one hundred dollars, five cents	5
Certificate of any other description than those specified, (a) five cents	5
Charter-party.—Contract or agreement for the charter of any ship or vessel, or steamer, or any letter, memorandum or other writing between the captain, master or owner, or person acting as agent of any ship or vessel, or steamer, and any other person or persons for or relating to the charter of such ship or vessel, or steamer, or any renewal or transfer thereof, if the registered tonnage of such ship or vessel or steamer does not exceed one hundred and fifty tons, one dollar	1 00
Exceeding one hundred and fifty tons, and not exceeding three hundred tons, three dollars	3 00
Exceeding three hundred tons, and not exceeding six hundred tons, five dollars	5 00
Exceeding six hundred tons, ten dollars	10 00
Contract.—Broker's note, or memorandum of sale of any goods or merchandise, * * exchange, * * real estate, or property of any kind or description, issued by brokers or persons acting as such, for each note or memorandum of sale, ten cents	10
Bill or memorandum of the sale, or contract for the sale of stocks, bonds, gold or silver bullion, coin, promissory notes or other securities, shall pay a stamp tax at the rate provided in section 99. (b)	
Conveyance.—Deed, instrument or writing, whereby any lands, tenements or other realty sold, shall be granted, assigned, transferred or otherwise conveyed to, or vested in the purchaser or purchasers, (c) or any other person or persons by his, her or their direction, (d) when the consideration or value (e) does not exceed five hundred dollars, fifty cents	50
When the consideration exceeds five hundred dollars, and does not exceed one thousand dollars, one dollar	1 00
And for every additional five hundred dollars, or fractional part thereof, in excess of one thousand dollars, fifty cents	50
Entry of any goods, wares or merchandise at any custom-house, either for consumption or warehousing, not exceeding one hundred dollars in value, twenty-five cents	25
Exceeding one hundred dollars, and not exceeding five hundred dollars in value, fifty cents	50

(a) This does not include the certificate of a magistrate, attesting his record of a conviction in a criminal case, on appeal. 9 Allen 487. *Ibid.* 355.

(b) So amended by act 13 July 1866. 14 Stat. 145. See 2 Bright. Dig. 279.

(c) A declaration of trust does not require a stamp, as a conveyance. 4 Nev. 473.

(d) The grantor is liable for the cost of the stamps on the conveyance. 12 Wr. 463.

(e) See 26 Law Rep. 485.

Exceeding five hundred dollars in value, one dollar	Dolls. Cts 1 00
Entry for the withdrawal of any goods or merchandise from bonded warehouse, fifty cents	50
Insurance (Life).—Policy of insurance or other instrument, by whatever name the same shall be called, whereby any insurance shall be made upon any life or lives—	
When the amount insured shall not exceed one thousand dollars, twenty-five cents	25
Exceeding one thousand dollars and not exceeding five thousand dollars, fifty cents	50
Exceeding five thousand dollars, one dollar	1 00
Insurance (marine, inland and fire).—Each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description, whether against perils by the sea or by fire, or other peril of any kind, made by any insurance company, or its agents, or by any other company or person, the premium upon which does not exceed ten dollars, ten cents	10
Exceeding ten, and not exceeding fifty dollars, twenty-five cents	25
Exceeding fifty dollars, fifty cents	50
Lease, agreement, memorandum or contract for the hire, use or rent of any land, tenement or portion thereof, where the rent or rental value is three hundred dollars per annum or less, fifty cents	50
Where the rent or rental value exceeds the sum of three hundred dollars per annum, for each additional two hundred dollars, or fractional part thereof, in excess of three hundred dollars, fifty cents	50
Manifest for custom-house entry, or clearance of the cargo of any ship, vessel or steamer for a foreign port—	
If the registered tonnage of such ship, vessel or steamer does not exceed three hundred tons, one dollar	1 00
Exceeding three hundred tons and not exceeding six hundred tons, three dollars	3 00
Exceeding six hundred tons, five dollars	5 00
Mortgage of lands, estate or property, real or personal, heritable or movable, whatsoever, where the same shall be made as security for the payment of any definite and certain sum of money, lent at the time or previously due and owing, or forborne to be paid, being payable; also any conveyance of any lands, estate or property whatsoever, in trust, to be sold or otherwise converted into money, which shall be intended only as security, and shall be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise; or any personal bond given as security for the payment of any definite or certain sum of money, exceeding one hundred dollars, and not exceeding five hundred dollars, fifty cents	50
Exceeding five hundred dollars and not exceeding one thousand dollars, one dollar	1 00
And for every additional five hundred dollars, or fractional part thereof, in excess of one thousand dollars, fifty cents	50
Upon every assignment or transfer of a mortgage, the same stamp tax upon the amount remaining unpaid thereon, as is herein imposed upon a mortgage for the same amount. (α)	
Provided, That upon each and every assignment or transfer of a * * policy of insurance, or the renewal or continuance of any agreement, contract or charter, by letter or otherwise, a stamp duty shall be required and paid equal to that imposed on the original instrument: And provided further, That upon each and every assignment of any lease, a stamp duty shall be required and paid equal to that imposed on the original instrument, increased by a stamp duty upon the consideration or value of the	

(α) So amended by act 13 July 1866. 14 Stat. 144. The act of 13 July 1870 provides that no stamp shall be required upon the transfer or assignment of a mortgage where the instrument it secures has been once duly stamped.

Dolla. Cts.

assignment, equal to that imposed upon the conveyance of land for similar consideration or value.(a)	
Passage ticket, by any vessel from a port in the United States to a foreign port, not exceeding thirty-five dollars, fifty cents	50
Exceeding thirty-five dollars and not exceeding fifty dollars, one dollar	1 00
And for every additional fifty dollars, or fractional part thereof, in excess of fifty dollars, one dollar	1 00
Power of attorney for the sale or transfer of any stock, bonds or scrip, or for the collection of any dividends or interest thereon, twenty-five cents	25
Power of attorney or proxy for voting at any election for officers of any incorporated company or society, except religious, charitable or literary societies, or public cemeteries, ten cents	10
Power of attorney to receive or collect rent, twenty-five cents	25
Power of attorney to sell and convey real estate, or to rent or lease the same, one dollar	1 00
Power of attorney for any other purpose, fifty cents (b)	50
Probate of will, or letters of administration: where the estate and effects for or in respect of which such probate or letters of administration applied for, shall be sworn or declared not to exceed the value of two thousand dollars, (c) one dollar	1 00
Exceeding two thousand dollars, for every additional thousand dollars, or fractional part thereof, in excess of two thousand dollars, fifty cents	50
<i>Provided</i> , That no stamp either for probate of wills, or letters testamentary, or of administration, or on administration or guardian bond, shall be required when the value of the estate and effects, real and personal, does not exceed one thousand dollars: <i>Provided further</i> , That no stamp tax shall be required upon any papers necessary to be used for the collection, from the government, of claims by soldiers or their legal representatives, of the United States, for pensions, back pay, bounty or for property lost in the service.(d)	
Protest.—Upon the protest of every note, bill of exchange, acceptance, check or draft, or any marine protest, whether protested by a notary public or by any other officer who may be authorized by the law of any state or states to make such protest, twenty-five cents	25
<i>Provided</i> , That when more than one signature is affixed to the same paper, one or more stamps may be affixed thereto representing the whole amount of the stamp required for such signatures; and that the term money, as herein used, shall be held to include drafts and other instruments given for the payment of money.(e)	
<i>Provided</i> , That the stamp duties imposed by the foregoing schedule B on manifests, bills of lading, and passage-tickets, shall not apply to steamboats or vessels plying between ports of the United States and ports in British North America. <i>And provided further</i> , That all affidavits shall be exempt from stamp duty.(d)	
(a) So amended by act 3 March 1865. 13 Stat. 482.	upon the amount of the personalty only. 2 Leg. Gaz. 180.
(b) A power to represent a creditor in bankruptcy, does not require a stamp. 3 Bank. Reg. 38.	(d) So amended by act 2 March 1867. 14 Stat. 475.
(c) If the executor have no interest in the real estate, the stamp duty is to be calculated	(e) So amended by act 13 July 1866. 14 Stat. 144.

Summary Convictions.

I. Requisites of a summary conviction.
II. Judicial decisions.

III. A form of general record of conviction.

I. A CONVICTION is "a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced." Bosc. on Conv. 7.

As this mode of jurisdiction has been introduced in derogation of the common law, and operates to the exclusion of trial by jury, the superior courts of justice have rigidly confined its authority to the strict letter of the respective statutes by which it was established; and in revising its proceedings, they require that rules similar to those adopted by the common law in criminal prosecutions, and founded in natural justice, should appear to have been observed, unless where the statutes expressly dispense with the form of stating them. 1 Burr. 613. 4 Burr. 2281. 1 Bay 357.

But though the courts are strict in forming their judgment upon convictions, they will not always be *astute* in finding objections to them. 1 Ld. Raym. 581. 2 T. R. 18.

A conviction cannot be good in part, and bad in part, but must be wholly quashed if there is any fault. Cowp. 728. 2 Str. 900.

The proceedings usually consist of six parts.

First, the information; secondly, the summons; thirdly, the appearance or non-appearance of the defendant; fourthly, (in case he does appear,) his defence or confession; fifthly, (unless he has confessed,) the evidence; sixthly, the judgment.

Information.—The information must always be stated at large. Where the statute directs the information to be *on oath*, it should be so stated in the conviction. Sometimes, where the offence is an invasion of private property, a complaint from the owner, or at least some proof of his dissent, is deemed necessary, even though the statute does not expressly require it. 4 Burr. 2282.

The *information* should contain:—

First, the *day* when it was taken, that it may appear to have been given within the time limited by the statute. *Secondly*, the *place* where it was taken, that it may appear the justice was acting within the limits of his jurisdiction. Here it should ~~seem~~ that the name of the county must be in the *body* of the conviction, and that a reference to the county in the margin is not sufficient, as it would be in an order, for the courts are far stricter in cases of conviction, and it has always been deemed necessary in an indictment. *Thirdly*, the *name* of the informer, that, as most of the statutes give a part of the penalty to him, it may appear afterwards that the witness is not the same person, it having been settled that the informer cannot be a witness where he is entitled to any part of the penalty. *Fourthly*, the *name and style* of the justice or justices to whom it is given, that it may appear he or they have authority to take such information. (2 Salk. 474. 1 Str. 261, 443, 711.) *Fifthly*, the *name of the offender*. *Sixthly*, the *time* of committing the offence ought to be stated, for the same reason that renders the time of taking the information material. However, the particular day need not be mentioned, provided the days are mentioned between which the fact is charged to have been committed; and all that is necessary to be laid in point of time is, that the prosecution appear to have been made within the limitation of the particular statute. (1 Salk. 369. 1 Ld. Raym. 581. 10 Mod. 248. 11 H. 521.) *Seventhly*, the *place* where the offence was committed must be inserted, that it may appear to be within the jurisdiction of the magistrate before whom the information is laid. (2 Ld. Raym. 1220.) *Eighthly*, the information must contain an exact description of the offence. The best *general* rule for describing the offence is to pursue exactly the words of the statute. 11 H. 521. But the rule admits of many modifications and exceptions. 2 Burr 679. 1 T. R. 222. 1 Ld. Raym. 581. 2 P. 265.

Where a statute expresses more offences than one in the disjunctive, though in the same sentence, you may convict on either. 1 Str. 496.

In some cases you must state the offence and its circumstances more fully than the statute on which the conviction is founded describes it. Thus, what is strongly

and necessarily implied in a statute, though not expressed in terms, should be expressed in a conviction. (2 Burr. 679.) Also, the number and nature of things taken, destroyed, damaged or embezzled (as the case may be) should be expressed; more especially wherever the statute directs any recompense to be given to the party injured, as when the conviction is upon a statute against the robbing of orchards, cutting of trees, &c., the number of trees cut should be mentioned. 2 Ld. Raym. 900. 5 Co. 34. 2 Str. 900. 2 P. 480.

Though exactness and precision is required in describing the offence; yet where a conviction expresses a number of offences consisting of the same fact repeated, the words that charge the fact to be an offence need not be repeated as many times as the fact is alleged to have been committed. 1 Ld. Raym. 583.

Of the summons.—The summons follows the information; and since it cannot, from the reason of the thing, be prior in order of time; so if the summons bear date on an earlier day than the information, it would vitiate the conviction. 2 Ld. Raym. 1546.

The party ought, in point of fact, to be summoned. In the case of *The King v. Venables*, "the court were unanimously of opinion that the party in those cases ought to be summoned in fact, and if the justices proceeded against a person without summoning him, it would be a misdemeanor in them, for which an information would lie against them." 1 Str. 630. 1 Park. Cr. R. 95. T. U. P. Charlt. 235.

Of the appearance or non-appearance of defendant.—It must be stated whether the defendant appeared or not, for only in the case of his not appearing is the summons material; for it is settled that the appearance cures every defect of summons. 1 Salk. 383. 3 Burr. 1785.

PARKER, C. J., delivered the resolution of the court. "We are all of opinion the offender may be convicted without appearing. The statute is silent as to the method of proceeding; and the law of England, it is true, in point of material justice, always requires the party charged with any offence to be heard before he be condemned in judgment; but that rule must have this exception, unless it is through his own default; were it otherwise, every criminal might avoid conviction. The law being so, the magistrate is bound to give some opportunity to the party to appear, and if upon such notice he neither come nor send a sufficient excuse, the magistrate may proceed to judgment. If this was not to be allowed, the consequence would be that the offender would escape unpunished because he would never appear purposely to be convicted, and that would be to make the execution of the law depend on the will of the offender." 1 Str. 44.

Of the defence or confession.—If the defendant confesses the charge, the justice may convict without going into any evidence against him; and it has been determined he may do so, even where the statute says nothing of confession, but only directs him to convict by the oath of a witness or witnesses. But the confession must be of such facts as fully constitute an offence; otherwise it will not supply any defect of evidence. 1 Burr. 609.

If the defendant denies the fact charged upon him, or pleads not guilty, the next thing to be stated, is

The evidence.—It should contain, as well as the information, the day and place when it was taken, the name of the offender, and the time when the offence was committed, subject to the qualification before stated, viz.: that it may be sufficient to fix it between such and such a day. 1 Salk. 378. 1 Ld. Raym. 581.

It must also contain, first, the name of the witness, that he may appear to be a different person from the informer, as the statutes generally give the latter a part of the penalty, (2 Ld. Raym. 1545;) secondly, the evidence must be stated to have been given in the presence of the defendant, that it may appear he has had the benefit of a cross-examination. 2 Str. 1240. 3 Burr. 1786. 2 T. R. 18.

The court will presume the witness to have been examined in the defendant's presence, unless the contrary appear. 3 Burr. 1786. 2 T. R. 18.

Even if it shall appear, on the conviction, that the evidence was not given in the defendant's presence, yet if he confess the charge that irregularity is cured. 1 T. R. 320.

A third rule with regard to the evidence, is, that it must be of a fact prior to, or existing at, the time of the information, and not of a fact subsequent to it. 1 Ld. Raym. 509.

A fourth rule is, that the fact must be proved to have been committed in the place where it was laid, or at least within some place within the jurisdiction of the magistrate convicting. 1 T. R. 241.

The fifth and last rule respecting the evidence, is, that it shall be set out at large, and (as a necessary consequence) contain a full and accurate statement of the facts that constitute the offence. 1 Bay 357. 2 Seld. 327. 2 P. 265.

In setting forth the act or acts of the defendant that constitute the offence, the evidence should, in general, be more particular than the information. In some instances, the offence can only be described generally in the information, and yet consists either of a number of distinct acts, which, in the aggregate, constitute the offence, and must, therefore, be set forth in the evidence, or of some act that, from its nature, must have been, in point of fact, particularly set forth by the witness, and, therefore, ought to be so by the justice. 1 Burr. 609. 2 T. R. 18.

Of the judgment or adjudication.—The judgment is a necessary part of every conviction, and should contain, first, an adjudication that the defendant is convicted, and, secondly, an adjudication of the forfeiture or penalty. 1 Park. Cr. R. 95.

As to the first, the general way of expressing it is to say, "that the defendant is convicted of the said offence against the form of the statute." Skin. 562.

On the other hand, when more offences than one are charged in the information, (as where a man was charged, on one of the lottery acts, with dealing in shares of lottery tickets, and also with registering tickets without a license,) it is not sufficient to say he is "convicted of the said offence," but if (which the court seemed to doubt) both offences might have been included in one conviction, he should have been convicted of both. 1 T. R. 249.

The second and last branch of the judgment is a declaration of the forfeiture or penalty incurred, and a distribution of the sum forfeited, in case the statute so directs. This declaration is held to be a necessary part of every conviction. 1 Salk. 378. 2 Str. 858. 2 Burr. 1163.

As to the distribution of the forfeiture, it should seem there need not be any stated by the justice, where the statute *expressly* gives it in certain proportions. 1 Salk. 383.

But where justices are required, by a penal statute, to distribute the penalty, on conviction, amongst certain persons, according to their discretion, an adjudication that the forfeiture be disposed of "as the law directs," is bad, for in such cases the justice or justices should adjudge what the several proportions shall be. 2 T. R. 96.

II. The essentials of a summary conviction, are, an information, that the defendant be summoned, or have notice of the charge, and an opportunity to make his defence, that the evidence be such as the common law approves, unless the statute directs otherwise, a conviction, judgment and execution according to the common law, influenced by the special authority under the statute, and a record of the whole proceedings, setting forth the particular circumstances, so as to appear that the justice has conformed to the law and not exceeded his jurisdiction. 11 P. F. Sm. 272.

A conviction, by the mayor of Philadelphia, under a city ordinance against huckstering, which does not state *where* the offence was committed, is bad. 4 B. 266. 3 Y. 475.

Where a return to a *certiorari* stated that the defendant was summoned to answer, &c., "for placing goods on the footway of the street, and in his porch," and the judgment was that the plaintiff recover of the defendant, without stating on which part of the charge judgment was given, the return was held bad. 1 Y. 471.

Where a form of summary conviction is peremptorily prescribed, it must be exactly followed; but if the provision is merely directory, and the conviction contains everything required by the form given, it will not be vitiated by unnecessarily stating more than is required. 1 Ash. 410.

Where no statutory form of conviction is given, and the proceedings are according to the course of the common law, every positive ingredient must be repeated in proof, and is not to be taken by reference merely to the charge. *Ibid.*

The form of conviction, given by the 4th section of the act of 22d April 1794,

for the prevention of vice and immorality, is directory merely, and, under that act, the justice is not bound to send up the evidence given before him. *Ibid.*

If the justice does send up the evidence, the court will not look into it, to ascertain if the conviction is warranted by it. *Ibid.*

When an act of assembly, creating an offence, provides that the person so offending, *on conviction* thereof, before a justice of the county, shall pay a fine of five dollars for every such offence, to be recovered as debts of like amount are recoverable, by any person who may sue for the same, the offender need not be convicted by indictment or by summary process, before the justice, but simply in an action of debt, by a judgment for the penalty, if proved guilty of the offence. 10 W. 382.

In a summary conviction, under the 2d section of the act of 22d April 1794, for profane swearing, the judgment must ascertain not only the amount of fine inflicted, but also the alternative duration of imprisonment; and if it do not, the proceedings are void, and the defendant cannot be held in prison. 3 P. L. J. 59.

A summary conviction must agree with, and cannot exceed the charge in the information. Several offences may be contained in one conviction. *Ibid.* 265.

Where the information or complaint, in a case of summary conviction, is so specific as to give the defendant notice of the substance, time and place of the offence charged, it is sufficient. Any indefiniteness in the information or summons is cured, by the defendant appearing and going on to trial without objection. 11 H. 521.

If the record of conviction set forth a definite offence, it is not vitiated by the fact that the same offence is indefinitely charged in the information on which the writ issued. *Ibid.*

The judgment of the court of common pleas, on a *certiorari* to a summary conviction by a justice of the peace, may be reviewed on writ of error in the supreme court. *Ibid.*

III. A FORM OF GENERAL RECORD OF CONVICTION.

BUCKS COUNTY, ss.

BE IT REMEMBERED, that on the 26th day of April, A. D. 1860, at the township of Bristol in the county of Bucks aforesaid, A. B., of the said township, farmer, cometh before J. R., one of the justices of the peace of the commonwealth of Pennsylvania, in and for the said county, and on his oath or affirmation, [if an oath or affirmation is required by the act upon which the conviction is founded,] informs me, the said justice, that E. F., of the township of Falls, in the said county, on the 20th day of April last past, at the township of Bristol aforesaid, in the said county, did [here set forth the fact in the words of the act of assembly, as near as may be] contrary to the form of the act of assembly in that case made and provided. And afterwards, upon the 2d day of May, in the year aforesaid, at Bristol, in the county of Bucks aforesaid, the said E. F., having been previously summoned to appear before me, the said justice, upon the said 2d day of May, in the year aforesaid, at ten of the clock in the forenoon of that day, at my office, in Bristol, to answer the matter of complaint contained in the said information, he, the said E. F., appears before me, the said justice, to answer; whereupon I, the said J. R., proceed to examine into the truth of the said complaint, contained in the said information, in the presence and hearing as well of the said A. B. as of the said E. F.; and thereupon, on the day and year last mentioned, at the township of Bristol aforesaid, G. H. comes before me to prove the charge contained in the said information against the said E. F., and is now by me, the said justice, sworn to speak the truth, the whole truth, and nothing but the truth, of and upon the matters contained in the said information; and the said G. H., being so sworn, does on his oath say and depose, in the presence and hearing of the said E. F., that the said E. F., on the 20th day of April last past, at the township of Bristol, in the said county, did [here again set forth the fact, or so much thereof as is sufficient to convict the offender.] And the said E. F. does not produce any evidence to contradict the proof aforesaid. Wherefore, it appears to me, the said justice, that the said E. F. is guilty of the premises charged upon him by the said information. It is, therefore, adjudged by me, the said justice, that the said E. F., according to the form of the act of general assembly aforesaid, be convicted, and he is accordingly convicted, of the offence charged upon him by the said information. And I do hereby adjudge that the said E. F., for the said offence, hath forfeited the sum of ten dollars, lawful money of the United States, to be distributed as the act of general assembly aforesaid doth direct. (In witness whereof, I, the said justice, to this present record of conviction, have set my hand and seal, at Bristol township, in the said county, the 2d day of May, A. D. 1860.

J. R., Justice of the Peace. [SEAL.]

Summons for Debt, &c.

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|--------------------------------------------------------------------|---------------------------------------------------------------------------|
| I. When a summons may issue. | IV. When an attachment may issue against a defaulting witness. |
| II. How the justice should issue the summons. | V. Summonses in debt or demand, in trover and conversion, and in damages. |
| III. How to serve and make return of the service of a summons, &c. | |

I. OF ISSUING A SUMMONS.

On complaint made in relation to any demand within the jurisdiction of the justice, he may issue process. Having ascertained that the complaint is cognisable before him, the next inquiry is as to the residence of the defendant. If that shall be found to be within the district for which the magistrate shall have been commissioned, then let the process be filled up, and issue. Although a defendant may not reside, yet if he be *found* within the jurisdiction of the magistrate, and the process be legally served and returned, it is the duty of the magistrate to act upon it, in the same manner, and the proceedings will be equally valid, as if the defendant were a resident of the district in which the justice resides.

II. OF FILLING UP THE SUMMONS.

If the suit be brought for debt, by one individual against another, the summons should be made to read "summon A. B. to answer C. D."

If brought by *partners in trade*, against partners in trade, it should read, "summon E. F. and G. H., trading under the firm of F. & H., to answer J. J. and L. K., trading under the firm of J. & K."

If either of the firms shall have been dissolved, the summons may read "lately trading, &c."

If brought by *executors against* an individual, it may read "summon M. N. to answer O. P. and Q. R., executors of the last will and testament of S. F., deceased." If the suit be brought by administrators, the summons should be filled up in a similar manner.

If the suit be brought by an individual, *against husband and wife*, the debt having been contracted by the wife *before* her marriage, the summons should read "summon U. V. and W. V., his wife, late W. X., to answer Y. Z."

The summons must fix a certain time for the appearance of the defendant to answer, which, by the act of 1855, may be between two designated hours of the day, after the lapse of which time, the defendant is in default, and the justice may proceed *ex parte*.

Summonses in *trover*, or in *trespass*, &c., may be filled up in the same way as those for debt.

III. OF THE SERVICE OF THE SUMMONS, &c.

The remarks about to be made in relation to this process and its service, apply with equal force to every description of summons, *scire facias* and *subpoena*. The mode of service, in all these cases, is the same. "The service," says the law of March 20th 1810, sect. 2, "on the defendant, shall be by [the constable] producing the original summons to, and informing him [the person to be summoned] of the contents thereof;" that is, by permitting the defendant to read it; by reading it to him; or, to use the words of the law, "by informing him of the contents thereof;" by whom he is sued; and *when, where* and *before whom*, he is to appear. If the constable shall deliver to the defendant a copy of the summons, without reading, or saying anything about its contents, that will be good service. When called upon to make a return of the summons so served, to the justice, the constable should write on the back of it, "served on the defendant by producing to him the original summons, and informing him of the contents thereof;" the constable subscribing his *name*, and the *date* of the service, on the back of the summons.

This is one way of serving a summons; but lest the constable might not have an opportunity of seeing the defendant, the law provides that it shall be good service of the summons for the constable to leave "a copy of it at his [the defendant's] dwelling-house, in the presence of one or more of his family, or neighbors, at least four days before the time of hearing" at the office of the justice.

The constable must attend to the following particulars:

He must make an *exact* copy of the process. He will be the more certain to do this, by bearing in mind that on its return he is to swear [or, if conscientiously scrupulous of taking an oath, affirm] to the correctness of the copy.

He must be particular *where* he leaves the copy. It must be left "at the *dwelling-house*." It will not do to leave it at the defendant's store, or at his counting-house, or work-shop or mill, or at any other place than his "dwelling-house." There, the law directs it to be served, and there our courts have ruled it shall be served.

The summons must be delivered to a constable, to be served by him. He has no right to depute another to perform this duty. He may, at the request and risk of the plaintiff, give, on the back of a warrant, a special deputation to another person to serve it, because this authority is vested in him by the act of assembly. This is believed to be the only *civil* process on which a constable is authorized to give a special deputation.

It must be left at the dwelling-house of the defendant, in the presence of "one or more of his family or neighbors." The law does not expect from the constable to inquire whether the person who opens the door of the dwelling-house, or to whom he delivers the copy, is a relation, or is in the employ of the defendant. If he or she shall appear to reside in or about the house, that person will be presumed to be one of his family, or one of his neighbors.

It must be left at the dwelling-house, not at the store, mill or work-shop of the defendant, "at least *four days* before the time of hearing" at the office of the justice.

Having attended to these simple but indispensable particulars, in the service, the constable must attend to the return which he is to make in writing to the justice, on the back of each of the processes he shall have been intrusted to serve. It may be as follows: "Served on the defendant, by leaving a copy of the within process at his dwelling-house, in the presence of one of his family," [or one of his neighbors,] as the case may be. Signed, D. C., constable, July 4th 1862.

When there are the names of more than one person in the process, who are to be summoned, it is the duty of the constable to serve all the persons named, if he can, and to indorse the result of his inquiries on the summons or subpoena. As thus: A summons is issued against A. B., C. D. and E. F., trading under the firm of B., D. & F. Each of these persons should be named in the return on the back of the summons, thus: "Served on A. B. by producing to him the original summons, and informing him of the contents thereof; on C. D., by leaving a copy of the within writ at his dwelling-house, in the presence of one of his family; the other defendant, E. F., not found. G. H., constable, July 4th 1862."

The truth of this return being verified by the oath or affirmation of the constable, the process may be filed until the appearance of one or both of the parties at the time appointed for the hearing.

IV. The service of a subpoena, if made and attested as above laid down, is to be regarded as sufficient for all purposes to the parties who may have issued it, save only that no attachment may issue against a defaulting witness, until it have been duly proved that the subpoena was *personally* served on him.

This being done, and an application made, the justice may issue an attachment to compel the attendance of the witness forthwith, or at another time to which the case may be adjourned. The attachment may issue according to the form given under the title "Attachment," for a witness.

V. COPY OF A SUMMONS IN DEBT OR DEMAND.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Fifth Ward, or to the next Constable of the said City, most convenient to the defendant, greeting:

You are hereby commanded to summon Timothy Holdfast to be and appear on the third day of December 1861, between the hours of 9 and 10 o'clock in the forenoon, before John White, an alderman in and for Fifth Ward, in the said city, to answer Joseph Graspall, in a plea of debt or demand, "arising from contract, either express or implied," not exceeding one hundred dollars. Witness our said alderman, at Philadelphia, who hath hereunto subscribed his name, and affixed his seal, the 27th day of November, in the year of our Lord one thousand eight hundred and sixty-one.

JOHN WHITE, Alderman. [SEAL.]

The alderman's office is No. 404, Library street.

SUMMONS IN TROVER AND CONVERSION.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Fifth Ward, or to the next Constable of the said City, most convenient to the defendant, greeting:

You are hereby commanded to summon James Find to be and appear on the third day of December 1860, between the hours of 11 and 12 o'clock at noon, before John White, an alderman in and for Fifth Ward, in the said city, to answer John Loet, in a plea of *trover and conversion*, for damages not exceeding one hundred dollars. Witness our said alderman, at Philadelphia, who hath hereunto subscribed his name, and affixed his seal, the 27th day of November, in the year of our Lord one thousand eight hundred and sixty.

JOHN WHITE, Alderman. [SEAL.]

The alderman's office is No. 404, Library street.

SUMMONS IN TRESPASS FOR DAMAGES.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of Fifth Ward, or to the next Constable of the said City, most convenient to the defendant, greeting:

You are hereby commanded to summon Mark Force to be and appear on the sixth day of December 1860, between the hours of 8 and 9 o'clock in the forenoon, before John White, an alderman in and for Fifth Ward, in the said city, to answer Peter Resist, of a plea of trespass, brought for the recovery of damages, for injury done or committed by the defendant, on the real or personal estate of the plaintiff, not exceeding one hundred dollars. Witness our said alderman, at Philadelphia, who hath hereunto set his hand and seal, the first day of December, in the year of our Lord one thousand eight hundred and sixty.

JOHN WHITE, Alderman. [SEAL.]

The alderman's office is No. 404, Library street.

SUMMONS FOR A PENALTY.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of Fifth Ward, or to the next Constable of the said City, most convenient to the defendant, greeting:

You are hereby commanded to summon Thomas Rude to be and appear on the sixth day of December 1860, between the hours of 10 and 11 o'clock in the forenoon, before John White, an alderman in and for Fifth Ward, in the said city, to answer Jonas Trusty in a plea of debt, for a penalty, not exceeding one hundred dollars. Witness our said alderman at Philadelphia, who hath hereunto subscribed his name, and affixed his seal, the first day of December, in the year of our Lord one thousand eight hundred and sixty.

JOHN WHITE, Alderman. [SEAL.]

The alderman's office is No. 404, Library street.

Sunday.

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| <p>I. No person shall be arrested on Sunday but for felony, treason or breach of the peace.</p> <p>II. Drinking in ale-houses, &c., forbidden.</p> <p>III. Worldly employment prohibited.</p> | <p>IV. Sale of liquors punished.</p> <p>V. Judicial authorities and decisions.</p> <p>VI. Of contracts made on Sunday.</p> <p>VII. Breach of the Sabbath.</p> |
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I. ACT OF 1705. Purd. 924.

SECT. 4. No person or persons upon the first day of the week shall serve or execute, or cause to be served or executed, any writ, precept, warrant, order, judgment or decree, except in cases of treason, felony or breach of the peace; but the serving of any such writ, precept, warrant, order, judgment or decree shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same, shall be as liable to the suit of the party aggrieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, precept, warrant, order, judgment or decree at all.

II. SECT. 5. All persons who are found drinking and tippling in ale-houses, taverns or other public house or place on the first day of the week, commonly called Sunday, or any part thereof, shall, for every offence, forfeit and pay one shilling and sixpence to any constable that shall demand the same, to the use of the poor; and all constables are hereby empowered, and, by virtue of their office, required, to search public houses and places suspected to entertain such tipplers, and them, when found, quietly to disperse; but in case of refusal, to bring the persons so refusing before the next justice of the peace, who may commit such offenders to the stocks, or bind them to their good behavior, as to him shall seem requisite.

III. ACT 22 APRIL 1794. Purd. 924.

SECT. 1. If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practise any unlawful game, hunting, shooting, sport or diversion whatsoever, on the same day, and be convicted thereof, every such person, so offending, shall, for every such offence, forfeit and pay four dollars, (a) to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum, or goods and chattels cannot be found whereof to levy the same by distress, he or she shall suffer six days' imprisonment in the house of correction of the proper county: *Provided always*, that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment, for the use of sojourners, travellers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessities of life before nine o'clock in the forenoon, nor after five in the afternoon of the same day.

IV. ACT 26 FEBRUARY 1855. Purd. 925.

SECT. 1. It shall not be lawful for any person or persons to sell, trade or barter in any spirituous or malt liquors, wine or cider, on the first day of the week, commonly called Sunday; or for the keeper or keepers of any hotel, inn, tavern, ale-house, beer-house, or other public house or place, knowingly to allow or permit any spirituous or malt liquors, wine or cider, to be drank on or within the premises or house occupied or kept by such keeper or keepers, his, her or their agents or servants, on the said first day of the week.

(a) Increased to \$25 in Allegheny county, by act 26th April 1855. Purd. 924 n. For form of conviction see "Profaneness."

SECT. 2. Any person or persons violating the provisions of the foregoing section, shall for each and every offence, forfeit and pay the sum of fifty dollars, one half of which shall be paid to the prosecutor, and the other half to the guardians of the poor of the city or county in which suit is brought, or in counties having no guardians of the poor, then to the overseers of the poor of the township, ward or borough in which the offence was committed; (a) to be recovered before any mayor, alderman, burgess or justice of the peace, as debts of like amount are now by law recoverable, in any action of debt brought in the name of the commonwealth, as well for the use of the guardians of the poor (or for the overseers of the poor of the township, ward or borough, as the case may be) as for the person suing: *Provided*, That when any prosecutor is himself a witness, on any trial under the provisions of this section, then the whole penalty or forfeiture shall be paid to the guardians or overseers as aforesaid: *And provided further*, That it shall be a misdemeanor in office, for any such mayor, alderman, burgess or justice of the peace, to neglect to render to the said guardians of the poor and prosecutor the amount of such penalty, within ten days from the payment of the same.

SECT. 3. In addition to the civil penalties imposed by the last preceding section, for a violation of the provisions of the first section of this act, every person who shall violate the provisions of that section, shall be taken and deemed to have committed a misdemeanor, and shall on conviction thereof, in any criminal court in this commonwealth, be fined in any sum not less than ten, nor more than one hundred dollars, and be imprisoned in the county jail for a period not less than ten, nor more than sixty days, at the discretion of the court.

V. Profanation of the Lord's day, is an offence against God and religion. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their Maker. 4 Bl. Com. 64.

Legal process cannot be issued on a Sunday, except for treason, felony or breach of the peace. 1 S. & R. 351. 1 West. Leg. Obs. 276. It seems, that any criminal process may be executed on a Sunday, as every crime involves a breach of the peace. See ante 498.

A judgment is not erroneous because the *verdict* on which it was rendered was delivered on Sunday. 3 W. 56. Lewis' Cr. L. 422. 26 Leg. Int. 388.

A principal may be taken up by his bail on Sunday. 1 Atk. 239.

Parliament may sit on Sunday. 1 Bl. R. 499.

A will may be made on Sunday. 5 P. F. Sm. 183.

VI. OF CONTRACTS MADE ON SUNDAY.

A contract made on Sunday is void. 1 Br. 171. 6 W. 231. 3 W. & S. 446. 5 P. F. Sm. 325.

A promissory note given on Sunday is void, and no action can be sustained upon it. 6 W. 231. 5 Ala. 467.

In an action on a contract for the sale of a chattel, proof by defendant, that it was received by the vendee on Sunday, from a third person, does not raise such a presumption that the contract was made on Sunday as will defeat the plaintiff's action. 1 W. & S. 477.

Under the act of the 22d April 1794, a contract made on a Sunday for the hire of horses to be used on an excursion of pleasure, on that or any other day, is void,

(a) The act of 29 April 1867 provides that all penalties, fines and forfeitures imposed, incurred or paid, under this act, except so far as part thereof is payable to the prosecutor, shall be paid over to the guardians, directors, or other representatives of the poor of the city, district or county in which the offence was committed. *Purd.* 1478.

and the hirer cannot recover. Under the same act, a contract made on Saturday for the hire of horses to be used on an excursion of pleasure on Sunday, is void, and plaintiff cannot recover. 2 M. 402.

But the hire of a carriage on a Sunday by a son, to visit his father, creates a legal contract. 6 Barr 417. "The visit to his father, by the defendant, was discharging a filial duty, which nothing in the law hinders or forbids." Ibid. 420, per COULTER, J.

A contract for the publication of an advertisement in a newspaper to be issued and sold on Sunday, is void. 24 N. Y. 353.

A bond executed on Sunday is not void at common law, but by reason of the statute. 3 W. & S. 441.

A bond is not perfected until delivery; hence a mere signing on Sunday does not render it void, if not delivered until the day following. 2 Barr 448.

Whether a marriage contract executed on Sunday be legal, *quere*? 2 H. 417.

VII. BREACH OF THE SABBATH.

The proper mode of procedure, under the act of 22d April 1794, against persons who perform worldly employment on Sunday, is by *conviction*, and not by a *qui tam* action. 3 S. & R. 48.

The offence of working on Sunday does not amount to a breach of the peace. 1 Ibid. 350.

A justice of the peace, who is authorized, by the act of 1794, to convict on view of a breach of the Sabbath, cannot enter forcibly into the premises of another where the breach is committed, to obtain a view. 1 Ibid. 347.

Persons who profess the Jewish religion, and others who keep the seventh day as their Sabbath, are not exempted from the penalties inflicted by the act upon those who do worldly employment on Sunday. 3 Ibid. 48. 8 Barr 312.

Travelling is not within the prohibition of the act of 1794. 5 S. & R. 302.

One penalty only can be incurred in one day by exercising one's business on a Sunday. Cowp. 640.

When three or more persons agree to go to a church where divine service is to be performed, and to laugh and talk during the performance of the same, in a manner which might be excusable in a tavern; and in so doing, manifest a determination to resist by force any effort that may be made to remove them or prevent their so doing, they will be guilty of riot. 6 P. L. J. 223. Bright. R. 44.

It seems that the unnecessary performance of secular labors on Sunday, in such a way as to disturb the worship of others, is indictable in Pennsylvania. Ibid.

The performance of worldly business on Sunday, does not amount to a breach of the peace; unless it be carried on in public, and in such a manner as to disturb those who keep it as a day of rest and religious observance. 1 Phila. R. 460.

The crying of newspapers in the public streets on Sunday is a breach of the peace. Ibid.

Driving a public conveyance for the transportation of passengers, is not a work of necessity, within the exception of the act of 1794. 10 H. 102. 4 P. F. Sm. 401. 23 Leg. Int. 340. The running of passenger cars on a city railroad on Sunday, by reason of the noise and disturbance accompanying it, may amount to a breach of the peace. 2 Gr. 506. See 3 Phila. 509.

The travelling which is not forbidden by the statute is that by private conveyance; the running of public conveyances is within the prohibition. 10 H. 102.

The sale of liquor by an innkeeper, to a sojourner, on Sunday, is within the prohibition of the act of 1794. 9 H. 426.

But such offence is not indictable as the keeping of a tippling or disorderly house; it is only punishable under the act of 1794. 10 C. 86.

It is not a violation of the act of 1794 for a hired domestic servant to drive his employer's family to church, on the Lord's day, in the employer's private conveyance. 10 C. 398.

But the business of a barber in shaving his customers on Sunday morning, is a violation of the act. 2 Leg. Gaz. 78.

On no individual is the obligation stronger than on a magistrate, to promote, by all due means, the influence of religion. The course of his duty presents many occasions in which he may properly diffuse a sense of piety, and a detestation of vice. He should uniformly administer oaths with that solemnity and respect which the important nature of the ceremony demands; and he should take pains to instruct the careless and profligate with respect to the obligation incurred, the heavy guilt of perjury, and the impossibility of escaping future punishment by evasive acts or mental equivocation. It depends upon magistrates principally to enforce those laws which are intended to suppress crimes in direct disobedience to the plainest precepts of the gospel, namely, profane swearing, breach of the Sabbath and drunkenness. This duty is particularly confided to them—and it is impossible to reconcile the neglect of it with that obligation and responsibility which attached to them the moment they qualified. But if, instead of punishing such crimes, magistrates should themselves commit them, and thereby extend their pernicious influence through the community, how severely ought such conduct to be reprobated! how deplorable must be the condition of a country whose morals are committed to the safeguard of such faithless agents! 1 Carolina Law Repository 458.

Surety of the Peace.

I. The law and judicial authorities.

II. Form of a warrant and commitment.

I. ACT 81 MARCH 1860. Purd. 250.

SECT 6. If any person shall threaten the person of another to wound, kill or destroy him, or to do him any harm in person or estate, and the person threatened shall appear before a justice of the peace, and attest, on oath or affirmation, that he believes that by such threatening he is in danger of being hurt in body or estate, such person so threatening as aforesaid, shall be bound over, with one sufficient surety, to appear at the next sessions, according to law, and in the mean time to be of his good behavior, and keep the peace toward all citizens of this commonwealth. If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his family, person or property, he may, on complaint of any person having reasonable cause to fear a breach of the peace therefrom, be required to find surety of the peace as aforesaid.

SURETY OF THE PEACE, so called because the party that was in fear is thereby secured. This security consists in [the person complained of] being bound with one or more sureties, in a recognisance or obligation to the king [commonwealth] entered on record and taken in some court, or by some judicial officer, whereby the parties acknowledge themselves to be indebted to the crown [the commonwealth] in the sum required, [for instance \$100,] with condition to be void and of none effect, if the party shall appear in court on such a day, and in the mean time shall keep the peace either generally towards the king and all his liege people, [to all the citizens of the commonwealth,] and particularly also with regard to the person who craves the security. 4 Bl. Com. 252.

Surety of the peace is demandable *of right* by any individual who will make the necessary oath, (1 B. 102 n.) that is, will swear that A. B. has threatened to do him "harm in person or estate," and that he believes "he is in danger to be hurt in body or estate."

Surety of the peace ought not to be granted on account of a *past* beating, unless there be fear of *future* danger; the remedy in such case being by action or indictment. 1 Ash. 140.

A committing magistrate has no authority to bind a person to keep the peace, or for his good behavior, longer than the next term of the court. 2 P. 458.

Surety for good behavior may be ordered by the court, after the acquittal of a prisoner, in such sum, and for such length of time as the public safety requires. 2 Y. 437. 10 Barr 339. 2 Hayw. 73-4. See 12 Eng. L. & Eq. 462. •

II. COPY OF A WARRANT FOR THREATS.

BRADFORD COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of S—, in the County of Bradford, greeting:

WHEREAS, J. D., of the township of H—, in the county of Bradford, tavern-keeper, hath this day made oath before J. R., Esquire, one of the justices of the peace in and for the county of Bradford, that R. R., of the township of S—, in the said county, blacksmith, hath threatened to do him harm in person or estate, and that, by reason of such threatening, he believes he is in danger to be hurt in body or estate: You are therefore hereby commanded to take the said R. R., and bring him before the said J. R. to answer the said complaint. Witness the said J. R., at S— township aforesaid, the first day of October, in the year of our Lord one thousand eight hundred and sixty.

J. R., Justice of the Peace. [SEAL.]

COMMITMENT.

BRADFORD COUNTY, ss.

The Commonwealth of Pennsylvania,

To the Constable of the Township of H—, in the County of Bradford, and to the Keeper of the Common Jail of the said County, greeting:

WHEREAS, R. R., of the township of S—, in the said county, blacksmith, hath been brought before G. H., Esquire, one of our justices of the peace in and for the said county, by virtue of a warrant issued on the oath of J. D.: And whereas the said R. R. hath refused to find sufficient surety to keep the peace towards all our citizens, but especially towards the said J. D.: These are therefore to command you the said constable to convey the said R. R. to the common jail of the said county, and deliver him to the keeper thereof, who is hereby enjoined to receive the said R. R., and keep him in safe custody until he find sufficient surety as aforesaid, or be otherwise legally discharged. Witness the said G. H., at H— township, aforesaid, the fifth day of October, in the year of our Lord one thousand eight hundred and sixty.

G. H., Justice of the Peace. [SEAL.]

Swine.

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| I. To be yoked, &c., if at large. Application may be made to a justice. | IV. Regulations in certain towns. |
| II. Who shall advertise the swine. | V. The act extended. |
| III. Proceedings if no owner appear. | VI. Judicial decisions and forms. |

I. ACT OF 1705. Purd. 932.

SECT. 1. No swine shall be suffered to run at large without rings and yokes, under the penalty of forfeiting half the value thereof, to the use hereafter expressed; therefore if any persons shall find on his, her or their lands, within fourteen miles of the navigable parts of the river Delaware, any swine, hog or hogs, shoat or shoats, pig or pigs, without rings in their noses sufficient to prevent their turning up the ground, and triangular or three-cornered yokes or bows about their necks, and to extend at least six inches from the angular point or corner, sufficient to keep them from breaking through fences, it shall and may be lawful for him, her or them, all such swine, hogs, shoats or pigs, to kill, and take, and drive and carry away, or to cause them to be killed, taken, driven or carried away: and being so taken and carried away, the said takers shall forthwith acquaint a justice of the peace thereof, and being by him legally attested, that the said swine were taken as aforesaid, without yokes or bows and rings, the said justice shall immediately appoint and order two indifferent persons of the neighborhood, to view and make a just and reasonable appraisement of all such swine, hogs, shoats or pigs, and to make return of their value, number and marks, unto the said justice of the peace, as soon as conveniently it may be done, after such appraisement; one moiety or half the value whereof shall be forfeit to the person or persons, owners or possessors of such lands where found and taken; and he or they that shall take up such swine as aforesaid, shall pay unto the said justice of the peace, for the use of the owner or owners of such swine, the other moiety or half part thereof; and thereupon the property of all such swine shall be and remain in the said owner or possessor of land as aforesaid, to his and their own proper use for ever.

II. SECT. 2. Such justice of the peace shall make publication thereof, by a paper affixed on his house, and on some tree near the high road side, declaring the number, marks and appraisement of all such swine, and by whom taken up, to the end that the owners may have notice thereof; unto whom the said justice of the peace shall pay the other moiety or half the value of such swine taken and appraised, he first deducting out of the same two shillings for the appraisers, and two shillings for the justice's clerk, for their trouble therein; but if it so happen that the moiety or half part, as appraised, will not pay the said four shillings, then such takers up shall pay what shall be wanting thereof.

III. SECT. 3. *Provides*, that if the moiety of such swine is not claimed by any person within twelve months after appraisement, the justice shall pay what money he has received, deducting charges, unto the overseers of the poor of the township where taken up, for the use of the poor of the said township, and the owners of such swine shall be thereupon debarred from any claim or right to the same.

IV. SECT. 4. Prohibits any swine to go at large in the towns of Philadelphia, Chester or Bristol, whether yoked and ringed or not; and if found running at large, they shall be forfeit, one half to him or them that shall take up the same, and the other half to the use of the poor of the respective towns, to be paid to the overseers according to the use aforesaid; the said town of Bristol being all the space contained within half a mile square from the Mill creek up the river Delaware.

V. ACT 10 MAY 1729. Purd. 932.

SECT. 1. The same penalties, rules and orders, enacted and directed to be observed by the (preceding) act, within fourteen miles of the navigable parts of Delaware

river, shall be in force and extended throughout the province [commonwealth] of Pennsylvania. (a)

VI. Unless swine be running at large, they cannot be proceeded against under the act of 1705, and the appraisement must so state the fact; swine escaping from their owner and caught on another's land are not liable to be killed. 10 S. & R. 393. See 10 Wr. 147.

A justice has no authority to adjudge a forfeiture, unless everything required by the statute to give him such authority appears. Under this act it must appear by the record, that the person giving the information was "legally attested" by the justice that the hog was taken up running at large without yoke, or bow, or ring. 8 P. F. Sm. 496.

INFORMATION, ON OATH OF THE TAKER.

DAUPHIN COUNTY, ss.

BEFORE me, one of the justices of the peace in and for the county of Dauphin, personally came D. W., of the township of W——, in the said county, yeoman, and, being duly sworn, did depose and say, that upon the fifteenth day of December, instant, he found upon his lands, situate in the township aforesaid, *three hogs and two shoats* without rings in their noses, and yoke or bows about their necks, and the same being then and there found, did kill and take, (or drive and carry away.) And further saith not. D. W.

Sworn and subscribed, December 17th 1860. Before me, J. B.

APPOINTMENT OF THE APPRAISERS.

To J. D. and R. R., of the Township of W——, in the County of Dauphin, greeting:

WHEREAS, D. W., of W—— township aforesaid, yeoman, hath this day made oath before me, one of the justices of the peace in and for the county of Dauphin, that, upon the fifteenth day of December, instant, he found upon his lands, situated in the township aforesaid, *three hogs and two shoats* without rings in their noses, and yokes or bows about their necks, and the same being then and there found, did kill and take, (or drive and carry away)—I do therefore appoint and order you, the said J. D. and R. R., to view and make a just and reasonable appraisement of all such *hogs and shoats* as aforesaid, and make return of their value, number and marks to me as soon as convenient. Witness my hand and seal at W—— township aforesaid, the seventeenth day of December, in the year of our Lord one thousand eight hundred and sixty.

J. P., Justice of the Peace. [SEAL.]

RETURN OF THE APPRAISERS.

To J. P., Esquire, one of the justices of the peace in and for the County of Dauphin:

IN obedience to your order of the seventeenth instant, we now make return, that we have viewed the *hogs and shoats* therein mentioned, and find that the number of the former is *three* and that of the latter *two*—that *two* of the said *hogs* are *entirely white*, and the *third*, which is the largest of the whole, has a large black mark upon his right side—that the *two shoats* are black and white mixed: and that they are worth eleven dollars in the whole, that is to say, nine dollars for the *three hogs*, and two dollars for the *two shoats*. Witness our hands, December the nineteenth, A. D. 1860.

J. D.
R. R.

PUBLICATION TO BE MADE BY THE JUSTICE.

PUBLIC notice is hereby given to all persons whom it doth or may concern, that on the seventeenth day of December, instant, D. W., of the township of W——, in the county of Dauphin, and state of Pennsylvania, yeoman, appeared before me, J. P., Esquire, one of the justices of the peace in and for the said county, and made oath, that upon the fifteenth day of December, instant, he found upon his lands situate in the township aforesaid *three hogs and two shoats* without rings in their noses, and yokes or bows about their necks, and the same being then and there found, he the said deponent did kill and take, (or drive and carry away.) In pursuance whereof, I the said justice did, by my warrant, appoint and order J. D. and R. R., two indifferent persons of the neighborhood, that is to say, of the same township, to view and make a just and reasonable appraisement of all such *hogs and shoats* as aforesaid, and make return of their value, number and marks unto me as soon as conveniently it might be done after such appraisement. Whereupon the said J. D. and R. R. did, upon the nineteenth day of December, instant, make return, that they had viewed the said *hogs and shoats*, and found the number of the former to be

(a) This act of 1729 was repealed as to the counties of Bedford, Northumberland, Westmoreland, Washington and Fayette, by act 27th March 1784. 2 Sm 96. It was extended to the counties of Tioga and Potter by act 18th April 1853. P. L. 560.

three, and that of the latter two—that two of the said hogs are entirely white, and the third, which is the largest of the whole, has a large black mark upon his right side—that the two shoats are black and white mixed—and that they are worth eleven dollars in the whole, that is to say, nine dollars for the three hogs, and two dollars for the two shoats. And whereas it is directed that “one moiety or half the value of all such hogs and shoats as may be killed, and taken, and driven, and carried away as aforesaid, shall be forfeit to the owners or possessors of such lands where found, and he or they shall pay unto the justice of the peace before whom information shall have been made, for the use of the owners of such swine, the other moiety or half part thereof, and thereupon the property of all such swine shall be and remain in the said owner or possessor of land as aforesaid, to his and their own proper use for ever.” In conformity to the said act, the aforesaid D. W. hath this day paid unto me, the said justice, the sum of five dollars and fifty cents, being one moiety or half the appraised value of such hogs and shoats, so found as aforesaid, for the use of the owner or owners of such swine, which said sum (first deducting out of the same all legal costs) I have in my hands ready to pay to such persons as may be entitled thereto, if claimed within twelve months, otherwise the said sum of five dollars and fifty cents (after deducting all legal costs as aforesaid) will be paid to the overseers of the poor of the township of W—— aforesaid, for the use of the poor of the said township, and the owners of such swine will be thereupon debarred from any claim or right to the same. Given under my hand at W—— township aforesaid, the twenty-first day of December, in the year of our Lord 1860. J. P., Justice of the Peace.

Telegraphs.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. PURD. 230, 246.

SECT. 72. If any superintendent, operator or other person, who may be engaged in any telegraph line, shall use, or cause to be used, or make known, or cause to be made known, the contents of any dispatch, or any part thereof, sent from or received at any telegraph office in this commonwealth, or in anywise unlawfully expose another's business or secret, or in anywise impair the value of any correspondence so sent or received, such person shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment not exceeding six months, or both, or either, at the discretion of the court.

SECT. 176. If any person, whether an operator in any telegraph office or otherwise, shall knowingly send or cause to be sent, by telegraph, any false or forged message as from such office, or as from any other person, knowing the same to be false, forged or counterfeited, with intent to deceive, injure or defraud any individual or body corporate, such offender, on conviction, shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding one year.

II. The 72d section of the Penal Code only makes the offender liable where he unlawfully exposes the secrets of the telegraph office; when it is done wantonly or voluntarily; it does not apply to cases where such disclosures become material in a court of justice. 2 P. 274.

Telegraph companies holding themselves out to transmit dispatches correctly, are bound to do so, or respond in damages, unless the causes of failure are beyond their control. 1 Am. L. R. 685.

A telegraph company is liable in damages, to the recipient of a message, for the misfeasance of their agent, in sending a different message from that addressed to him. 11 C. 298.

If a telegraphic message be sent, subject to the express condition, that the company will not be liable for mistakes arising from any cause, unless the message be repeated back, for which a higher rate of compensation is charged, the sender is bound by his contract, and cannot recover unless he bring himself within the terms of the company's undertaking. 6 Am. L. R. 448. 33 Eng. L. & Eq. 180.

But the company is not excused from liability to a third person, for damages sustained by the negligent transmission of an erroneous message, by the fact that the sender did not pay for its being repeated back; especially, where the mistake consisted in transmitting a different message from the one ordered. 11 C. 298.

Tender.

Judicial exposition of the effects of a tender made for moneys due.

In all cases where a tender shall be made, and full payment offered, by discount or otherwise, in such specie as the party by contract or agreement ought to do, and the party to whom such tender shall be made doth refuse the same, and yet afterwards will sue for the debt or goods as tendered, the plaintiff shall not recover any costs in such suit. *Purd.* 331.

In all actions for the recovery of money, founded on contract, hereafter brought in any of the courts of this commonwealth, or before any of the justices of the peace or aldermen thereof, the defendant or defendants therein shall have the right, at any time before trial in court, to make to the plaintiff or plaintiffs a tender of lawful money equal to the amount he or they shall admit to be due, with all lawful costs incurred in said action, up to the date of making such tender; and if the party to whom such tender shall be made, refuses to accept the same, then in the event of the plaintiff or plaintiffs failing to recover more than the principal sum so as aforesaid tendered, with legal interest thereon, he or they shall pay all the costs legally incurred in the said action, after the time of the tender aforesaid: *Provided*, That the said defendant or defendants shall be required to keep up said tender at every trial of the action aforesaid, and may pay the money into court on leave obtained, but shall not be required to preserve or pay in the identical money originally tendered. *Purd.* 1481.

Tender, the offering of money or any other thing in satisfaction; or circumspectly to endeavor the performance of a thing; as a tender of rent, is to offer it at the time and place when and where it ought to be paid. *Termes de la Ley* 557.

A legal tender can only be made in the lawful money of the United States (gold or silver, or paper money made a legal tender by act of congress), hence an offer of bank notes is invalid. But if such offer be made and not objected to on that ground, but specifically on some other account, the tender would be good. 5 S. & R. 326. 1 R. 415. See 2 Greenl. Ev. § 601.

A mere offer to pay the money is not, in legal strictness, a tender; nor is the defendant entitled to the advantage of a tender unless he plead it, *and* bring the money into court. 2 D. 190.

A tender of the sum due does not amount to an actual payment and discharge; but it suspends the interest until a subsequent demand and refusal. 1 D. 407.

No tender is a substantial one but a legal tender; and the only effect of a tender and a refusal, where the plaintiff has a direct cause of action, is to expose the plaintiff to the loss of costs if the defendant plead the tender, *and* bring the money into court. 10 S. & R. 14.

If a man be bound to do a thing, he must either do it, or offer to do it; if no objections are made, he must show that he made the tender in a regular manner; but this is not necessary if the other party, by his conduct, dispense with a regular tender by a previous refusal to accept it. 1 Pet. C. C. 24.

A party who has a right to object to a tender, is not precluded from availing himself of this objection, by the circumstance that his motive for objecting was, not the tender, but a desire on other grounds to get rid of the contract. 5 S. & R. 323.

A deposit in bank of funds to meet a particular demand is equivalent to a tender. 5 Wh. 503.

A contract for the delivery of specific articles of property to another, at a certain time and place, in discharge of a previous debt, is performed, and the debt satisfied by a tender and delivery of the property at the time and place, although the payee did not attend to receive the property. And no action can afterwards be maintained against the debtor on the contract. 5 W. 262.

To render a tender effectual and legal, it must be unqualified, and not be fettered with any condition. *Gow's Rep.* 214. 4 Campb. 156. 2 C. & P. 50. 7 D. & L. 119.

A tender of a quarter's rent, coupled with a demand of a receipt to a particular day—the contest between the parties being whether one or two quarters' rent were due—is not a valid tender. 5 M. G. & S. 428.

On a contract executed, where a debt is due to a party without the performance of anything on his part, the debtor, in order to discharge himself from an action for it, must show an *actual tender*, which must be pleaded at an early stage in the cause, and the money brought into court. 3 C. 294.

Theatres.

ACT 30 MARCH 1864. Purd. 1380.

SECT. 1. It shall not be lawful to exhibit to the public, in any building, garden, grounds, concert-room, saloon or other place or room within the city of Philadelphia, any interlude, tragedy, comedy, opera, ballet, play, farce, negro minstrelsy, negro or other dancing, or any other entertainment of the stage, or any part thereof, or any representation, in which a drop curtain and scenery or theatrical costumes are used, or any equestrian, circus or dramatic performance, or any performance of jugglers, ropedancing or acrobats, or any entertainment of vocal or instrumental music, or any menagerie, until a license for such exhibition, performance or entertainment shall have been first had and obtained from the mayor of the city of Philadelphia; which license shall be granted by him for each and every place or building in which such exhibitions, performances or entertainments are held, upon the payment, by the owner or manager, of the sum of ten dollars to the city treasurer, for the whole or for any portion of each calendar year. And every manager, proprietor or director of any such exhibition, performance or entertainment, who shall neglect to take out such license, or who shall allow or cause any such exhibition, performance or entertainment without such license, and every owner or lessee of any building, room, garden, grounds, concert-room or other place, who shall lease or let the same for the purpose of any such exhibition, performance or entertainment, or shall assent to the use thereof for any such purpose, except as permitted by such license, and without such license having been previously obtained and then in force, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one hundred dollars, or undergo an imprisonment not exceeding three months, or both or either, at the discretion of the court.

SECT. 2. It shall not be lawful for any female to attend among or wait upon the audience or spectators, at any of the exhibitions, performances or entertainments mentioned hereinbefore, or at any other place of public amusement in the city of Philadelphia, to procure, offer, furnish or distribute any description of commodities or refreshments whatsoever; nor shall it be lawful for any manager or proprietor of any such exhibition, performance, entertainment or place of public amusement to employ or permit the employment of any female, to attend among or wait upon the audience or spectators thereat, to procure, offer, furnish or distribute any description of commodities or refreshments whatsoever; and any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars, or undergo an imprisonment not exceeding one year, or both or either, at the discretion of the court.

SECT. 3. It shall be lawful for the mayor of the city of Philadelphia, upon satisfactory proof, under oath or affirmation, of the violation of any of the provisions of this act, to vacate, annul and render void and of no effect any license which shall have been obtained as aforesaid by any manager, proprietor, owner or lessee for the holding such exhibition, performance or entertainment, or allowing or letting any part of a building or other premises for the purposes thereof; and it shall also be lawful for the said mayor to prevent any such exhibition, performance or enter-

tainment from being held, exhibited or performed, until the license hereinbefore provided for shall be paid, or if the same shall have been annulled or vacated for violation of any of the provisions of this act, and to that end to direct the police to close the building, room or other place in which the said exhibition, performance or entertainment is intended to be held, and to prevent the entrance of auditors or spectators.

ACT 14 MARCH 1867. Pamph. 440.

SECT. 1. It shall not be lawful for the owners or lessees of any public hall or place of amusement in the city of Philadelphia, (a) to obstruct, or allow to be obstructed by others, any of the aisles or passage-ways in the auditorium of said halls or places of amusement, by placing therein any benches, chairs, stools or other articles that may prevent free egress or ingress during the hours that said places may be open to the public.

SECT. 2. Said owners, lessees or other agents are hereby required to keep open, at all hours during the time such halls or places of amusement are open to the public, all doors giving means of ingress or egress, unless said doors open outwards from said places, then the same may be closed; but no hindrance, such as locks, or catches of any kind, shall be allowed to obstruct or prevent instant and easy egress through the same; and when said doors open inwards, it is required of such owners or lessees that the same be fastened securely and firmly open. (b)

SECT. 4. That a penalty of five hundred dollars be imposed upon the owners or lessees of any of said public halls or places of amusement, who may, at any time, violate any of the provisions of this Act, to be recovered in like manner as penalties for violation of any law are now enforced in the city of Philadelphia. (c)

Threatening Letters.

I. Provisions of the Penal Code.

II. Offence at common law.

I. ACT 31 MARCH 1860. Purd. 221.

SECT. 23. If any person shall knowingly send or deliver or utter to any other person, any letter or writing, accusing or threatening to accuse either the person to whom such letter or writing shall be sent or delivered, or any other person, of any crime or misdemeanor punishable by law with imprisonment at labor, with a view or intent to extort or gain, by means of such threatening letter or writing, any property, money, security or other valuable thing, from any person whatsoever; or shall send, deliver or utter any letter or writing threatening to kill or murder any other person, or to burn or destroy any coal-breaker, house, barn or other building, or any rick or stack of grain, hay or straw or other agricultural produce; every such offender shall be guilty of a misdemeanor, and, on conviction, be sentenced to an imprisonment by separate or solitary confinement at labor, or by simple imprisonment, not exceeding three years, and to pay a fine not exceeding one thousand dollars.

II. The extortion of money by actual duress or by threats of such a nature as are calculated to overcome a man of ordinary firmness, is an indictable offence at

(a) The 6th section extends the provisions of this act to the cities of Pittsburgh and Allegheny; and by act 18 February 1870, it is extended to the city of Altoona. P. L. 167.

(b) The 3d section requires the principal theatres of Philadelphia, in addition, to keep attached to a plug or water attachment, during the time they are open to the public, sufficient fire hose to reach to their furthest limits. P.

L. 441.

(c) The 5th section requires the building inspectors to enforce this act on the complaint of any citizen; and distributes the penalty, one-half to the informer, and one-half to the treasurer of the fund for the relief of disabled firemen. In the city of Altoona, the latter moiety is to be distributed by the mayor among the several fire companies in equal shares.

common law; but what are such threats as a man of ordinary firmness ought to resist, is generally an embarrassing question, on the trial of a common law indictment for such offence. This section is a consolidation of the English statutes upon the subject, and obviates the difficulties which beset common law proceedings in such cases. The decisions on the English statutes will be found in *East's P. C.* ch. 23.

Timber.

I. Provisions of the Penal Code.

II. Civil remedies.

I. ACT 31 MARCH 1860. *Purd.* 242.

SECT. 152. If any person shall cut down or fell any timber tree or trees, knowing the same to be growing or standing upon the lands of another person, without the consent of the owner; or if any person shall purchase or receive any timber tree or trees, knowing the same to have been cut or removed from the lands of another, without the consent of the owner thereof; or who shall purchase or receive any planks, boards, staves, shingles or other lumber made from such timber tree or trees, so as aforesaid cut or removed, knowing the same to have been so made; the person so offending shall be guilty of a misdemeanor, and, being thereof convicted, shall be sentenced to pay such fine, not exceeding one thousand dollars, or to such imprisonment, not exceeding one year, as the court, in their discretion, may think proper to impose.

Timber trees are such as are used, not only for building purposes, but in the mechanical arts. *Lewis' Cr. L.* 506.

The act of assembly extends as well to unseated as to seated lands; both are alike within its protection. *2 J.* 195.

In a prosecution for cutting timber trees, the title of the prosecutor to the land on which the timber was cut, is not in question, it is enough that he is in possession under a claim of title. *Bro. Appx.* 25. A tenant under a lease for years may be described as the owner. *Lewis' Cr. L.* 505.

Before a party can be made to suffer criminally, under this section, it must be shown that the act was done *knowing* the timber to be growing on the land of another. Knowledge is an ingredient of the offence. *9 C.* 490. But it is unnecessary to prove that the defendant knew *who* was the owner. *Lewis' Cr. L.* 505. The act of 1833, which does not appear to be repealed or supplied, in this respect, by the revised Penal Code, expressly provides that it shall be sufficient to convict the offender, "that he knew the lands on which the said tree or trees were growing did not belong to him or to any person by whom he was authorized." *Purd.* 961, n.

II. ACT 29 MARCH 1824. *Purd.* 961.

SECT. 3. In all cases where any person, after the said first day of September, shall cut down or fell, or employ any person or persons to cut down or fell any timber tree or trees, growing upon the lands of another, without the consent of the owner thereof, he, she or they so offending, shall be liable to pay to such owner double the value of such tree or trees so cut down or felled; or in case of the conversion thereof to the use of such offender or offenders, treble the value thereof, to be recovered with costs of suit, by action of trespass or trover, as the case may be; and no prosecution by indictment shall be any bar to such action.

ACT 8 APRIL 1833. *Purd.* 961.

SECT. 10. In all cases in which suits shall be brought before a justice of the peace, to recover damages for the cutting of timber trees, under and by virtue of the 3d section of the act of the 29th of March 1824, and the defendant shall offer to make oath or affirmation, agreeably to the 2d section of the act of the 22d of

March 1814, that the title to the land will come in question, the justice shall not receive the same until the defendant shall enter into recognisance before him, with one or more sureties, in such sum as the justice may direct to pay to the plaintiff, such sum as shall be recovered against him in the said suit, when removed as hereinafter directed, together with costs; and on the said oath or affirmation being made, instead of dismissing the said suit, the justice shall transmit a copy of the record thereof, and of all the proceedings therein, to the prothonotary of the court of common pleas of his county, who shall enter the same on his docket, and the said suit shall then be proceeded in, in the said court, as if originally rightly brought there.

ACT 1 APRIL 1840. Purd. 961.

SECT. 1. All and singular the penalties and provisions of the act, passed the 29th day of March 1824, shall be, and they are hereby made applicable to any person or persons who shall purchase or receive any timber tree or trees, knowing the same to have been cut or removed from the lands of another person without the consent of the owner or owners thereof; or who shall purchase or receive any planks, boards, staves, shingles or other lumber made from such timber tree or trees, so as aforesaid cut or removed, knowing the same to have been so made; and in all cases of suits brought before a justice of the peace under the 3d section (of the act) of the 29th day of March 1824, to which this is a supplement, against any person or persons for publishing or receiving such timber tree or trees, or lumber made therefrom, and the defendant shall offer to make oath or affirmation, agreeably to the second section of the act of the 22d of March 1814, that the title of land will come in question, the same course of proceeding shall be had, as is provided in and by the 10th section of the act of the 8th day of April 1833.

The action of trespass to recover treble damages, given by the act of 1824, for cutting timber trees, can be maintained only by the owner of the land. 4 W. 221.

The party injured may sue either in trespass or trover; if he bring trover he waives the trespass to his land, and is entitled to recover treble the value of the trees cut and taken away. 4 H. 254.

To enable the party injured to recover treble damages, under the 3d section of the act of 1824, it is only necessary to prove that the timber was cut without the consent of the owner; knowledge on the part of the defendant, that the timber was growing upon the lands of another, is only requisite in a criminal prosecution. 9 C. 489.

But under the act of 1840, a purchaser of timber cut by a trespasser is not liable for treble damages, unless he had knowledge of the trespass committed in obtaining it. *Ibid.*

A recovery of treble damages in an action of trespass for entering the plaintiff's land and cutting his timber, cannot be sustained unless the record show that the action was brought under the statute. 12 C. 320.

To oust the jurisdiction of the justice under the act of 1833, there must be a *positive* affidavit that the title to the land will come in question; it is not enough to swear to the best of the deponent's knowledge and belief. *Carpenter v. Koons*, Com. Pleas, Phila., 29 September 1849. MS.

Unless such affidavit be made, the justice's jurisdiction is not ousted, although it subsequently appear that the title to the land will come in question; it is too late to make the objection after the case comes into the common pleas by appeal. 8 H. 464.

Time.

Judicial expositions as to the mode of computing time.

In all contracts or transactions between man and man, *months* are to be considered *calendar*, and not *lunar* months. 6 S. & R. 539.

Thus, a note payable "two months after date," is not due at the expiration of two *lunar* months. Ibid. 15 Johns. 119.

So the word "*month*" in an act of assembly has uniformly been construed to mean a *calendar* month. 2 D. 302. 4 Ibid. 144. 3 S. & R. 184.

Months are calculated either as *lunar*, consisting of twenty-eight days, thirteen of which make a year, or as *calendar* months, of unequal lengths, whereof in a year there are only twelve. 2 Bl. Com. 142.

A person is of full age the day before the twenty-first anniversary of his birth-day. 1 Ibid. 462.

Whenever, by a rule of court, or an act of the legislature, a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day on which the rule is taken, or the decision made, is excluded; and if one or more Sundays occur within the time, they are counted, unless the *last day falls on a Sunday*, in which case the act may be done on the *next day*. 3 P. R. 200. 4 Barr 516. 5 C. 524-5. 4 Wr. 372. 10 P. F. Sm. 452.

The three days' grace allowed in this country on bills of exchange and promissory notes are reckoned exclusive of the day on which the bill or note falls due, and inclusive of the last day of grace. Byles on Bills 161.

The five years from the day of entry of a judgment, within which it must be revived by *scire facias*, are exclusive of the day on which the judgment was entered. 6 W. & S. 377.

There is no priority of lien between judgments entered on the same day; 3 P. R. 245; 1 P. F. Sm. 482; or between a mortgage entered on the same day; 10 H. 359; 12 H. 363; 1 C. 319; 2 Gr. 130; for the law does not recognise fractions of a day, unless to prevent great mischief or inconvenience. 2 Br. 19.

But this principle does not apply where there has been an absolute conveyance; in such case, to affect lands in the hands of a purchaser, the judgment must have been, not merely simultaneous with, but anterior to the conveyance; and the actual priority may be shown by parol. 8 W. & S. 307-8. 2 Gr. 130. So, it may be shown that the defendant died before the entry of the judgment. 2 Wr. 480.

Mortgages entered for record on the same day, have priority according to the time they were *actually* left at the office for record. Purd. 324.

Every bill takes effect as a law from the time when it is approved by the governor or president, and then its effect is prospective and not retrospective. The doctrine that, in law, there is no fraction of a day, is a mere legal fiction, and has no application to such a case. 2 Story 571. 1 Cal. 400. But in 20 Verm. 653; 21 Ibid. 619, this is denied to be law.

The statute of 21 Hen. III., provides that, in leap-year, the 29th February and the preceding day shall be holden but for one day. Rob. Dig. 207. But this has no relation to the computation of time, when a rule or a statute fixes a certain number of days. 4 Barr 517.

When a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time, is obtained, the proceedings are suspended *for all purposes*, till the rule is disposed of. And therefore the time for putting in bail remains the same after the rule is discharged as it was when it was granted. 4 T. R. 176.

A contract to complete a work by a certain time, means that it shall be done *before* that time. 3 P. R. 48.

Trade Marks.

I. Provisions of the Penal Code.
II. Civil remedies.

III. Criminal responsibility.
IV. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 246.

SECT. 173. If any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, any representation, likeness, similitude, copy or imitation of the private stamps, wrappers or labels, usually affixed by any mechanic or manufacturer to and used by such mechanic or manufacturer on or in the sale of any goods, wares or merchandise, with intent to deceive or defraud the purchaser or manufacturer of any goods, wares or merchandise whatsoever, such person shall be guilty of a misdemeanor, and, on conviction thereof, be sentenced to pay a fine not exceeding one hundred dollars, and undergo an imprisonment not exceeding two years.

SECT. 174. If any person shall have in his possession any die, plate, engraving or printed label, stamp or wrapper, or any representation, likeness, similitude, copy or imitation of the private stamp, wrapper or label usually affixed by any mechanic or manufacturer to and used by such manufacturer or mechanic on or in the sale of any goods, wares or merchandise, with intent to use or sell the said die, plate, engraving or printed stamp, label or wrapper, for the purpose of aiding or assisting, in any way whatever, in vending any goods, wares or merchandise, in imitation of or intended to resemble and to be sold for the goods, wares or merchandise of such mechanic or manufacturer, such person shall be guilty of a misdemeanor, and, upon being thereof convicted, be sentenced to pay a fine not exceeding one hundred dollars, and to undergo an imprisonment not exceeding one year.

SECT. 175. If any person shall vend any goods, wares or merchandise, having thereon any forged or counterfeited stamps or labels of any mechanic or manufacturer, knowing the same to be forged or counterfeited, and resembling or purporting to be imitations of the stamps or labels of such mechanic or manufacturer, without disclosing the fact to the purchaser thereof, such person shall, upon conviction, be deemed guilty of a misdemeanor, and be sentenced to pay a fine not exceeding five hundred dollars.

II. ACT 20 APRIL 1853. Purd. 966.

SECT. 1. All manufacturers and venders of mineral waters and other beverages in bottles, upon which their mark or marks shall be respectively impressed, may file in the office of the secretary of the commonwealth a description of such bottles, and of the name or marks thereon, and shall cause the same to be published for six weeks, successively, in a daily, weekly or other newspaper published in the county wherein the same shall be manufactured or sold, except in the city and county of Philadelphia, where the said publication shall be made for the same time in two daily newspapers: *Provided*, That those manufacturers or venders of mineral waters or other beverages, who may have already complied with the provisions in regard to registry and publication contained in the sixth section of an act entitled "An act authorizing the commissioners of the incorporated districts of the Northern Liberties and Kensington, to open a street to be called Delaware avenue, and for other purposes," approved the 24th day of January, Anno Domini 1849, shall not be again required to make registry or publication, and shall be entitled to all the benefits of this act.

SECT. 2. It is hereby declared to be unlawful for any person or persons hereafter, without the permission of the owner thereof, to fill with mineral waters or other beverages any such bottles so marked, or to sell, dispose of, or to buy, or to traffic in any such bottles so marked and not bought by him or her of such owner thereof, and every person so offending shall be liable to a penalty of fifty cents for every bottle so filled, or sold, or used, or disposed of, or bought, or trafficked in, for the first offence, and of five dollars for every subsequent offence, to be recovered

before any alderman or justice of the peace, as fines and penalties are by law recoverable, for the use of the commonwealth.(a)

SECT. 3. The fact of any person, other than the rightful owner thereof, using any such bottles for the sale therein of any beverage, shall be *prima facie* proof of the unlawful use or purchase of such bottles as aforesaid, and any such owner, or agent of the owner, who shall make oath or affirmation before any alderman or justice of the peace, that he has reason to believe, and does believe, that any of his bottles stamped and registered as aforesaid, are being unlawfully used, or are concealed by any person or persons selling or manufacturing mineral waters or other beverages, that the said alderman or justice of the peace shall, thereupon, issue a process in the nature of a search-warrant, directed to any constable, commanding him to search the premises, wagons, carts or other places of the offender or offenders, where said bottles are alleged to be, and if upon such search any bottles so marked, shall be found, to bring the same, together with the body of the person in whose possession they may be found, before said alderman or justice of the peace, there to be dealt with according to law.

III. ACT 4 APRIL 1865. Purd. 1415.

SECT. 1. Any person or persons engaged in the manufacture of malt liquor for sale in butts, hogheads, barrels, half-barrels, casks, half-casks, quarter-casks or kegs, with his, her or their name or names or other private marks, respectively, branded or stamped thereon, may file in the office of the prothonotary of the county in which such articles shall be manufactured a description of the names used, and other private mark or marks to be branded or stamped thereon, and shall cause the same to be published once a week for six weeks successively, in a newspaper published in such county, and in the city of Philadelphia, where such publications shall be made for the same time, in two daily newspapers published in said city.

SECT. 2. It is hereby declared to be unlawful for any person or persons, hereafter, other than the lawful owner or owners, as mentioned and referred to in the first section of this act, to fill with malt liquor or liquors for any purpose whatever, or to use, traffic in, purchase, sell, dispose of, detain, convert, mutilate or destroy, or wilfully or unreasonably refuse to return or deliver to such owner, upon demand being made, any such butt, hoghead, barrel, half-barrel, cask, half-cask, quarter-cask or keg, so branded or stamped, or from which such brand or stamps have been removed, cut off, defaced or obliterated, or to remove, cut off, deface or obliterate, or to brand or stamp other brands or stamps on the same, without the written permission of such original or lawful owner or owners thereof, or unless there shall have been a sale in express terms of any such article, exclusive of the malt liquor contained therein, to such person or persons, by said original or lawful owner or owners; any person so offending shall upon conviction be deemed guilty of a misdemeanor, to be punished for the first offence by a fine of ten dollars for each and every such butt, hoghead, barrel, half-barrel, cask, half-cask, quarter-cask or keg, so filled and trafficked in, purchased, sold, disposed of, detained, converted, mutilated or destroyed, or not so delivered or returned; and by a fine of twenty dollars, and by imprisonment in a county jail, for not less than one and not more than three months for each and every subsequent offence, to be recovered in the same manner as fines are now recoverable, one-half for the use of the poor of the city or the county where such offence shall be committed, and one-half for the use of the officer who may arrest such offender.

SECT. 3. Any such owner or owners, or the agent of such owner or owners, who shall make oath or affirmation before any justice of the peace, alderman or any magistrate having jurisdiction in criminal matters, that he has reason to believe, setting forth the facts upon which such belief is founded, and does believe, that any of the above-named articles, belonging to him or them, so branded or stamped as aforesaid, or from which the brands or stamps have been cut off, removed, defaced or obliterated, or which have been mutilated or wilfully detained, after demand has been made by any person or persons manufacturing or selling malt liquors, or any other liquor or liquid, or that any junk or cask dealer, or any other person or per-

sons whomsoever, shall have any of the articles above described, unlawfully as aforesaid, in his, her or their possession, or secreted on his, her or their premises, or in any other place under his, her or their control, the said magistrate shall thereupon, on proof of such demand having been made, issue a search-warrant, directed to any constable or other proper officer, to search the premises of the offender or offenders, or said place where any such articles are alleged to be, particularly describing such premises or place; and if upon search any such articles shall be found, to take possession of the same, and to bring the body of the person, in whose possession or control any such article may be found, before such magistrate, to be tried as for a misdemeanor, under the same regulations now provided by law for the trial of misdemeanor, and to be punished in the manner set forth in the second section of this act.

ACT 9 APRIL 1870. Purd. 1643.

SECT. 1. If any person or persons shall, without the permission of the owner thereof, fill with mineral water or any other articles whatsoever, any bottle marked and registered in accordance with the acts of April 9th 1849, and January 20th 1849, and April 20th 1843, by the manufacturers and venders of mineral water and other beverages, or shall sell or buy, traffic in or use or dispose of any such bottles for gain, convenience or profit, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof in the proper court, shall be liable to a fine not exceeding five hundred dollars, or imprisonment not exceeding six months.

SECT. 2. The using by any other person than the rightful owners of such bottles as aforesaid, shall be *prima facie* proof of the unlawful dealing in or using said bottles: *Provided*, That this act shall only apply to the city of Philadelphia.

IV. An action on the case may be maintained by a manufacturer who marks his goods with the known and accustomed mark of the plaintiff—where the mark used by the defendant resembles the plaintiff's mark so closely as to be calculated to deceive, and as to induce persons to believe the defendant's goods to be of the plaintiff's manufacture, and the defendant uses such mark with intent to deceive—and sells the goods so marked as and for goods of the plaintiff's manufacture; and proof of special damage is not necessary. 5 Man. G. & S. 109. 2 Am. L. R. 681. See 3 P. L. J. 143. 26 Leg. Int. 4, 5, 413.

Where the plaintiff had invented a certain medicine, and the defendant had prepared an inferior article, which he sold as and for the medicine of the plaintiff, it was held to be a fraud, for which the plaintiff might maintain an action, without proof of special damage. 19 Pick. 214. And see 3 Doug. 293. 3 B. & C. 541. 5 D. & R. 292. 4 B. & Ad. 410. 2 M. & G. 385.

No person has a right to use the names, marks, letters or other symbols which another has previously got up, or been accustomed to use, in his trade, business or manufactures. 2 Sandf. Ch. R. 586. Ibid. 603.

Where a manufacturer adopts a certain trade mark, and stamps it upon the article manufactured, he is entitled to the exclusive use of it, and a court of equity will restrain, by injunction, any other person who pirates such trade mark from using the same. 11 Paige 292. And see 2 Brewst. 303, 308, 314, 321.

And where the person pirates a trade mark for the fraudulent purpose of passing off his own article for that of him whose mark he has taken, and to supplant him in the good-will of the business, he will be liable also to respond in damages for the injury thus caused. Ibid.

It is no defence to such a suit that the simulated article is equal in quality to the genuine. 2 Sandf. Ch. R. 586. Ibid. 622. 11 Paige 293. 2 W. & M. 1.

Nor that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious, or an imitation. 2 Sandf. Ch. R. 586.

A foreigner is entitled to the protection of his trade mark as well as a citizen. 4 McLean 516.

On a dissolution of partnership, both the former partners are entitled to use the trade mark of the firm. 5 McLean 256.

On a bill to restrain one from the use of trade marks, the question is not whether the complainant was the original inventor of the mark alleged to have been pirated, nor whether the article sold under the pirated mark is of equal value with the genuine; but the ground is, that the complainant has an interest in the good-will of his trade or business, and having taken a particular label or sign, indicating that the article sold under it was made by him, and sold under his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to pirate upon the good-will of his friends or customers, by using such label or sign, without his consent or authority. 2 Sandf. Ch. R. 622.

An alien manufacturer may maintain a bill for such injunction, or an action at law, against a citizen of the United States using his trade mark. 11 Paige 292. 3 W. & M. 1.

Dodderidge, in Southern and Howe's case, (Cro. Jac. 468,) cited a case to be adjudged in 33 Eliz. B. C. A clothier of Gloucestershire sold very good cloth, so that in London, if they saw any cloth of his mark, they would buy it without searching; and another, who made bad cloth, put his mark upon it without his privity. Action on the case was brought upon this deceit, and adjudged it well lies. Treatise of Frauds 185. Poph. 143-4.

A court of equity will not, in a contest between persons who profess to be manufacturers of *quack* medicines, interfere to protect the use of trade marks, by injunction. 7 P. L. J. 176.

A complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade-marks. Ibid. 176. 8 Sim. 477. 26 Leg. Int. 29.

Transcript.

What constitutes a transcript from a justice's docket—of the effects of taking a transcript from the docket of one justice to

another justice, and of filing a transcript in the courts of common pleas. Copy of a transcript.

A TRANSCRIPT is the copy of an original writing or deed where it is written over or exemplified. (Cowell.) A copy of the proceedings before a justice of peace, as they are recorded on his docket, is called a transcript.

It shall be the duty of the justice, on demand made either by plaintiff or defendant, to make out a copy of his proceedings at large, and deliver the said copy duly certified by him, to the party requiring the same, and if on such demand he shall refuse so to do, it shall be deemed a misdemeanor in office. Act 20 March 1810, § 23. Purd. 605.

The prothonotaries of the respective counties shall enter on their dockets transcripts of judgments obtained before justices of the peace of their proper counties, without the agency of an attorney, [for the fee of fifty cents,] which transcripts the justices shall deliver to any person who may apply for the same, and which judgments, from the time of such entries on the prothonotary's docket, shall bind the real estate of the defendants; but no *feri facias* shall be issued by any prothonotary until a certificate shall be first produced to him from the justice before whom the original judgment was entered, stating therein, that an execution had issued to the proper constable as directed by this act, and a return thereon that no goods could be found sufficient to satisfy said demand; and any justice issuing an execution on a judgment removed as aforesaid, shall, on the plaintiff producing a receipt for the delivery of such transcript to the prothonotary of the county, to be entered of record, tax [fifty cents] upon such execution for the prothonotary's fees as aforesaid; and no judgment, whether obtained before a justice, or in any court of record within this commonwealth, shall deprive any person of his or her right as a freeholder longer or for any greater time than such judgment shall remain unsatisfied, any law, usage or custom, to the contrary notwithstanding. Ibid. § 10.

Transcripts of judgments of justices of the peace, filed in the common pleas, stand on the same footing in all respects as judgments originally entered in court. 1 B. 221.

A transcript entered on the docket of the common pleas is, as regards real estate, virtually a judgment of that court; consequently, it may be set aside, on motion, with or without an issue, where it has been obtained surreptitiously, or it may be only opened to let the party into a defence, where he has missed his time either through accident or mistake. 1 P. R. 20.

A transcript of the judgment of a justice, filed in pursuance of the act, is in its legal effect a judgment of the court of common pleas, and may be so styled in a *scire facias* to revive the same. 3 P. R. 98.

If a judgment be rendered by a justice, for a sum beyond his jurisdiction, and a transcript of such judgment be filed in the common pleas, it cannot be treated as a nullity in a *scire facias* to revive such judgment; the remedy being by motion to have the judgment struck off, or, perhaps, by writ of error. *Ibid.*

In an action brought to recover the amount of a judgment rendered by a justice of the peace in another county, a *certified* transcript of such judgment is *prima facie* evidence under the act of 1810, although not sworn to be a true copy. 2 P. R. 465.

Where it is alleged that the transcript returned to the common pleas does not conform to the docket of the justice, which is alleged to be erroneous, and an application is made for leave to amend the docket by the transcript, the court below are to determine, upon inspection of the docket, and all the papers and evidence before them, what are the true words of the record; and if the amendment be refused, the supreme court will not, for that reason, reverse the judgment. 1 R. 370.

After an appeal has been entered, the justice cannot grant a transcript to constitute a lien, according to section 10 of the act of 1810. 1 B. 224.

A transcript of the judgment of a justice of the peace, filed in the common pleas, creates no lien upon the defendant's real estate, if an appeal be entered before the justice within the time limited by law. 7 W. 540.

A transcript of the judgment of a justice of the peace filed in the court of common pleas, in pursuance of the act of 1810, is such a judgment of that court as an attachment may issue upon under the provisions of the 19th section of the act 16 June 1836. 2 W. & S. 169.

TRANSCRIPT FROM THE DOCKET OF ALDERMAN WHITE.

THE CITY OF PHILADELPHIA

vs.

SAMUEL LEECH.

COSTS	:	:	:	:	:	\$3.37
TRANS.	:	:	:	:	:	20

Warrant issued, September 5th 1870. A. G. Fisher, Constable. Returned, September 9th 1870, on oath:—"I have here the body of the defendant, as within I am commanded."

Plaintiffs charge the defendant, as driver of cab No. 79, with having violated the 10th section of an ordinance intituled "An Ordinance for the regulation of the owners and drivers of hackney-coaches, wagons, carts and drays within the city of Philadelphia," passed April 16th 1812, by standing with said cab in a street other than those which are appointed for them, to wit, in Chestnut street, in the city of Philadelphia, opposite to Jones's Hotel, on the 5th of September inst., between the hours of 3 and 5 o'clock, P. M., he not being then actually employed, whereby he incurred a penalty of two dollars. A. G. Fisher, sw. P. J. H. Presser, sw. P. Whereupon, judgment for the plaintiff for two dollars. *Eo. d.*, execution issued. Ret. September 27th. September 12th, received a certiorari, and same day made a return and stayed the execution.

September 10th, Tr. for the defendant.

CITY OF PHILADELPHIA, ss.

I CERTIFY, that the above is a correct transcript of the proceedings had before me, in the above suit, and of record on my docket.

WITNESS my hand and seal, at Philadelphia, this thirteenth day of September, in the year of our Lord 1870.

JOHN WHITE,
Alderman in and for Fifth Ward.

Treason.

I. Provisions of the Penal Code.

II. Judicial decisions.

I. ACT 31 MARCH 1860. Purd. 216.

SECT. 1. If any person owing allegiance to the commonwealth of Pennsylvania, shall levy war against the same, or shall adhere to the enemies thereof, giving them aid and comfort within the state or elsewhere, and shall be thereof convicted on confession in open court, or on the testimony of two witnesses, to the same overt act of the treason whereof he shall stand indicted, such person shall, on conviction, be adjudged guilty of treason against the commonwealth of Pennsylvania, and be sentenced to pay a fine not exceeding two thousand dollars, and undergo an imprisonment, by separate and solitary confinement at labor, not exceeding twelve years.

SECT. 2. If any person, having knowledge of any of the treasons aforesaid, shall conceal, and not, as soon as may be, disclose and make known the same to the governor or attorney-general of the state, or some one of the judges or justices thereof, such person shall, on conviction, be adjudged guilty of misprision of treason, and shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding six years: *Provided always*, That nothing herein contained shall authorize the conviction of any husband or wife for concealing any treasons committed by them respectively.

ACT 18 APRIL 1861. Purd. 217.

SECT. 1. If any person or persons belonging to or residing within this state, and under the protection of its laws, shall take a commission or commissions from any person, state or states, or other the enemies of this state, or of the United States of America, or who shall levy war against this state or government thereof, or knowingly and willingly shall aid or assist any enemies in open war against this state or the United States, by joining their armies, or by enlisting, or procuring or persuading others to enlist for that purpose, or by furnishing such enemies with arms or ammunition, or any other articles for their aid and comfort, or by carrying on a traitorous correspondence with them, or shall form, or be in anywise concerned in forming any combination or plot or conspiracy, for betraying this state or the United States of America into the hands or power of any foreign enemy, or any organized or pretended government engaged in resisting the laws of the United States, or shall give or send any intelligence to the enemies of this state or of the United States of America, or shall, with intent to oppose, prevent or subvert the government of this state or of the United States, endeavor to persuade any person or persons from entering the service of this state or of the United States, or from joining any volunteer company or association of this state about being mustered into service, or shall use any threats or persuasions, or offer any bribe, or hold out any hope of reward, with like intent to induce any person or persons to abandon said service, or withdraw from any volunteer company or association already organized under the laws of this commonwealth, for that purpose; every person so offending and being legally convicted thereof, shall be guilty of a high misdemeanor, and shall be sentenced to undergo solitary imprisonment in the penitentiary, at hard labor, for a term not exceeding ten years, and be fined in a sum not exceeding five thousand dollars, or both, at the discretion of the court: *Provided*, That this act shall not prohibit any citizen from taking or receiving civil commissions for the acknowledgment of deeds and other instruments of writing.

SECT. 2. If any person or persons within this commonwealth, shall sell, build, furnish, construct, alter or fit out, or shall aid or assist in selling, building, constructing, altering or fitting out any vessel or vessels, for the purpose of making war or privateering, or other purpose, to be used in the service of any person or parties whatever, to make war on the United States of America, or to resist by force or otherwise, the execution of the laws of the United States, such person or persons

shall be guilty of a misdemeanor, and on conviction thereof, shall be sentenced to undergo solitary imprisonment, in the penitentiary, at hard labor, not exceeding ten years, and be fined in a sum not exceeding ten thousand dollars, or both, at the discretion of the court.

II. Treason is a breach of allegiance, and can be committed by him only who owes allegiance, either perpetual or temporary. 5 Wheat. 97.

Where the premeditated object and intent of a riotous assembly is to prevent by force and violence the execution of a law of the state, by force and violence to coerce its repeal by legislative authority, or to deprive any class of the community of the protection afforded by law, and the rioters proceed to execute by force, their premeditated objects and intents, they are guilty of treason, in levying war against the state. 2 Wall. Jr. 140, 202. Whart. St. Tr. 634. 2 D. 348, 346. Wharton on Homicide 462.

But a resistance to the execution of a law of the state, accompanied with any degree of force, is not treason; to constitute that offence, the object of the resistance must be of a public and general character. 1 Paine 265. And there must be an actual levying of war; a conspiracy to subvert the government by force, is not treason; nor is a mere enlistment of men, who are not assembled, a levying of war. 4 Cr. 75. 2 Wall. Jr. 136, 140. 4 Am. L. J. 83. So, no man can be convicted of treason who was not present when the war was levied. 2 Burr's Trial 401, 439. See Whart. C. L. § 2719-36.

Delivering up prisoners and deserters to the enemy, is giving them aid and comfort, and therefore, treason. 2 Wheeler's Cr. Cas. 477. And so is the carrying of provisions towards the enemy, with intent to supply him, though that intention should be defeated. 3 W. C. C. 234. Whart. Cr. L. § 2737. See McGee v. The Fanny, Hopk. Dec. 92-3.

The clause requiring the testimony of two witnesses to the same overt act of treason, refers to the proofs on the trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the grand jury. 2 Wall. Jr. 138. 1 Burr's Trial 196. 18 Leg. Int. 149. But see Fries's Trial 14. Whart. St. Tr. 480.

Trespass and Trover.

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|-----------------------------------------------------|-----------------------------------------------|
| I. Jurisdiction of justices in trespass and trover. | III. Judicial decisions relating to trespass. |
| II. Proceedings before referees. | IV. Trover and conversion. |

I. ACT 22 MARCH 1814. Purd. 604.

SECT. 1. The justices of the peace of the several counties of this commonwealth, and the aldermen of the city of Philadelphia, shall have jurisdiction of actions of trover and conversion, and of actions of trespass brought for the recovery of damages for injury done or committed on real and personal estate, in all cases, where the value of the property claimed, or the damages alleged to have been sustained, shall not exceed one hundred dollars.

SECT. 2. It shall be the duty of the justice or alderman before whom any suit or action is brought, if the demand does not exceed ten dollars, to proceed to hear and determine as to him of justice and right shall appear to belong; but if the demand in controversy should exceed that sum, then, on the request of either party, or his or her agent, three reputable citizens shall be chosen by the parties or their agents, as referees, or if they cannot agree, or if only one party or his or her agent should appear, then the justice or alderman shall appoint the referees, who shall be sworn or affirmed justly and truly to assess the damages alleged to have been sustained, or the value of the property in dispute, which they or a majority of them shall have power to assess: *Provided*, That if both parties or their agents shall not prefer a

reference, the justice or alderman shall proceed to hear and determine, and if the sum adjudged does not exceed five dollars and thirty-three cents, the same shall be final and conclusive; and each referee shall be entitled to receive one dollar for every day he shall have attended in each case: *Provided*, That if the defendant shall, before the trial of the action, make oath or affirmation that the title to lands will come in question in the said action, then the justice or alderman shall dismiss the same; and in case of such dismissal the costs shall be paid in equal shares by the plaintiff and defendant: *Provided always*, that if the damages so found by the justice, alderman or referees, shall not amount to more than one dollar, the plaintiff or plaintiffs shall not recover more costs than damages.

SECT. 3. Either party shall have the right of appealing to the court of common pleas of the proper county, where the judgment given by the justice or alderman alone shall exceed five dollars and thirty-three cents, and where judgment given on the award of referees shall exceed twenty dollars.

SECT. 4. The process, return thereof, notices, awards, judgments and appeals, and the proceedings of justices, constables, referees and courts, and every proceeding necessary to carry this act into effect, which is not herein specially provided for, shall be made and done, under and according to the provisions and regulations in similar cases contained in the act, entitled "An act to amend and consolidate with its supplements the act, entitled 'An act for the recovery of debts and demands not exceeding one hundred dollars, before a justice of the peace, and for the election of constables and for other purposes.'"

SECT. 5. Nothing in this act contained shall be construed to extend to actions of ejectment, replevin or slander, actions on real contracts for the sale or conveyance of lands and tenements, actions for damages in personal assault and battery, wounding or maiming or to actions for false imprisonment.

SECT. 7. The said aldermen and justices shall take cognisance, by amicable suit, of all causes of action within their jurisdiction, whether such jurisdiction arises from this act, or from an act to amend and consolidate, with its supplements, the act entitled "An act for the recovery of debts and demands not exceeding one hundred dollars, before a justice of the peace, and for the election of constables, and for other purposes."

II. ACT 26 MARCH 1814. Purd. 604.

SECT. 1. If any referee appointed under the third section of the act to which this is a supplement, or under an act regulating the proceedings of justices of the peace and aldermen in cases of trespass, trover and rent, shall not attend at the time and place fixed for hearing the cause, it shall be the duty of the referee or referees present, (where the parties cannot agree on the person or persons to supply the vacancy, or where only one of the parties attends,) to appoint proper persons in place of those who may be absent, and the referees thus appointed shall have the same authority as those originally appointed.

SECT. 2. The said referees shall be sworn or affirmed by an alderman or justice of the peace, or they may swear and affirm each other, and then any of them shall have power to administer oaths or affirmations to witnesses, in the cause before them; and the said referees, or a majority of them, shall have power to adjourn their meetings to any other time or place, and as often as they may deem proper.

ACT 13 FEBRUARY 1816. Purd. 604.

SECT. 1. In all actions for the recovery of damages for any trespass, wrong or injury done or committed against real or personal estate brought before any justice of the peace or alderman of this commonwealth, and referred agreeably to law, the referees are hereby empowered, in addition to their report of the damages, if any sustained by the plaintiff, to decide and report also whether the plaintiff or defendant shall pay the costs of such action, or in what proportion they shall be paid by the plaintiff or defendant respectively, on which report judgment shall be entered, as well for the costs as the damages, and execution shall issue as in other cases; anything in the 2d section of the act, entitled "An act regulating the proceedings of justices of the peace and aldermen in cases of trespass, trover and rent," passed the 22d day of March 1814, or in any other act, to the contrary notwithstanding.

ACT 26 APRIL 1815. Purd. 604.

SECT. 1. No action brought before a justice of the peace or alderman shall be referred to referees for trial, unless by the agreement or express assent of both parties to the action, or their agents, which agreement or assent shall be noted by such justice or alderman upon his docket.

III. The action of trespass lies for immediate (injuries to the *person*) or to the *personal or real property* of another, accompanied with *force* either actual or implied, whether the act be wilful or unintentional, or whether it be committed by the defendant or by another at his command or procurement, or, having been done for his use or benefit, he afterwards assents to it. Where, however, the injury is consequential or collateral, *case* is the proper remedy. 1 Y. 586. 1 Leg. Gaz. 206.

Trespass on the *case* is an action brought for the recovery of damages, for acts *unaccompanied with force*, and which in their *consequences* only are injurious; for though an act may be in itself lawful, yet if in its effects or *consequences*, it is productive of any injury to another, it subjects the party to this action. Esp. N. P. 597. Justices have no jurisdiction of actions of trespass on the *case*. 13 S. & R. 420. 1 Ash. 152.

Per Lord ELLENBOROUGH, C. J.: "Whether the injury complained of arises *directly* or follows *consequently* from the act of the defendant, I consider as the only just criterion of *trespass and case*." 1 Camp. N. P. 497.

If an act done cause immediate injury, whether it be intentional or not, trespass lies; and if done by the co-operation of several persons, all are trespassers, and all may be sued jointly, or one is liable for the injury done by all; but it must appear that they acted in concert, or that the act of the one sued naturally and ordinarily produced the acts of the others. 19 Johns. 381. 2 C. 482.

The jurisdiction conferred on justices of the peace by the act of 1814, is concurrent with that of the common pleas. 4 S. & R. 417. 6 Ibid. 87. 1 Ash. 192.

To give jurisdiction to a magistrate, in trespass, the damage must form an actual or immediate injury operating upon the body of the property. 6 B. 33.

It is not necessary, however, that an actual loss should be proved. Every entry upon the close of another, without his permission, unless justified and authorized by law, is a trespass, for which suit may be brought before an alderman or justice of the peace. 13 Leg. Int. 29. 8 Phila. R. 424.

Thus, a justice has jurisdiction of an action of trespass for entering the plaintiff's house, and making a noise and disturbance therein, although no actual loss be proved. 13 S. & R. 417-20. And for intruding into the plaintiff's dwelling-house and refusing to leave when directed. 13 Leg. Int. 29.

A *devastavit* is not a trespass within the meaning of the act of 1814, of which a magistrate has jurisdiction. 12 S. & R. 58.

The law is settled, that none but the person in possession of the land can maintain trespass *quare clausum fregit*. 2 Br. 109. 4 Y. 218. 5 Wh. 539.

A tenant may sustain an action of trespass *quare clausum fregit* against his landlord, for an injury done to his way-going crop after the expiration of the lease, and after he had removed from the premises. 8 W. 282.

An owner of the freehold may cut or carry away the grain or grass of one in wrongful possession, without subjecting himself to a recovery against him in an action of trespass. 5 W. 543.

In an action of trespass before a justice of the peace, for cutting timber on the land of the plaintiff, it is not error that the record do not show in what county the land is situate. 5 P. L. J. 222. 3 Ibid. 425.

To stay proceedings in an action of trespass before a justice, the affidavit, under the second section of the act of 1814, that the title to lands will come in question, must be *positive*; it is not sufficient to swear to the best of the deponent's knowledge and belief. *Carpenter v. Koons*, Purd. 604, n. It is too late to make such objection after the case comes into the common pleas by appeal. 8 H. 464.

In the case of personal chattels, he who has the *general* property need not prove possession, because the law draws the possession to the property; but one who claims only a *special* property, must prove that he once had *actual* possession, without which no special property is complete. 3 S. & R. 512, 513.

See 1st ed. h
p 245
as to construction

In trespass for taking and carrying away the plaintiff's goods, it is not necessary for him to show title in the first instance; his possession is sufficient, and the defendant must show a better right in himself. 2 W. 180.

Where a quantity of corn was taken from the owner by a *wilful* trespasser, and converted by him into whiskey, *held*, that the property was not changed, and that the whiskey belonged to the owner of the original material; and was liable to be seized in execution to satisfy his debt. 3 N. Y. 379. 2 R. 428.

If a chattel wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs to the original owner; and, this rule, *it seems*, holds against an innocent purchaser from the wrongdoer, without regard to the increased value bestowed by him upon the chattel. But if it be converted by an *innocent* purchaser or holder into a thing of a *different species*, as where wheat is made into bread, olives into oil, or grapes into wine, the original owner cannot reclaim it. *Ibid*.

There is no such distinction, however, in favor of a *wilful* wrongdoer. He can acquire no property in the goods of another by any change wrought in them by his labor or skill, however great the change may be, provided it can be proved that the improved article was made from the original material. *Ibid*. 1 Bouv. Inst. 199.

A recovery in an action of trespass, for taking the goods of the plaintiff, divests his property in the goods. 1 R. 121.

Trespass lies against a constable who seizes the property of a defendant under an execution, and refuses him the benefit of the exemption law. 4 C. 238. 3 Gr. 240. See 27 Leg. Int. 228.

IV. TROVER AND CONVERSION.

The action of *trover* and *conversion* lies for the recovery of damages for the wrongful conversion of personal property, whether consisting of merchandise, money, bonds, notes, title-deeds or any other chattel merely personal, in which a man may have a valuable property. 1 Chit. Pl. 148. 2 Y. 537.

This action reaches all cases where one man has obtained the goods of another by any means, and has sold or used them without the assent of the owner, or has refused to deliver them on demand.

It is confined to the conversion of some *personal* property, and it does not lie for injuries to land or other real estate, even by a severance of a part from the freehold, unless there be also an asportation. 3 S. & R. 515.

But if, after severance from the freehold, as in the case of trees, the property severed be taken away, or, if coals dug from a pit be afterwards thrown out, *trover* will lie by a person having the right and possession, against a mere intruder and trespasser. *Ibid*.

So, where the trunks of trees blown down by a tempest, are cut and carried away by a tenant, *trover* is the proper remedy for the owner or lessor. 12 S. & R. 272.

It lies for money, though it be not in a bag, or otherwise distinguishable from other coin, because the thing itself is not to be recovered in this action, but merely damages for the conversion. *Ibid*.

This action in Pennsylvania is an equitable remedy, and therefore if a defendant have an equitable or legal lien on the property in his possession, it may be set up and allowed by the jury (or the justice) in assessing damages. 3 S. & R. 563.

If a man puts a chattel into the possession of a mechanic to repair, and he pledges it, the owner can maintain *trover* against the pawnbroker. The pawnbroker can have no greater property in the thing pawned than the pawnor himself had. 1 Br. 43.

The conversion of one *partner* of property which came into possession of the firm or partnership accounts, is the conversion of all, and makes all liable in *trover*. 4 R. 120.

Trover will not lie for goods seized by virtue of legal process, and in the custody of the law. 9 Johns. 381.

Trover lies against a common carrier who puts goods on a wharf, for such part of them as are lost, or not actually delivered to the consignee. 15 Johns. 39.

In order to support this action, the plaintiff must show property in himself, and a wrongful conversion by the defendant; and this property must be either *absolute*

or *special*; but it is unnecessary that the plaintiff should ever have had the actual possession, for it is a rule of law that the property of personal chattels draws to it the possession. 2 P. R. 45. 1 Y. 19.

The nature of *absolute* property is very readily understood, and requires no explanation; a *special* property is the consequence of a rightful possession for a particular and special purpose. 7 T. R. 392. 1 Bac. Abr. 50.

As to the other essential ingredients of this action, the *conversion*, it is to be observed, that every assumption of property in, or exercise of authority over, the goods of another, inconsistent with the title of the rightful owner, or in exclusion of his right, is a conversion. 7 Johns. 254, 306. 10 Ibid. 175. As if a bailee use or misuse the thing delivered to him, (2 Saund. 47 f.) or deliver it to a stranger; as where a factor pledges the goods of his principal for his own debt. 14 Johns. 128.

The wrongful taking and carrying away another person's goods is, itself, a conversion. 15 Johns. 481. But where the goods have come lawfully into the defendant's possession, and there has been no actual conversion, the plaintiff must demand them, and the defendant refuse to deliver them up, in order to constitute a conversion. 2 Saund. 47 e.

There are exceptions to this rule; as, where the possessor, on demand by the owner or his agent, answers that he is ready to deliver them, on being satisfied that the defendant is really the owner or agent, no conversion can be inferred. 6 S. & R. 305.

But where the possessor refuses to deliver them because of a claim of his own to ownership, or of a lien which he asserts he has on them, such a refusal falls within the general rule, and is evidence of a conversion. Ibid.

It is no objection to the action, that the plaintiff has subsequently repossessed himself of the property, for he is still entitled to damages for the injury sustained. 1 Johns. 65. 7 Ibid. 254. 10 Ibid. 176.

The value of the property at the time of the demand is the measure of damages; but compensation may also be made for an aggravation of the injury by peculiar circumstances in the taking or detention. 12 S. & R. 89, 94. 6 Ibid. 300. 4 W. 418. 3 W. 333. 9 C. 251. x c

Though trover may lie for a *certificate* of stock as it does for a bond or deed, yet it will not lie for a certain number of shares of stock claimed by the plaintiff. 17 S. & R. 285.

As a general principle, the defendant in an action of trover may show title in a third person. 4 W. 241.

If the owner of goods brings an action of trespass or trover against one who has sold his goods without authority, and obtains a judgment equal to the value of the goods, the right of property in the goods is changed, so that he cannot maintain an action afterwards for the goods against the vendee of the defendant; and this, although the first judgment should not be satisfied. 4 R. 285-6.

Constructive possession of unoccupied land is sufficient to support trover for the asportation and conversion of trees felled thereon. 9 W. 172.

If an executor separate certain articles of property from those of his testator, and declares them bequeathed to the legatee, it is such a delivery as will enable the latter to maintain trover for them. 7 W. 570.

He who parts with the possession of his property for the purpose of defrauding his creditors, cannot maintain trover to recover it back. But after his death, if his estate be otherwise insufficient to pay his debts, the action of trover survives to his personal representatives, who may prosecute it for the benefit of creditors. 6 W. 453.

Riding a horse taken up as an estray, for the purpose of discovering the owner, is not such an act of conversion as will support an action of trover. 7 W. 557.

A neglect, by one who takes charge of an estray, to pursue the course prescribed by the statute, does not make him liable to an action of trover, unless he uses the estray, or refuses to deliver him up on demand. Ibid.

Vagrants.

- I. Who to be deemed vagrants. and disorderly persons.
 II. Conviction and punishment of vagrants III. Judicial decisions.

I. ACT 18 JUNE 1836. Purd. 999.

SECT. 32. The following described persons shall be liable to the penalties imposed by law upon vagrants:—

1. All persons who shall unlawfully return into any district whence they have been legally removed, without bringing a certificate from the city or district to which they belong.

2. All persons who, not having wherewith to maintain themselves and their families, live idly and without employment, and refuse to work for the usual and common wages given to other laborers in the like work, in the place where they then are.

3. All persons who shall refuse to perform the work which shall be allotted to them by the overseers of the poor as aforesaid.

4. All persons going about from door to door, or placing themselves in streets, highways or other roads, to beg or gather alms; and all other persons wandering abroad and begging.

5. All persons who shall come from any place without this commonwealth, to any place within it, and shall be found loitering or residing therein, and shall follow no labor, trade, occupation or business, and have no visible means of subsistence, and can give no reasonable account of themselves, or their business in such place.

II. ACT 21 FEBRUARY 1767. Purd. 999.

SECT. 1. It shall and may be lawful for any justice of the peace of the county where such idle and disorderly persons shall be found, to commit such offenders (being thereof legally convicted before him, on his own view, or by the confession of such offenders, or by the oath or affirmation of one or more credible witness or witnesses) to the work-house of the said county, if such there be, otherwise to the common jail of the county; there to be kept at hard labor, by the keeper of such work-house or jail, for any time not exceeding one month.

SECT. 2. If any persons shall be found offending, in any township or place, against this act, it shall and may be lawful for any constable of such township or place, and he is hereby enjoined and required, on notice thereof given him by any of the inhabitants thereof, to apprehend and convey, or cause to be conveyed, such persons so offending to a justice of the peace of the county, who shall examine and try such offenders, and, on such confession or proof, shall commit them to the work-house or jail of the county, there to be kept at hard labor during the term aforesaid; and if any constable, after such notice given as aforesaid, shall refuse or neglect to use his best endeavors to apprehend and convey such offenders before the justice of the peace aforesaid, being thereof legally convicted before such justice of the peace, every such constable shall forfeit and pay to the overseers of the poor of the township or place where such offence shall be committed, to the use of the poor thereof, the sum of ten shillings, to be levied by distress and sale of the offender's goods, by warrant from such justice; and the overplus, if any, after the charge of prosecution and of such distress shall be satisfied, shall be returned to such offender.

SECT. 3. Any person or persons who shall conceive him, her or themselves aggrieved by any act, judgment or determination of any justice or justices of the peace out of sessions, in and concerning the execution of this act, may appeal to the next general quarter sessions of the city or county, giving reasonable notice thereof; whose order thereupon shall be final.

Act 22 March 1836. Purd. 1000.

SECT. 6. All persons who may be convicted, according to the existing laws of

this commonwealth, before the mayor, recorder or any alderman of the city of Philadelphia, or before any alderman or justice of the peace of the county of Philadelphia, as a vagrant or disorderly person, shall be sentenced to suffer confinement, at suitable employment, in the vagrant apartment of the city and county of Philadelphia, for the term of one month, and to be fed, clothed and treated as convicts in the Philadelphia county prison are directed to be fed, clothed and treated.

ACT 21 MARCH 1866. Purd. 1446.

SECT. 1. If any person shall be found, by any constable, police officer or detective, staying or loitering in or around any steamboat landing, railroad depot, gambling or drinking saloon, restaurant, banking-house, broker's office or any place of public amusement, crowded thoroughfare or other place of public resort, in any city or incorporated borough, within the counties of Erie, Crawford, Venango and Warren, (a) having no apparent business, trade or occupation, and without any visible avocation or means of subsistence, it shall be the duty of said officer to arrest such person, and take him or her, as soon as may be, before the mayor of any city, the burgess of any borough, or any convenient magistrate of the place where the arrest is made; and upon due proof of the fact, by one or more witnesses or by confession, and upon the party arrested failing to furnish any reasonable or satisfactory account of his or her name, residence, character or business at that place, he or she shall be deemed and taken to be a vagrant, and shall be subject to all the existing laws respecting vagrants now in force in this commonwealth; and the mayor of any city and the burgess of every borough within the said counties are hereby vested with full authority and jurisdiction to execute all the provisions of this act, and all existing laws relative to vagrants.

SECT. 4. After the arrest of any such person as is hereinbefore described, and upon the oath or affirmation of the arresting officer or other person that he has reason to suspect, and does suspect such person of being a gambler, burglar, thief or pickpocket, it shall be lawful for the mayor, burgess or justice before whom such person is brought, to direct the officer, in his presence or that of some disinterested person named by him, to search the person, the baggage, and place of residence or resort of such suspected person, and return to the presiding magistrate everything he may find or take, deemed confirmatory of such suspicion, and everything not so deemed shall be left with or returned to the owner; and if, upon said examination and search, such mayor, burgess or other magistrate shall be satisfied such suspected person is a professional gambler, thief, pickpocket or burglar, he shall have power so to render his judgment, and then to sentence such party to pay a fine of any sum not exceeding one hundred dollars, and the costs of prosecution, and to undergo imprisonment, in the county jail, for any period not exceeding three months, or to require such party to enter into recognisance, and give bail for his or her appearance at the next court of quarter sessions in such sum as he may fix; and upon the failure of any such party to comply with said sentence, or give the required recognisance and bail, to commit him or her to the jail of the county; of all of which doings the said magistrate shall keep a record, and transmit a certified copy of the same to the clerk of the quarter sessions, at or before the next succeeding term.

SECT. 5. If any person shall feel him or herself aggrieved by the final adjudication of any mayor, burgess or justice, under this act, he shall have the right to sue out a writ of *habeas corpus*, before any judge of the county in which he shall be so arrested, and have a rehearing of his case, or by giving satisfactory security, in the usual form, shall have the right to have a writ of *certiorari* to remove the proceedings to the next court of quarter sessions for review, which shall suspend the further execution of the judgment or sentence until the case is heard and finally determined by the court.

III. Vagrants are, since the repeal of the act of 8th February 1766, on the same footing in the city of Philadelphia, and the districts adjoining to it, that they are

(a) See act 11 April 1866, as to Franklin county of York, P. L. 844; and act 9 April county, P. L. 720; act 4 April 1870, as to the 1870, as to Lebanon county, P. L. 1005.

in other parts of the state, and, therefore, an alderman of the city of Philadelphia may lawfully commit any vagrant found therein, to prison, to be kept at hard labor for any time not exceeding one month, on conviction, according to the act of the 21st February 1767. 1 Sm. 268. 5 B. 516.

Under the acts of assembly relating to the "house of refuge," the adjudication of a magistrate, on a charge of vagrancy and crime, is in no respect conclusive, but the whole subject is open on the hearing of a *habeas corpus*, when it is incumbent on the managers to show affirmatively, and from evidence, that the child detained in their custody is a proper subject for the house of refuge, within the true intent and meaning of their charter. 1 Ash. 248.

Whenever it is made to appear, affirmatively and clearly, that a male or female child, who exhibits knowledge and capacity to commit a crime, and who, if a male, is within the age of 21, and if a female, is within the age of 18, has been guilty of vagrancy, he or she may lawfully be committed to the house of refuge. *Ibid*.

Admitting that there may be a case in which a child under 14 may justly be adjudged a vagrant, yet the circumstances of such case ought to be urgent, unequivocal and decisive. *Ibid*.

A father cannot transfer the custody of the person of his child to the managers of the house of refuge, unless the child is adjudged a proper subject for the house of refuge, by due course of law. *Ibid*.

"There is another class of offenders, called '*disorderly persons*,' in our acts of assembly. What constitutes this offence, is not, perhaps, so well understood. The acts done, or duties neglected, that make one an *idle or disorderly person*, are all pointed out in the act of the 21st of February 1767, and these are all embraced within the act of the 13th of June 1836, where the offence of *vagrancy* has been clearly described in the various classes of offences already quoted. If this term is to have no greater signification than what is given to it by the act of 1767, then all who fall within its description are made *vagabonds* by the act of 13th June 1836, and then there are no offenders who can be called '*disorderly*' persons; but we must suppose that the legislature intended to use them as synonymous terms. But did the legislature intend that the term '*disorderly*' should have any more extended application against the good order of society, than what is understood by the term '*vagrant*,' in the act of 1836? I am inclined to think they did; for we must presume that the law-making power perfectly understood the terms which they have used. What, then, is understood by the word *disorderly*? When applied to society, it means, lawless, contrary to law, inclined to break loose from restraint, unruly; in a manner, violating law and good order, contrary to rules or established institutions. Such is the definition given to the word by one of our best American lexicographers.

"The act of 17 Geo. II., ch. 5, speaks of '*idle and disorderly persons*,' and vagrants, or rogues and vagabonds, as two distinct classes of offenders; and the act of the 21st of February 1767, copies portions of this act of parliament, and calls all such offenders '*idle and disorderly persons*.' The act of 13th of June 1836, speaks of some offences not embraced in the former act, and also describes all who are mentioned in the act of 1767, and calls all such *vagrants*—and yet in the same session, as appears by the act of the 22d of March 1836, provision is made for the punishment of *disorderly persons*. Now, it seems to me, that, so far as these laws have relation to the city and county of Philadelphia, we may well suppose that many offenders who are not vagrants within the meaning of the act of 13th June 1836, are '*disorderly persons*,' and may be punished as such by the law of the 22d March of that year. If such was the meaning of the legislature then no violation of the rules of good order in the community can well occur, without the offender rendering himself obnoxious to punishment by some of the laws which I have referred to in the course of these remarks, on the judgment of a local magistrate, unless the offence is of that grade which makes it the subject of an indictment.

"In my opinion, there are offences which would not render one a *vagrant*, within the meaning of the law, yet would make him a *disorderly person*, within the true meaning of the term; and a magistrate may convict him as such. When a person is proved before a magistrate to be a '*disorderly person*,' the punishment is the same as that inflicted upon a vagrant. He may be sentenced to the county prison

for a period not exceeding thirty days. To make such a conviction a valid one, I think the magistrate ought to state clearly upon his record, the acts done by the offender, which make him a disorderly person. Nor is he bound to make a return of such conviction to the court, unless the case comes up in course before the court of quarter sessions. The party aggrieved by the decision of a magistrate has the right of appeal; and by the act of 1838, the judges of the court of quarter sessions can at any time cause all persons imprisoned, either as vagrants, disorderly, or for a breach of the peace, to be brought from the prison, before them, and examine the same, and recommit or discharge the individuals thus imprisoned, as they shall think law and justice require.

"It would be difficult, if not impossible, to enumerate the cases where a committing magistrate ought to commit one as a '*disorderly person*;' for a correct decision of each case must depend upon the facts disclosed upon the hearing. The term '*disorderly*' is certainly very extensive in its signification, and all who violate the peace and good order of society are liable to be punished, either as vagrants, disorderly, or for a breach of the public peace, or should be bound for their good behavior. Each case should be carefully considered by the magistrate, and no one should be improperly committed; at the same time, whenever the law has been violated, or the good order of society has been disturbed, there should be such an efficient administration of the law as is calculated to protect the public against future aggressions." 2 P. 458.

Wagers.

I. Of the nature and character of wagers.
II. Wagers on elections.

III. Wagers on a horse-race.

I. LORD ELLENBOROUGH refused to try an action upon a wager on a cock-fight, observing it was impossible to be engaged in ludicrous inquiries of this sort, consistently with that dignity which it was essential a court of justice should preserve. 2 Camp. 140. In another case, which was a wager whether a person might be lawfully arrested for a sum under £40, his lordship threw down the record with great displeasure, saying, "I certainly will not try this cause. I sit here to decide points of law that arise incidentally before me, and the decision of which is necessary for the purposes of justice—not to state my opinion upon any question submitted to me from idle curiosity. I consider the attempt extremely indecent." 2 Camp. 108. On the other hand, an action was held to be maintainable on a wager of a "rump and dozen," whether the defendant was older than the plaintiff. Mr. Sergeant Vaughan urged, with his usual effect, that instead of any public prejudice arising from the thing betted, it was for the public benefit to promote conviviality and good humor. MANSFIELD, C. J., indeed said, "he did not, judicially, know the meaning of a 'rump and dozen.'" But HEATH, J., observed, that they knew very well, privately, that a "rump and dozen" was what the witness stated, namely, a good dinner and wine; "in which," said the learned judge, "I can discover no illegality." CHAMBER, J., added, that "the witness had explained the 'rump and dozen' to mean a good dinner, and this is sufficiently certain. Then where is the immorality? Is it impossible for people to sit down to a good dinner without being guilty of excess?" 3 Camp. 161.

But whatever may be the law in England, or in any of our sister states, on the subject of wagers, in Pennsylvania it is settled that an action cannot be maintained to recover a sum of money, alleged to have been lost by the defendant to the plaintiff, upon a wager or bet. 6 Wh. 176.

As every bet about the age, or height, or wealth, or circumstances, or situation of any person, is either malicious, or indecent, or impertinent, or indelicate, such bets are illegal, and no court ought, in any case, to sustain a suit on such wager;

and this, whether the subject of the bet was man, or woman, or child, married or single, native or foreigner, in this country or abroad. I hold that no bet of any kind, about any human being, is recoverable in a court of justice. *HUSTON, J.* 1 R. 42, 43.

In an action against the drawer of a check upon a bank, evidence is admissible, on the part of the defendant, to prove that the check was drawn in pursuance of an agreement, by which a sum of money was bet by the defendant with the plaintiff, upon a certain event; and such consideration having been proved, the defendant is entitled to a verdict. 6 Wh. 176.

A notice to a stakeholder not to pay over money deposited in his hands, upon an illegal wager, must come from the *owner* of the money. A notice from the person who made the bet and deposited the money, on behalf of the owner, is ineffectual to enable the owner to recover it back. 2 W. & S. 59.

II. WAGERS ON ELECTIONS.

The statute against betting *on elections*, was intended to avoid all bets, paid or unpaid, and to suppress anything connected with the subject; it cannot, therefore, be eluded by any appended agreement, which would give to an actual wager the similitude of something else. 7 W. 343.

All contracts or promises, depending upon a bet on the result of an election, are null and void: ingenuity cannot invent any mode of evidencing such contract, so that it can be enforced by law. 7 W. 294.

A., the winner of a bet on the gubernatorial election of 1841, brought suit against B., the stakeholder, who had omitted to deliver up the money, after the loser had directed him to pay it to the winner, or to his order: *Held*, that since the act of 2d July 1839, relating to elections, the plaintiff could not recover either the whole sum deposited, or the share deposited by himself. 3 P. L. J. 388.

Upon a deposit being made, to secure a bet on an election, the money, *eo instanti*, vests in the guardians of the poor; and their omission to sue for it within the time limited by statute, does not give to either of the wagering parties the right to recover any portion of the sum deposited. *Ibid*.

Money contributed by individuals, and deposited in the hands of a stakeholder as a wager upon the result of an election, cannot be recovered back, in a joint action by the contributors. 3 W. & S. 405.

Money lost by a wager upon an election, and paid over to the winner, cannot be recovered back from him by means of a foreign attachment, at the suit of a creditor of the loser. 6 W. & S. 485.

The subject of betting on elections is comprehended in four sections of the election law of July 2d 1839, including the 115th, 116th, 117th and 118th sections.

Money lent in New Jersey, to bet upon the presidential election, may be recovered in Pennsylvania, in absence of any proof that betting on elections is against the law of New Jersey. 2 H. 18.

III. WAGERS ON A HORSE RACE.

If a bet be made on a horse race, money deposited with a stakeholder as a forfeit, in case of the party not appearing, may be recovered back by the loser. 3 P. R. 468.

If the stakeholder pays the money to him to whom it was forfeited, without notice, and in good faith, he is protected by the limitation contained in the act of assembly; otherwise, if he acted unfairly and connived with one of the parties. *Ibid*.

Money staked on a horse race may be recovered by the better, either from the winner or the stakeholder. *Ibid*. 494.

Where a sum of money is raised by the contributions of several persons, to be bet upon a horse race, and the same is deposited in the hands of the stakeholder by one of the contributors, such contributor can recover back from the stakeholder only that part of the money which he contributed, and not the whole deposit. *Ibid*.

In such action against the stakeholder, he may give evidence to show that part of the money staked was counterfeit, although it be not produced on the trial. *Ibid*.

Warrant or Capias.

- | | |
|--------------------------------------------------------------|-----------------------------------------------|
| I. Form of a civil warrant or capias. | III. Of the bail to be taken by the constable |
| II. Of the service of a warrant, and the constable's return. | and his assignment of it. |

I. CIVIL WARRANT OR CAPIAS.

CITY OF PHILADELPHIA, ss.

The Commonwealth of Pennsylvania,

To the Constable of Fifth Ward, or to the next Constable of the said city, most convenient to the defendant, greeting :

You are hereby commanded to TAKE the body of [A. B.] if [he] be found in the said city, and bring [him] before [J. B.], one of our aldermen in and for the said city, forthwith, on the service hereof, to answer [C. D.] in a plea of debt, for a penalty not exceeding one hundred dollars. Witness the said J. B., at Philadelphia, who hath hereunto set his hand and seal, the [tenth] day of [July,] in the year of our Lord one thousand eight hundred and sixty.

J. B., Alderman. [SEAL.]

This form may be made to answer in cases of *trover* and *conversion*, and in *trespass*, by making on it, to the letter, the same alterations which have been made to render the form of a *summons* for debt available in similar cases. [See pages 674, 675.]

The *return* of the constable on a warrant can be no other than bringing the defendant before the justice, returning that he has taken bail for his appearance, or that he has not been able, after diligent search and inquiry, to find the defendant. Whatever may be his return, he should endorse it on the warrant, subscribe it with his name, and date it.

II. OF THE SERVICE OF A CIVIL WARRANT.

When the constable arrests the defendant, he is to take him "forthwith;" that is, without any unnecessary delay—"before the justice" who issued the warrant. A civil warrant must not be served on a Sunday; nor may the constable, on any day, to serve a civil warrant, break open an *outer* door for the purpose of arresting the defendant; but if he finds the outer door open, and is *certain* the defendant is in the house, he may break open the inner door to arrest him. In the eye of the law, the defendant is arrested so soon as the officer, who has the process, shall *touch* the body of the defendant. If after arrest the defendant shall break away to escape, the officer is authorized to break open *outer*, as well as inner doors, to take him. When the constable brings his prisoner before the justice, he should return the warrant indorsed—"I herewith present the body of the defendant." If the defendant shall have been arrested and given bail, the constable may return his warrant indorsed—"I arrested the defendant and discharged him on bail, to appear at the justice's office on the sixth of July, inst., at 9 o'clock, A. M." If the constable have been unable to find the defendant, he may indorse the writ—"I have been unable to find the within named defendant." On this, as on all other occasions, when he returns process, it is the duty of the constable to subscribe his name *as constable*, and to *date* his return.

III. When the constable does take bail, he should take it in the words of the act of assembly of 20 March 1810, to wit :

"We, A. B. and C. D., are held and firmly bound unto E. F., constable of G—, or order, in the sum of \$—, on condition that the said A. B. shall be and appear before G. H., Esq., a justice of the peace in the said township of —, on the — day of —, to answer — in a plea —. Witness our hands, the — day of —."

"If the bail for the appearance so taken by the constable shall be insufficient, the constable shall be liable therefor, as sheriffs now are, to the plaintiff or plaintiffs

named in the warrant, notwithstanding" it may have been assigned to the plaintiff by the constable. It may be well, to save time, for the constable to appoint *an hour* in the bail bond, as well as a day, at which time the defendant shall appear at the office of the justice. If the bail bond shall be assigned to the plaintiff, it may be assigned in the following manner:

"I, A. B., constable of — township, [ward or district,] do hereby assign to C. D., the plaintiff named in the annexed warrant, all my right, title and interest, in the within obligation, for value received.

Scaled and delivered }
in the presence of }
G. H. and W. M.

A. B., Const. [SEAL]"

If, when the defendant is brought before the justice on a warrant, he satisfy the justice that he is a freeholder, he should be liberated. The plaintiff may then proceed by summons. If the defendant claim to be a freeholder, yet be unable to satisfy the justice of the fact, and he give bail for his appearance, at a time to which the case shall be adjourned, he should be liberated. If, when the parties meet, the defendant satisfy the justice that he is a freeholder, he should be allowed his privilege, and if sued, be sued by a summons. He should, however, be allowed sufficient time to return home before any summons be *served* on him. If he should not be so permitted, the intention of the legislature would be frustrated and set at naught. The establishment of his right of exemption would only act as a trap to hold him, while his privilege should be violated and process served upon him, which would render the privilege of little or no value.

Since the passage of the act of 12th July 1842, to abolish imprisonment for debt, no warrant of arrest can be issued by a justice of the peace, in a civil action, except in cases of trover or trespass; or in cases within the exception in the act of 1842, viz.: where it is proved by affidavit, to the satisfaction of the justice, that the plaintiff's demand is for the recovery of money collected by a public officer, or for official misconduct [See title, "Arrest for Debt," page 158.]

Weights and Measures.

I. ACT 15 APRIL 1845. Purd. 1015.

SECT. 7. In case any maker, vender or proprietor of beams, scales, weights or measures, within the city or county of Philadelphia, or county for which a sealer has been appointed, shall neglect or refuse to comply with the requisitions which the regulator of weights and measures is authorized and directed to make, or shall sell by false beams, scales, weights or measures, such person or persons so offending shall for each and every offence forfeit and pay the sum of five dollars, which may be sued for and recovered as debts of the like amount are by law recoverable, for the use of the poor of the city, district or township, in which such fine shall have been incurred.

II. ACT 21 APRIL 1846. Purd. 1015.

SECT. 1. Any person who shall, in any way, alter any measure, so that the capacity thereof is diminished, after the same shall have been adjusted and sealed, or shall, in buying or selling, use any measure so altered; and any person who shall alter any scale, beam or weight, so as to impair the adjustment thereof, after the same shall have been adjusted and sealed; and any dealer, vender or weigher, who shall have in his possession any scale, beam, weight or measure, so altered as aforesaid; shall, on conviction thereof, before any alderman or justice of the peace, forfeit and pay the sum of ten dollars; and if the person so convicted refuse or neglect to satisfy such forfeiture, with costs, immediately, or produce goods and chattels sufficient whereon to levy the said forfeiture, together with costs, then the said alderman

or justice of the peace shall commit the offender to the jail of the county wherein the offence was committed, there to be kept at hard labor for the space of thirty days.

SECT. 2. Any person who shall be convicted as aforesaid, and shall think himself or herself aggrieved by such conviction, may remove the proceedings, by *certiorari*, to the next court of quarter sessions, held for the city or county wherein the offence shall have been committed; and, on the hearing of the *certiorari*, the court may, if they think proper, examine testimony; but no judgment shall be reversed for any matter of form, if it shall be proved to the satisfaction of the court that the offence charged has been committed by the defendant.

SECT. 3. One moiety of the forfeitures in money accruing and becoming due for any offence against this act, shall be paid to the overseers or guardians of the poor of the city, borough or township wherein the offence shall have been committed, and the other moiety to the person or persons who shall prosecute and sue for the same.

III. ACT 11 APRIL 1850. Purd. 1015.

SECT. 8. Whenever any description of manufactured goods, commonly called dry goods or groceries, shall be sold by the piece, in packages, or by weight, and the said pieces or packages shall be marked or represented to contain a certain number of yards, pounds or ounces, and the same shall be sold as containing that number or weight, when in fact the said pieces or packages shall contain a less number of yards, or pounds, or ounces, than so represented, the seller or manufacturer thereof shall forfeit and pay to the purchaser a sum equal to double the value of the quantity or weight found to be deficient, to be recovered by action of debt in any court of law, or before any alderman or justice of the peace in this commonwealth, in the same manner that debts of like amount are now by law recoverable.

IV. ACT 8 APRIL 1851. Purd. 1013.

SECT. 13. All the provisions of the laws and parts of laws regulating the inspection of weights, scales, beams and measures used for the purpose of buying and selling, shall be extended to all such weights, scales, beams and measures as are used for ascertaining weights and measures, for the purpose of charging for freight, tonnage, transportation, commissions or other charges where such charges are regulated by weight or measure.

Witnesses.

ACT 24 FEBRUARY 1870. Purd. 1600.

If any person, who shall have been required by virtue of any writ of subpoena or other legal process, to attend and testify in any prosecution for forgery, perjury or felony before any criminal court, judge, justice or other judicial tribunal in this commonwealth, or who may have been recognised or held to bail to attend as a witness on behalf of the commonwealth or defendant, before any court having jurisdiction, to testify in any prosecution as aforesaid, shall unlawfully and wilfully, from this commonwealth or from the jurisdiction of such court, and with intent to defeat the ends of public justice, shall abscond, elope or conceal himself, and refuse to appear as required by said subpoena or other legal process or recognisance of bail, shall be guilty of a misdemeanor, and being thereof convicted, shall be sentenced to pay a fine not exceeding two thousand dollars or undergo an imprisonment not exceeding two years, or both, or either, at the discretion of the court.

APPENDIX.

CODE OF CRIMINAL PROCEDURE.

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| I. Proceedings to detect the commission of crimes. | IV. Of the trial. |
| II. Indictments and pleadings. | V. Of costs. |
| III. Courts of criminal jurisdiction. | VI. General provisions. |

I. PROCEEDINGS TO DETECT THE COMMISSION OF CRIMES.

1. The judges of the supreme court, of the court of oyer and terminer and jail delivery, of the courts of quarter sessions, or any of them, shall and may direct their writs and precepts to the sheriffs and coroners of the several counties within this commonwealth, when need shall be, to take persons indicted for felonies, or other offences, before them, who may dwell, remove or be received into another county; and it shall and may be lawful to and for the said judges, or any of them, to issue subpoenas into any county of the commonwealth, for summoning and bringing any person to give evidence in any matter or cause before them, or any of them, and to compel obedience to such writs, precepts or subpoenas, by attachment or otherwise, and under such pains and penalties as other writs or subpoenas are or ought by law to be granted and awarded; and that it shall be lawful for said judges, or any of them, if they see fit to direct such writ, precept, summons, subpoena or attachments, to be executed by the sheriff of the county in which the same is awarded, which said writ, precept, summons or subpoena shall be the sufficient warrant of such sheriff for executing the same throughout this commonwealth, as fully and effectually as if directed to, and executed by the sheriff of the proper county where issued: *Provided*, That the reasonable expenses of executing such process, when issued on behalf of the commonwealth, shall be paid out of the funds of the county where issued; and the expenses of removing any person charged with having committed an offence in one county into another county, or of transporting any person charged with having committed any offence in this state from another state into this state for trial, or for conveying any person, after conviction, to the penitentiary, shall be paid out of the treasury of the county where the offence is charged to have been committed. (a) Act 31 March 1860, § 1. Purd. 248.

2. Where any person charged with having committed any felony, (b) in any city or county of this commonwealth, shall go or escape into any other county thereof, it shall and may be lawful for the president, or any judge of the court of common pleas in the county where the said person may be found, to issue his warrant, authorizing and requiring the sheriff of the said county, to take the said person and conduct him to the proper county, where the said felony is alleged to have been committed, the expenses of which shall be paid to the said sheriff by the county to which the said person is conducted. Ibid. § 2.

(a) The county is not liable for the expenses incurred in an unsuccessful attempt to arrest a fugitive from justice, who has taken refuge in another state. 8 C. 540.

(b) This does not extend to misdemeanors;

a fugitive charged with having committed a misdemeanor in another county can only be arrested under the provisions of the succeeding section. 1 Gr. 218.

3. In case any person against whom a warrant may be issued by any judge or alderman of any city, or justice of the peace of any county in this commonwealth, for any offence there committed, shall escape, go into, reside or be in any other city or county out of the jurisdiction of the judge, alderman, justice or justices of the city or county granting such warrant as aforesaid, it shall and may be lawful for, and it is hereby declared to be the duty of any alderman, justice or justices of the city or county where such person shall escape, go into, reside or be, upon proof being made, upon oath or affirmation, of the handwriting of the judge, alderman, justice or justices granting such warrant, to indorse his or their name or names on such warrant, which shall be sufficient authority to the person or persons bringing such warrant, and to all other persons to whom such warrant was originally directed, to execute the same in such other city or county, out of the jurisdiction of the alderman, justice or justices, granting such warrant as aforesaid, and to apprehend and carry such offender before the alderman, justice or justices who indorsed such warrant, or some other alderman, justice or justices of such other city and county where such warrant was indorsed. And in case the offence for which such offender shall be so apprehended, shall be bailable in law by an alderman or justice of the peace, and such offender shall be willing and ready to give bail for his appearance at the next court of general jail delivery or quarter sessions, to be held in and for the city and county where the offence was committed, such alderman, justice or justices shall and may take such bail for his appearance, in the same manner as the alderman or justice of the peace of the proper city or county might have done; and the said alderman, justice or justices of the peace of such other city or county so taking bail, shall deliver or transmit such recognisance and other proceeding to the clerk of the court of general jail delivery or quarter sessions, where such offender is required to appear by virtue of such recognisance, and such recognisance and other proceedings shall be as good and effectual in law as if the same had been entered into, taken or acknowledged in the proper county where the offence was committed, and the same proceedings shall be had therein. And in case the offence for which such offender shall be apprehended in any other city or county, shall not be bailable in law by an alderman or justice of the peace, or such offender shall not give bail for his appearance at the proper court having cognisance of his crime, to the satisfaction of the alderman or justice before whom he shall be brought, then the constable or other person so apprehending such offender, shall carry and convey him before one of the aldermen or justices of the peace of the proper city or county where such offence was committed, there to be dealt with according to law. (a) Ibid. § 3.

4. No action of trespass or false imprisonment, or information or indictment, shall be brought, sued, commenced, exhibited or prosecuted by any person, against the alderman, justice or justices, who shall indorse such warrant, for or by reason of his or their indorsing the same, but such person shall be at liberty to bring or prosecute his or their action or suit against the alderman or justice who originally granted the warrant. Ibid. § 4.

5. When any person shall be accused before a magistrate, upon oath or affirmation, of the crime of burglary, robbery or larceny, and the said magistrate shall have issued his warrant to apprehend such person or persons, or to search for such goods as have been described, on oath or affirmation, to have been stolen goods, if any shall be found in the custody or possession of such person or persons, or in the custody or possession of any other person or persons, for his, her or their use, and there is probable cause, supported by oath or affirmation, to suspect that other goods, which may be discovered on such search, are stolen, it shall and may be lawful for the said magistrate to direct the said goods to be seized, and to secure the same in his own custody, unless the person in whose possession the same were found shall give sufficient surety to produce the same at the time of his or her trial. And the said magistrate shall forthwith cause an inventory to be taken of the said goods, and shall file the same with the clerk of that court in which the accused person is

(a) A warrant issued by a justice of the peace in one county, and indorsed by a justice of another county, charging a misdemeanor to have been committed in the county whence

the warrant issued, will not justify the detention of the offender in the jail of the county where the warrant was indorsed. 1 Gr. 218.

intended to be prosecuted, and shall give public notice in the newspapers, or otherwise by advertising the same in three or more public places in the city or county where the offence is charged to have been committed, before the time of trial, noting in such advertisement the said inventory, the person charged and time of trial. And if, on such trial, the accused party shall be acquitted, and no other claimant shall appear or suit be commenced, then, at the expiration of three months, such goods shall be delivered to the party accused, and he, she or they shall be discharged, and the county be liable to the costs of prosecution; but if he be convicted of larceny only, and, after restitution made to the owner and the sentence of the court being fully complied with, shall claim a right in the residue of the said goods, and no other shall appear or claim the said goods, or any part of them, then it shall be lawful, notwithstanding the claim of the said party accused, to detain such goods for the term of nine months, to the end that all persons having any claim thereto may have full opportunity to come, and to the satisfaction of the court, prove their property in them; on which proof the said owner or owners, respectively, shall receive the said goods, or the value thereof, if from their perishable nature it shall have been found necessary to make sale thereof, upon paying the reasonable charges incurred by the securing the said goods and establishing their property in the same; but if no such claim shall be brought and duly supported, then the person so convicted shall be entitled to the remainder of the said goods, or the value thereof, in case the same shall have been sold agreeably to the original inventory. But if, upon an attainder of burglary or robbery, the court shall, after due inquiry, be of opinion that the said goods were not the property of such burglar or robber, they shall be delivered, together with a certified copy of the said inventory, to the commissioners of the county, who shall indorse a receipt therefor on the original inventory, register the said inventory in a book, and also cause the same to be publicly advertised, giving notice to all persons claiming the said goods to prove their property therein to the said commissioners; and unless such proof shall be made within three months from the date of such advertisement, the said goods shall be publicly sold, and the net moneys arising from such sale shall be paid into the county treasury for the use of the commonwealth: *Provided always*, That if any claimant shall appear within one year, and prove his or her property in the said goods to the satisfaction of the commissioners, or in the case of dispute, shall obtain the verdict of a jury in favor of such claim, the said claimant shall be entitled to recover, and receive from the said commissioners or treasurer, the net amount of the moneys paid as aforesaid into the hands of the said commissioners, or by them paid into the treasury of this commonwealth. Ibid. § 5.

6. If any person shall threaten the person of another to wound, kill or destroy him, or to do him any harm in person or estate, (a) and the person threatened shall appear before a justice of the peace, and attest, on oath or affirmation, that he believes that by such threatening he is in danger of being hurt in body or estate, such person so threatening as aforesaid, shall be bound over, with one sufficient surety, to appear at the next sessions, (b) according to law, and in the mean time to be of his good behavior, and keep the peace toward all citizens of this commonwealth. (c) If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his family, person or property, he may, on complaint of any person having reasonable cause to fear a breach of the peace therefrom, be required to find surety of the peace as aforesaid. (d) Ibid. § 6.

(a) Surety of the peace is demandable of right by any individual who will make the necessary oath. 1 B. 102, n. See 1 Ash. 46. 2 P. 468.

(b) A committing magistrate has no authority to bind a person to keep the peace, or for his good behavior, longer than the next term of the court. 2 P. 468.

(c) Surety for good behavior may be ordered by the court, after the acquittal of a prisoner, in such sum, and for such length of time, as

the public safety requires. 2 Y. 487. 10 Barr 839. 2 Hayw. 73-74. See 12 Eng. L. & Eq. 462.

(d) This section is partly taken from the act of 1700, 1 Sm. 5; the addition thereto provided by this section, against the unnecessarily carrying deadly weapons, is introduced from an obvious necessity, arising from daily experience and observation. Report on the Penal Code 89.

Rail 7. In all cases the party accused, on oath or affirmation, of any crime or misdemeanor against the laws, shall be admitted to bail by one or more sufficient sureties, to be taken before any judge, justice, mayor, recorder or alderman where the offence charged has been committed, except such persons as are precluded from being bailed by the constitution of this commonwealth: (a) *Provided also*, That persons accused as aforesaid, of murder or manslaughter, shall only be admitted to bail by the supreme court or one of the judges thereof, or a president or associate law judge of a court of common pleas: persons accused, as aforesaid, of arson, rape, mayhem, sodomy, buggery, robbery or burglary, shall only be bailable by the supreme court, the court of common pleas or any of the judges thereof, or a mayor or recorder of a city. *Ibid.* § 7.

8. All sureties, mainpernors and bail in criminal cases, whether bound in recognisances for a particular matter or for all charges whatsoever, shall be entitled to have a bail-piece, duly certified by the proper officer or person before whom or in whose office the recognisance of such surety, mainpernors or bail shall be or remain, and upon such bail-piece, by themselves or their agents, to arrest and detain, and surrender their principals, with the like effect as in cases of bail in civil actions; and such bail-piece shall be a sufficient warrant or authority for the proper sheriff or jailer to receive the said principal, and have him forthcoming to answer the matter or matters alleged against him: *Provided*, That nothing herein contained shall prevent the person thus arrested and detained from giving new bail or sureties for his appearance, who shall have the same right of surrender hereinbefore provided. *Ibid.* § 8.

S. 1211 9. In all cases where a person shall, on the complaint of another, be bound by recognisance to appear, or shall, for want of security, be committed, or shall be indicted for an assault and battery or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy, by action, if the party complaining shall appear before the magistrate who may have taken recognisance or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate, in his discretion, to discharge the recognisance which may have been taken for the appearance of the defendant, or in case of committal, to discharge the prisoner, or for the court also where such proceeding has been returned to the court, in their discretion, to order a *nolle prosequi* to be entered on the indictment, as the case may require, upon payment of costs: *Provided*, That this act shall not extend to any assault and battery, or other misdemeanor, committed by or on any officer or minister of justice. *Ibid.* § 9.

II. INDICTMENTS AND PLEADINGS.

10. The foreman of any grand jury, or any member thereof, is hereby authorized and empowered to administer the requisite oaths or affirmations to any witness whose name may be marked by the district attorney on the bill of indictment. (b) *Ibid.* § 10.

11. Every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of the assembly prohibiting the crime, and prescribing the punishment, if any such there be, or, if at common law, so plainly that the nature of the offence charged may be easily understood by the jury. Every objection to any indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer, or on motion to quash such indictment, before the jury shall be sworn, and not afterward: (a) and every court, before whom any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular,

(a) A justice may take bail after commitment for trial. 6 W. & S. 314. 2 P. 458. And see 7 W. 454. 5 B. 512. 1 Sm. 57, n. A recognisance taken by a justice to answer the charge of arson is *coram non iudice*, and void. *Com. v. Philips*, 2 U. S. Law Mag. 316.

(b) That witnesses, whose names had not

been marked by the direct attorney on the bill of indictment, were sworn and examined by the foreman of the grand jury, is not pleasurable in bar; at most, it is only ground for a motion to quash. 13 Leg. Int. 132.

(c) See 8 W. 197. 14 Wr. 245. 27 N. Y. 329. 4 Luz. Leg. Obs. 54.

by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared. (a) *Ibid.* § 11.

12. It shall be lawful for any court of criminal jurisdiction, if such court shall see fit so to do, to cause the indictment for any offence whatever, when any variance or

(a) Sections 11 to 22 are new, and certainly not the least important in the proposed amendments of our penal system. The history of criminal administration abounds with instances in which the guilty have escaped, by reason of the apparently unreasonable nicety required in indictments. Lord HALK, one of the best, and most humane of English judges, long since remarked, that such niceties were "grown to be a blemish and an inconvenience in the law, and the administration thereof; that more offenders escaped by the easy ear given to exceptions to indictments, than by the manifestations of their innocence, and that the grossest crimes had gone unpunished, by reason of these unseemly niceties." The reason for recognising these subtleties by the common law, no doubt arose from the humanity of the judges, who, in administering a system in which the punishment of death followed almost every conviction of felony, were naturally disposed, in favor of life, to hold the crown to the strictest rules. Since, however, the reform of the penal laws, and the just apportionment of punishment to crimes according to their intrinsic atrocity and danger, the reason which led to the adoption of these technical niceties has ceased, and with the cessation of the reason, the technicalities themselves should be expunged from our system. The 11th section of this act proposes what the commissioners believe will be an effective remedy to this reproach of the common law, without depriving the accused of any proper privilege; it leaves him, at the outset of his trial, to determine whether he will question the relevancy of his accusation, or take issue on the merits of the charge; if he elects the latter, and is condemned, there seems neither moral nor legal fitness in permitting him to urge formal exceptions, which, if suggested, at an early period, would have been promptly corrected. The 12th and 13th sections are intended to meet cases of frequent occurrence, in which, although an indictment is strictly formal, yet, owing to some accidental slip in its preparation, it is found on the trial that the proofs do not entirely tally with the description of the instrument set forth in the indictment, or in the names of persons or places described therein. By the law as it now stands, where written instruments enter into the gist of the offence, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, &c., they are required to be set out in words and figures; the omission of a figure in an indictment for forgery is fatal. In the case of *Com. v. Gillespie*, 7 S. & R. 469, a mistake in spelling the name of "Burrall" which in the indictment was spelled "Burrill," was adjudged fatal after verdict. So, a variance between the names of the persons aggrieved, and places described in the indictment, and the proofs thereof on trial, will entitle the defendant to an acquittal, on the

ground of the want of agreement between the allegata and the probata. The proposed sections authorize the courts to amend such verbal errors, if objected to; and thus terminate a class of technical niceties, which are a reproach to the rational administration of justice. The 14th and 15th sections avoid the existing necessity of setting forth, in indictments, the names of numerous individuals, owners of property feloniously or fraudulently taken, or maliciously injured or destroyed; it will serve to reduce the voluminousness of such indictments, and can do no possible injury to the defendant, who cannot be interested in the fact, whether one person is, or one hundred persons are the owners of property in regard to which he is charged with having committed a felony or misdemeanor. The 16th section refers to public property, and rests on the same principle as the fourteenth and fifteenth sections. The 17th and 18th sections will enable the criminal pleader to simplify hereafter the forms of indictments in forgery, and facilitate him in averring instruments necessary to be recited in any other indictment. The 12th and 13th sections contemplate the amendment of indictments, framed according to the existing law, where an accidental error occurs between the instrument and names described, and those offered in proof. These sections strike at the root of the evil sought to be eradicated, by giving the pleader the option to prepare his indictment in such a way as to avoid, altogether, such difficulties; which can be done with ordinary care and caution. The 19th section contemplates avoiding the necessity of specifically describing the parties intended to be defrauded, and the embarrassing the proofs, in any case, with a question not really material to the issue. In forgeries, uttering and passing forged money, and in cheating by false pretences (the crimes contemplated by the section), the gist of the offence is, that the act charged was committed with an intent to defraud; an indictment containing that averment, should be sufficient, without requiring the pleader to go into the description of who was the party intended to be defrauded; a mistake in whom would acquit the accused, although the jury should be convinced that he had forged or uttered false money, or had been guilty of cheating by false pretences, with intent to defraud. The 20th section, providing for indictments for murder and manslaughter, from the nature and consequences of these offences, require that a somewhat detailed explanation of the reasons which have led to their introduction should be given. By the common law, in an indictment for murder, it is essentially necessary to set forth, particularly, the manner of the killing, and the means by which it was effected; if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a different species

variances shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof in the indictment whereon the trial is pending, to be forthwith amended in such particular or particulars, by some officer of the court, and after such amendment the trial shall proceed in the same manner, in all respects, as if no such variance or variances had appeared. Ibid. § 12.

13. If, on the trial of any indictment for felony or misdemeanor, there shall appear to be any variance between the statement of such indictment and the evidence offered in proof thereof, in the name of any place mentioned or described in any such indictment; or in the name or description of any person or persons or body politic or corporation therein stated, or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein; or the name or description of any person or persons, body politic or corporate therein stated or alleged to be injured or damaged, or intended to be injured or damaged, by the commission of such offence; or in the Christian name or surname, or both Christian and surname, or other description whatsoever of any person or persons whomsoever therein named or described; or in the name or description of any matter or thing whatsoever therein named or described; or in the ownership of any property named or described therein; it shall and may be lawful for the court before whom the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence upon such merits, to order such indictment to be amended, according to the proof, by some officer of the court, both in that part of the indictment wherein said variance occurs, and in every other part of the indictment in which it may become necessary to amend; and after such amendment, the trial shall proceed in the same manner, in all respects, and with the same consequences, as if no variance had occurred. And every verdict and judgment which shall be

of death, as by shooting, starving or strangling. A few cases will serve to illustrate how far this principle has been carried. In *Rex v. Kelly*, 1 Mood. Cr. Cas. 118, decided in 1825, the indictment charged that the prisoner struck the deceased with a piece of brick, and it appeared probable that the prisoner had not struck with the brick, but that he struck with his fist, and that the deceased fell from the blow upon a piece of brick, and that the fall on the brick was the cause of the death; it was unanimously held by the twelve judges of England, on a case reserved, that the cause of the death had not been truly stated, and the prisoner was discharged. So, in *Rex v. Martin*, 5 C. & P. 128, where the indictment charged the wound to have been inflicted by a blow with a hammer, held in the prisoner's hand, and it appeared that the injury might have been occasioned by a fall against the lock or key of a door, it was held, that if the injury was occasioned by a fall against the lock or key of a door, produced by the act of the defendant, the indictment was not sufficient. In *Rex v. Hughes*, 5 C. & P. 126, decided in 1882, the prisoner was indicted for an attempt to murder, by shooting the injured party with a pistol loaded with a leaden bullet; on the trial, no evidence was produced to actually prove that the pistol was loaded with a leaden bullet, none having been found either in the wound, or in the room where the wound was inflicted; the surgeon, examined in the case, testified that the wadding, if rammed tight, might have produced the effect without any ball; in this state of the evidence, the court ruled, that the indictment was not sufficiently proved, and

the defendant was acquitted. It is true, that the courts have drawn a distinction, which rendered their rulings in indictments for homicide, as to the manner and cause of the death, more reconcilable with reason, to wit: that where the instrument laid in the indictment, and the instrument proved, are of the same nature and character, there is no variance, as if the wound is charged to have been inflicted with a dagger or knife, proof is sufficient which establishes the wound to have been inflicted with a sword, spear or the like; so, if the indictment allege a death by one kind of poison, proof of death by another kind of poison will support it. The section under consideration proposes to go one step in advance of this doctrine, by declaring that it shall hereafter be sufficient, in an indictment for murder, to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased; without going into the details of the cause and manner of the death, which the cases cited show only tends to create unnecessary difficulties on the trial, and often results in the complete defeat of justice. The 21st and 22d sections are intended to simplify indictments for perjury and subornation of perjury, which are now extremely voluminous and technical; these characteristics of indictments for these crimes, are so familiar to all criminal lawyers as to render it unnecessary to enter into any details on the subject. The sections recommended for adoption will remedy these evils, and place indictments for these crimes on a rational footing. Report on the Penal Code 40-3.

given after making such amendment, shall be of the same force and effect, in all respects, as if the indictment had originally been in the same form in which it was after such amendment was made. *Ibid.* § 13.

14. In order to remove the difficulty of describing the ownership of property, in the case of partners and joint owners, in any indictment for any felony or misdemeanor committed on or with respect to any money, chattels, bond, bill, note or other valuable security or effects belonging to or in the possession of any partners or joint owners, it shall be sufficient to aver that the particular subject-matter on which or with respect to which any such offence shall have been committed, to be the property of some one or more of the partners or joint owners named in the indictment, and of other persons being partners or joint owners with him or them, without stating any of the names of such other persons; and in any indictment for any felony or misdemeanor, committed on or with respect to any house or building whatsoever, belonging to or in the possession of any partners or joint owners, or for any felony or misdemeanor committed on or with respect to any property being in any such house or building, it shall be sufficient to aver that the particular house or building on or with respect to which, or on or with respect to the property being in which, any such offence shall have been committed, is the property of some one or more of the partners or joint owners named in the indictment, and of other persons being partners or joint owners with him or them, without stating any of the names of such other persons. *Ibid.* § 14.

15. With regard to frauds committed against partners and joint owners, it shall be sufficient in any indictment for any felony or misdemeanor committed with intent to defraud any partners or joint owners, to allege that the act was committed with intent to defraud any one or more of the partners or joint owners named in the indictment, and other persons being partners or joint owners with him or them, without stating any of the names of such other persons. *Ibid.* § 15.

16. With respect to property belonging to counties, cities, townships and districts, it shall be sufficient in any indictment for any felony or misdemeanor committed on or with respect to any goods, chattels, furniture, provisions, clothes, tools, utensils, materials or things whatsoever, which have been or at any time shall be provided for or at the expense of any county, city, township or district, to be used in any court, jail, house of correction, almshouse or other building or place, or in any part thereof respectively, or to be used for the making, altering or repairing of any bridge or road, to aver that any such things are the property of such county, city, township or district. *Ibid.* § 16.

17. In any indictment for forgery, uttering, stealing, embezzling, destroying or concealing, or obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof. *Ibid.* § 17.

18. In all other cases whatsoever in which it shall be necessary to make any averment in any indictment, as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, and in such manner as to sufficiently identify such instrument, without setting out any copy or fac-simile of the whole or any part thereof. *Ibid.* § 18.

19. It shall be sufficient in any indictment for forging, uttering, offering, disposing of or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove any intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud. *Ibid.* § 19.

20. In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder, to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder

the deceased; and it shall be sufficient in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased. (a) Ibid. § 20.

21. In every indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged, and in what court, or before whom the oath or affirmation was taken, averring such court or person or body to have competent authority to administer the same, together with the proper averment, to falsify the matter wherein the perjury is assigned, without setting forth the information, indictment, declaration or part of any record or proceeding, other than as aforesaid, and without setting forth the commission or authority of the court, or person, or body before whom the perjury was committed. Ibid. § 21.

22. In every indictment for subornation of perjury, or for corrupt bargaining, or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence, without setting forth the information, indictment, declaration or part of any record or proceedings, and without setting forth the commission or authority of the court, or person or body before whom the perjury was committed, or was agreed or promised to be committed. Ibid. § 22.

23. In cases arising under the laws of this commonwealth for the restraint of the horrid practice of duelling, it shall be sufficient to form an indictment generally, against either of the principals for challenging another to fight at deadly weapons, and notwithstanding it may appear on the trial that the defendant only accepted the challenge, it shall be sufficient to convict and render him liable to the penalties of the law; and in like manner an indictment against the seconds may be framed generally, for carrying and delivering a challenge, and proof of the mere act of fighting, and the defendant being present thereat, shall be sufficient to convict the defendant upon an indictment so framed; and if the duel shall take place within this commonwealth, the mere fact of fighting shall be full and complete evidence of the charges, respectively, of giving or receiving, or of carrying or delivering a challenge, without other proof thereof. Ibid. § 23.

24. In every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving the said property, knowing it to have been stolen; and in any indictment for feloniously receiving property, knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing said property; and it shall be lawful for the jury trying the same, to find a verdict of guilty either of stealing the property or of receiving the same, knowing it to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same, to find all or any of the said persons guilty of either stealing the property or of receiving it, knowing it to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving it, knowing it to have been stolen. (b) Ibid. § 24.

25. In all cases of felony the prisoner shall be arraigned, and where any person on being so arraigned shall plead not guilty, every such person shall be deemed and taken to put himself upon the inquest or country for trial, without any question being asked of him how he will be tried, and the inquest shall be charged only to

(a) This section does not conflict with the constitutional provision contained in the 9th section of the declaration of rights, that in all criminal prosecutions the accused shall have a right "to demand the nature and cause of the accusation against him." 1 Wr. 109.

(b) This section is new, and was intended to remedy difficulties arising from the common law doctrines in relation to the joinder of offences and joint offenders. At common law, a felony and a misdemeanor, such as burglary and receiving stolen goods, could not be regularly joined; in larceny, counts for receiving were sometimes added, but the practice was regarded as of doubtful legality, until in the case of *Rex v. Galloway*; 1 Mood. Cr. Cas. 284, and of *Rex v. Madden*; Ibid. 277, it was decided to be erroneous. In Pennsylvania, the uniform practice has

been to unite counts for larceny and receiving, but in no other kind of felonious taking has such joinder been permitted. So, at common law, if two persons are charged with jointly receiving stolen goods, a joint act of receiving must be proved; proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. *Rex v. Messingham*, 1 Mood. Cr. Cas. 257. The proposed section will obviate these technical difficulties, as it permits a count for receiving to be joined with all indictments for felonious taking, and authorizes the conviction of one or more of several persons, jointly indicted, for felonious taking or receiving, either as principals or receivers, according to their actual guilt. Report on the Penal Code 43. See 4 P. F. Sm. 424. (11 Pitts. L. J. 313.

inquire whether he be guilty or not guilty of the crime charged against him, and no more. And wherever a person shall be indicted for treason or felony, the jury impannelled to try such person shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony. Ibid. § 25.

26. If any prisoner shall, upon his arraignment for any offence with which he is indicted, stand mute, or not answer directly, or shall peremptorily challenge above the number of persons summoned as jurors for his trial to which he is by law entitled, the plea of not guilty shall be entered for him on the record, (a) the supernumerary challenges shall be disregarded, and the trial shall proceed in the same manner as if he had pleaded not guilty, and for his trial had put himself upon the country. Ibid. § 26.

27. No person shall be required to answer to any indictment for any offence whatsoever, unless the prosecutor's name, if any there be, is indorsed thereon; and if no person shall avow himself the prosecutor, the court may hear witnesses, and determine whether there is such a private prosecutor, and if they shall be of opinion that there is such a prosecutor, then direct his name to be indorsed on such indictment. (b) Ibid. § 27.

28. It shall be lawful in cases of embezzlement by clerks, servants or other persons in the employ of another, to charge in the indictment, and proceed against an offender for any distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master or employer, within the space of six calendar months, from the first to the last of such acts, and in every such indictment, except where the offence shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly. (c) Ibid. § 28.

29. No district attorney shall, in any criminal case whatsoever, enter a *nolle prosequi*, either before or after bill found, without the assent of the proper court in writing first had and obtained. Ibid. § 29.

30. In any plea of *autrefois acquit*, or *autrefois convict*, it shall be sufficient for any defendant to state, that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment. Ibid. § 30.

III. COURTS OF CRIMINAL JURISDICTION.

31. The courts of oyer and terminer and general jail delivery shall have power—

I. To inquire by the oaths and affirmations of good and lawful men of the county, of all crimes committed, or triable in such county.

II. To hear, determine and punish the same, and to deliver the jails of such county of all prisoners therein, according to law.

III. To try indictments found in the quarter sessions, and certified by the said

(a) Where a plea of "not guilty" is entered under this section, for a prisoner who stands mute, and there is a trial and judgment, he cannot subsequently assign for error any matters appertaining to the precept, venire, drawing, summoning and returning of jurors, &c.; such case is within the 53d section of this act. 5 Wh. 67, 78.

(b) By this section the old law has been so amended as to enable the court to determine the question, in any case, whether there is such a prosecutor, and who he is, and if any, to order his name to be indorsed on the indictment.

Report on the Penal Code 44. If there be no proof of a prosecutor, the defendant must plead without such indorsement. 1 D. 5.

(c) The provisions of this section are necessary for preventing the difficulties that may be hereafter experienced in the prosecution of the various fraudulent embezzlements prescribed against by the revised Penal Code, and particularly by the 107th section thereof, against such embezzlement by clerks, servants and other persons in the employ of others. Report on the Penal Code 44. See 4 Luz. Leg. Obs. 53.

court according to law; and the said courts shall have exclusive jurisdiction and power to try and punish all persons charged with any of the crimes herein enumerated, which shall be committed within the respective county, to wit:

(1.) All persons charged with any murder or manslaughter, or other homicide, and all persons charged with being accessory to any such crime.

(2.) All persons charged with treason against the commonwealth.

(3.) All persons charged with sodomy, buggery, rape or robbery, their counsellors, aiders and abettors.

(4.) All persons charged with the crime of voluntarily and maliciously burning any building, or other thing, made punishable in the same manner as arson. (a)

(5.) All persons charged with mayhem, or with the crime of cutting off the tongue, putting out the eye, slitting the nose, cutting off the nose, cutting off a lip, cutting off or disabling any limb or member of a person, by lying in wait, or with malice aforethought, and with intent in so doing to maim or disfigure such person, and their aiders and abettors and counsellors.

(6.) All persons charged with burglary.

(7.) Every woman who shall be charged with having endeavored privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would be by law a bastard, so that it may not be known whether such issue was born dead or alive, or whether it was murdered or not.

(8.) All persons charged with the second or any subsequent offence of receiving, harboring or concealing any robber, burglar, felon or thief, or with the crime of receiving or buying any goods or chattels, which shall have been feloniously taken or stolen, knowing the same to be so taken or stolen. *Ibid.* § 31.

32. The courts of quarter sessions of the peace shall have jurisdiction and power within the respective counties—

I. To inquire, by the oaths or affirmations of good and lawful men of the county, of all crimes, misdemeanors and offences whatsoever, against the laws of this commonwealth, which shall be triable in the respective county.

II. To inquire of, hear, determine and punish, in due form of law, all such crimes and misdemeanors and offences, whereof exclusive jurisdiction is not given as aforesaid, to the courts of oyer and terminer of such county.

III. To take, in the name of the commonwealth, all manner of recognisances and obligations heretofore taken and allowed to be taken by any justice of the peace; and they shall certify such as shall be taken, in relation to any crime not triable therein, to the next court of oyer and terminer having power to take cognisance thereof.

IV. To continue or discharge the recognisance and obligations of persons bound to keep the peace, or to be of good behavior, taken as aforesaid, or certified into such court by any justice of the peace of such county, and to inquire of, hear and determine, in the manner hitherto practised and allowed, all complaints which shall be found thereon.

V. The courts of quarter sessions shall also have jurisdiction in cases of fines, penalties or punishments, imposed by any act of assembly, for offences, misdemeanors or delinquencies, except where it shall be otherwise expressly provided and enacted.

VI. The said courts shall also have and exercise such other jurisdiction and powers, not herein enumerated, as may have been heretofore given to them by law.

Whenever any indictment shall be found in any court of quarter sessions, for any crime or offence not triable therein, it shall be the duty of said court to certify the same into the court of oyer and terminer next to be holden in such county, there to be heard and determined in due course of law.

The judges of the county courts of oyer and terminer and quarter sessions, and every of them, shall have power to direct their writs or precepts to all or any of the

(a) This has reference to the extent and degree as well as to the kind of punishment; and therefore, whilst the offence described in the 137th section of the Penal Code, is a felony and triable only in the oyer and termi-

ner, that described in the 138th section, being only a misdemeanor, is to be tried in the quarter sessions. 8 Pittsburgh Leg. J. 293. See tit. "Arson."

sheriffs or other officers of any of the counties, cities, boroughs or towns corporate of this commonwealth, to arrest and bring before them persons indicted for felonies and other offences, and amenable to the respective court; each of said courts shall have power to award process to levy and recover such fines, forfeitures and amercements, as shall be imposed, taxed or adjudged by them respectively; each of the said courts shall have full power and authority to establish such rules for regulating the practice thereof respectively, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper: *Provided*, That such rules shall not be inconsistent with the constitution and laws of this commonwealth; each of the said courts is empowered to issue writs of subpoena, under their official seal, into any county of this commonwealth, to summon and bring before the respective court any person to give testimony in any cause or matter depending before them, under the penalties hitherto appointed and allowed, in any such case, by the laws of this commonwealth. Ibid. § 32.

33. Every person indicted in any court of quarter sessions, or in any county court of oyer and terminer and general jail delivery, may remove the indictment, and all proceedings thereon, or a transcript thereof, into the supreme court by a writ of certiorari, or a writ of error, as the case may require: *Provided*, That no such writ of certiorari, or writ of error shall issue, or be available, to remove the said indictment and proceeding thereupon, or a transcript thereof, or to stay execution of the judgment thereupon rendered, unless the same shall be specially allowed (a) by the supreme court, or one of the justices, thereof, upon sufficient cause to it or him shown, (b) or shall have been sued out, with the consent of the attorney-general; which special allowance or consent shall be in writing, and certified on the said writ. Ibid. § 33.

IV. OF THE TRIAL.

34. No person who may hereafter be arraigned on any indictment, and who shall be bound by recognisance to appear and abide by the judgment of the court, shall be placed within the prisoner's bar to plead to such indictment, or be confined therein during his trial; and all persons shall have an opportunity of a full and free communication with their counsel. Ibid. § 34.

35. Every person indicted for treason shall have a copy of the indictment (c) and a list of the jury and the witnesses to be produced on the trial for proving such indictment, mentioning the names and places of abode of such jurors and witnesses, delivered to him three whole days before the trial. (d) Ibid. § 35.

36. On the trial of any indictment for treason or misprision of treason, murder, manslaughter, concealing the death of a bastard child, rape, robbery, burglary, sodomy, malicious maiming and arson, the accused shall be at liberty to challenge, peremptorily, twenty of the jurors, and on the trial of all other indictments the accused shall be at liberty to challenge, peremptorily, four of the jurors. (e) Ibid. § 36.

(a) A writ of error issued without a special allocatur will be quashed. 2 S. & R. 468. 2 Wh. 113. So, also, if the allocatur be obtained before sentence. 16 S. & R. 819.

(b) It is never granted on mere technical matters, not going to the merits. 2 Barr 244. 3 S. & R. 199. 8 Y. 39. 6 B. 408. 4 B. 424. 1 Wh. 525. There must be strong ground to believe that if the case be not removed, some important principle of law, or the plain justice of the case, will be violated. 4 Pittsburgh Leg. J. 668.

(c) The caption is a portion of the indictment, and a copy of it must be furnished to the prisoner. 2 D. 342.

(d) The word "trial" here means the trying of the cause by the jury, and not the arraignment and pleading preparatory to such trial by the jury. 4 Mas. 232.

(e) The 36th, 37th, 38th and 39th sections are intended to supply the 152d, 153d, 154th,

155th and 156th sections of the act of 14th April 1834, P. L. 368. The changes therein, in reference to challenges, are, that by the 36th section of this act the number of challenges allowed the accused in treason, is twenty, whereas by the 152d section of the act of 1834, thirty-five challenges are allowed; and that by the 154th section of the act of 1834, the commonwealth is interdicted from challenging, without cause, in any case of felony, whereas by the 37th section of the present act, the commonwealth is only interdicted from challenging peremptorily in the cases enumerated in the 36th section, to wit: treason, misprision of treason, murder, manslaughter, concealing the death of a bastard child, rape, robbery, burglary, sodomy, malicious maiming and arson, and in all other felonies and misdemeanors, is allowed the same number of challenges as the defendant, to wit: four. The object of thus extending

on certiorari.

Challenges

37. The commonwealth shall have the right, in all cases, to challenge, peremptorily, four persons, and every peremptory challenge beyond the number allowed by law in any of the said cases, shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made. Ibid. § 37.

38. All challenges in criminal proceedings shall be conducted as follows, to wit: the commonwealth shall challenge one person, and then the defendant shall challenge one person, and so alternately, until all the challenges shall be made; but if the commonwealth shall refuse to make any challenge, the defendant shall, nevertheless, have the right to challenge the full number allowed him by law. Ibid. § 38.

39. When a challenge for a cause assigned shall (a) be made in any criminal proceeding, the truth of such cause shall be inquired of and determined by the court. (b) Ibid. § 39.

40. In all cases in which two or more persons are jointly indicted for any offence, it shall be in the discretion of the court to try them jointly or severally, except that in cases of felonious homicide, the parties charged shall have the right to demand separate trials; (c) and in all cases of joint trials, the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried, and no more. (d) Ibid. § 40.

to the commonwealth the right of challenging, in the minor felonies, the same number of jurors as the defendant, arises from the fact, that by the present code a large number of offences, which were misdemeanors at common law, are now made felonies; hence, the excluding of the commonwealth from the right of challenge in any felony, is almost totally to deprive her of the right of challenge. In the practical administration of criminal justice, the right of the commonwealth to challenge four jurors peremptorily, is of the deepest importance; it is not an uncommon thing to find in a panel of jurors, one or more persons pledged to the defendant by personal or social sympathies, or influenced in his favor by worse motives; the right to peremptorily challenge four jurors, is the security of the public against such contingencies. Report on the Penal Code 46. This provision allowing four peremptory challenges to the commonwealth, does not conflict with that clause of the declaration of rights, which provides "that trial by jury shall be *as heretofore*, and the right thereof shall remain inviolate." 1 Wr. 45.

(a) The commonwealth need not show cause of challenge until the panel is exhausted. 7 W. 585. 1 Wr. 45. 4 Wr. 462. 26 Leg. Int. 388.

(b) The power to challenge for cause may be exercised at any time before the oath is tendered to the jury. 11 H. 12. It is good cause of challenge that the juror has conscientious scruples on the subject of capital punishment. 17 S. & R. 165. Or that he has formed and expressed an opinion upon the evidence in the cause. 14 S. & R. 292. See 2 W. & S. 202. 1 Cranch C. C. 452. Or that the juror has been subpoenaed as a witness by the prisoner. 7 W. 585. Or that he is tenant of one of the parties. 8 W. 304. Or that he had grossly misbehaved himself on a former occasion, declaring that he had tried to acquit any one the judge desired to have convicted; and that he was "a Tom Paine man, and would as lief swear on a spelling book as on the Bible." 11 H. 12.

(c) Where separate trials are granted, the

court will not control the discretion of the district-attorney as to which of the defendants shall be first tried. 12 C. 305.

(d) This section is new, and is introduced to settle a question in criminal practice, which has produced difficulty. At common law, upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers to which they are respectively entitled. The embarrassments from defect of jurors, resulting from the exercise of this right by numerous defendants jointly indicted, led the courts, at a very early period, to determine that they had the power, against the will of the prisoners, to sever the panel, and try them severally, if they insisted upon their right of several challenges. This settled the question that prisoners, jointly indicted, could, against their wishes, be tried separately; but whether prisoners, jointly indicted, could demand a *separate* trial, presented another question; some insisting that they possess such a right; others contending that such severance is a matter of sound discretion, to be exercised by the court, with that due regard and tenderness to prisoners, which characterises our criminal jurisprudence; and this latter we regard as the better opinion. In the section under consideration this doctrine has been adopted, except as to cases of joint indictments for felonious homicide, in which it is proposed to give the accused the positive right to demand separate trials; in cases of joint trials, it is also proposed to limit the number of the challenges, of all the prisoners, to the number each would be entitled to if separately tried, and no more. As prisoners jointly indicted for felonious homicide, have, by this section, the right to sever in their trials, persons so circumstanced will not be affected by this latter provision, in cases of joint trial, as their being so tried is a matter resting entirely in their own choice. Report on the Penal Code 45.

41. All courts of criminal jurisdiction of this commonwealth shall be and are hereby authorized and required, when occasion shall render the same necessary, (a) to order a *tales de circumstantibus*, either for the grand or petit jury, (b) and all talesmen shall be liable to the same challenges, fines and penalties as the principal jurors: *Provided*, That nothing herein contained shall repeal or alter the provisions of an act passed the 20th day of April 1858, entitled "An act establishing a mode of drawing and selecting jurors in and for the city and county of Philadelphia." Ibid. § 41.

42. No alien shall, in any criminal case whatsoever, be entitled to a jury *de medietate linguæ*, or partly of strangers. Ibid. § 42.

43. The trial of all treason against the commonwealth, committed out of the jurisdiction of the state, shall be in the county where the offender is apprehended, or into which he shall first be brought. Ibid. § 43.

44. If any person shall become an accessory before the fact, to any felony, whether the same be a felony at common law, or by virtue of any act of assembly now in force or hereafter to be in force, such person may be indicted, tried, convicted and punished in all respects as if he were a principal felon. (c) Ibid. § 44.

(a) The court may direct a special venire to issue to two citizens, instead of the sheriff or coroner, whenever in their opinion, the nature of the case requires it. 8 Phila. R. 219.

(b) It is an irregularity to call talesmen, unless it appear of record, that the regular panel was exhausted, and an order for talesmen made; but such irregularity, if not objected to, is cured by the verdict, under the 53d section. 10 H. 94.

(c) The principle of this section, which prescribes the same punishment against accessories before the fact in felony, under the various synonyms of aiders, abettors, counsellors, comforters, &c., as against principals, is familiar to our criminal legislation; it is found in the 7th section of the act of 1718, 1 Sm. 118; in the 2d section of the act of 8th March 1780, 1 Sm. 499; in the 2d, 3d and 5th sections of the act of 6th April 1790, 2 Sm. 581; and in the 4th section of the act of 23d April 1829, 10 Sm. 481. There is, therefore, nothing new in the principle of this section, which is founded on the theory of the moral guilt of the accessory before the fact being equal to that of the principal offender. The new principle in the section is that which makes the accessory before the fact, guilty of a substantive offence, and which subjects him to punishment for his crime, without postponing it until the conviction of the actual perpetrator; or more precisely speaking, which abolishes in felonies the technical distinction now existing between accessories before the fact and principal offenders. This was always the law as regards misdemeanors in which there are no accessories, all being regarded by law as principals; in felony, however, except in certain cases about to be noticed, an accessory cannot be tried before the conviction or outlawry of his principal, unless tried with him. In felonies of frequent occurrence, this was found a great and serious evil, which called for and received partial legislative correction; as early as the act of the 31st May 1718, 1 Sm. 105, it was provided that persons harboring, concealing or receiving robbers, burglars, felons or thieves, or receiving or buying any goods or chattels that should have been feloniously taken or stolen by any such robbers, &c., knowing the same to be stolen, might be pro-

ceeded against as is therein directed; and that if any such principal felon could not be taken, so as to be prosecuted and convicted for such offence, that nevertheless it shall be lawful to prosecute and punish every such person buying or receiving any goods stolen by such principal felon, knowing the same to be stolen, although the principal felon should not be convicted of the felony. This, however, embraced only one class of accessories, to wit, receivers of stolen goods, in cases where the principal was not amenable to justice; afterwards, by the act of 28d September 1791, 8 Sm. 41, it was provided "in all cases of felonies of death, robbery and burglary, it shall be lawful to punish receivers of such felons, robbers and burglars, by a fine and imprisonment, although the principal felons, robbers and burglars cannot be taken, so as to be prosecuted and tried for said offences; which conviction and sentence of said receivers shall exempt them from being prosecuted as accessories after the fact in case the principal felon, robber or burglar shall afterwards be taken and convicted. This act extended only to accessories after the fact, in cases in which the principals could not be taken.

The act of 11th April 1825, 8 Sm. 438, was passed to avoid a difficulty which afterwards arose in the prosecutions of receivers of stolen goods, in cases in which the principals were amenable to justice. The act of 1718 was taken from the 4th section of 4th and 5th Anne, chap. 81, which only authorized proceedings against such receivers before the conviction or attainder of their principals, when such principals could not be taken. Foster, in his discourse on accomplices, § 6, p. 373, says on this point: "I know attempts have been made, under various shapes, to prosecute the receiver as for a misdemeanor, while the principal hath been in custody and amenable, but not convicted; but I think such devices illegal." The act of 1825 solved the difficulty, by declaring that receivers of property, knowing it to have been feloniously stolen, may be prosecuted, although the principal be not before convicted, and whether he is amenable to justice or not.

It will thus be seen, that all our legislation

45. If any person shall become an accessory after the fact, to any felony, whether the same be a felony at common law, or by virtue of any act of assembly now in force, or that may be hereafter in force, he may be indicted and convicted as an accessory after the fact, to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined and punished, by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become accessory, had been committed at the same place as the principal felony: *Provided always*, That no person who shall be once duly tried for any such offence, whether as an accessory after the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence. (a) Ibid. § 45.

46. If any person hereafter shall be feloniously stricken, poisoned or receive other cause of death in one county, and die of the same stroke, poisoning or other cause of death in another county, then an indictment found therefor by jurors of the county where the death shall happen, shall be as good and effectual in law, as well against the principal in such murder as against the accessory thereto, as if the stroke, poisoning or other cause of death had been given, done or committed in the same county where such indictment shall be found; and the proper courts having jurisdiction of the offence shall proceed upon the same as they might or could do in case such felonious stroke, poisoning or other cause of death, and the death itself thereby ensuing, had been committed and happened all in one and the same county. (b) Ibid. § 46.

47. If any person shall be feloniously stricken, poisoned or receive other cause of

with regard to the trial of accessories to felonies, before the conviction of their principals, applies only to accessories after the fact, a class of offenders who have had no primary connection with the original crime, and whose guilt only consists in having given comfort and succor to the actual offender after its perpetration; except in cases of receivers of stolen goods, this offence is often almost venial, consisting frequently in parents and friends, influenced by the ties of blood, or the impulses of affection, giving aid and comfort to an offender whose crime they abominate and deplore. It seems strange that the common law privilege, which exempted accessories from liability to justice until the conviction or attainder of the principal, should be taken away in cases of accessories after the fact, and left in those of accessories before the fact, whose guilt is always as great, and often much greater, than that of the principal. The 46th section proposes putting our statute laws on the subject of accessories to felonies in harmony with justice and reason. Report on the Penal Code 46-8.

(a) This section is only an extension of the existing laws, which, as will be seen from the preceding remarks, subjected accessories before the fact, and receivers, to punishment before the conviction or attainder of their principals. It embraces such accessories not only in common law felonies, but those created, or which hereafter may be created, by statute; it authorizes the conviction of such offenders either with or after the conviction of the principals, or for a substantive offence, whether the principal felon shall or shall not have

been previously convicted, or shall or shall not be amenable to justice. It also provides for the case of a party becoming an accessory after the fact in one county to a felony committed in another; giving jurisdiction over the crime of such accessory to the courts of the county having jurisdiction over the crime of the principal offender. This provision supplies the 22d and 23d sections of the act of 1718, 1 Sm. 119, made, probably, to meet a doubt at common law, whether an accessory in one county to a felony in another, was indictable in either. Report on the Penal Code 48.

(b) This section has been introduced to remove a difficulty which might arise in a case of homicide, where a man had died in one county from an injury, or other cause of death, received in another county. Hawkins, in his Pleas of the Crown, book 2, chap. 26, § 86, says, that, "at the common law, if a man had died in one county of a stroke received in another, it seems to have been the more general opinion that, regularly, the homicide was indictable in neither of them, because the offence was not complete in either, and no grand jury could inquire of what happened out of their county." This inconvenience was remedied by 2d & 8d Edward VI., chap. 24, by which it was enacted, that in such cases, the trial should take place in the county where the death happened. This statute is among those reported by the judges of the supreme court, as being in force in Pennsylvania; hence the expediency of this section to meet such a case, should it hereafter arise. Report on the Penal Code 49.

death within the jurisdiction of this state, and shall die of such stroke, poisoning or other cause of death at any place out of the jurisdiction of this state, an indictment therefor found by the jurors of the county in which such stroke, poisoning or other cause of death shall happen as aforesaid, shall be as good and effectual, as well against the principal in any such murder, as against the accessory thereto, as if such felonious stroke, poisoning or other cause of death, and the death thereby ensuing, and the offence of such accessory, had happened in the same county where such indictment shall be found; and the courts having jurisdiction of the offence shall proceed upon the same, as well against principal as accessory, as they could in case such felonious stroke, poisoning or other cause of death, and the death thereby ensuing, and the offence of such accessory, had both happened in the same county where such indictment shall be found. (a) Ibid. § 47.

48. In order to obviate the difficulty of proof as to all offences committed near the boundaries of counties, in any indictment for felony or misdemeanor committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, it shall be sufficient to allege that such felony or misdemeanor was committed in any of the said counties; and every such felony or misdemeanor shall and may be inquired of, tried, determined and punished in the county within which the same shall be so alleged to have been committed, in the same manner as if it had been actually committed therein. (b) Ibid. § 48.

49. In order to obviate the difficulty of proof as to offences committed during journeys from place to place, in any indictment for felony or misdemeanor committed on any person or on any property, upon any stage coach, stage, wagon, railway-car or other such carriage whatever, employed in any journey, it shall be sufficient to allege that such felony or misdemeanor was committed within any county or place through any part whereof such coach, wagon, cart, car or other carriage shall have passed in the course of the journey during which such felony or misdemeanor shall have been committed; and in all cases where the centre or other part of any highway shall constitute the boundaries of any two counties, it shall be sufficient to allege that the felony or misdemeanor was committed in either of the said counties through, or adjoining to, or by the boundaries of any part whereof such coach, wagon, cart, car or other carriage shall have passed in the course of the journey during which such felony or misdemeanor shall have been committed; and in any indictment for any felony or misdemeanor, committed on any person or on any property on board any vessel whatsoever, employed in any voyage or journey on any navigable river, canal or inland navigation, it shall be sufficient to allege that such felony or misdemeanor was committed in any county or place through any part whereof such vessel shall have passed in the course of the voyage or journey during which such felony or misdemeanor shall have been committed; and in all cases where the side or bank of any navigable river or creek, canal or inland navigation, or the centre or other part thereof, shall constitute the boundary of any two counties, it shall be sufficient to allege that such felony or misdemeanor was committed in either of the said counties through, or adjoining to, or by the boundary of any part thereof, such

(a) In the case of a wound, or other cause of death, being given in this state, and the party receiving the same dying in another state (a thing which might very readily occur, as in the case of duels), by the existing law it is at least doubtful whether a prosecution for homicide could be maintained in either; Hawkins, book 1, chap. 81, §§ 11, 12. If a mortal injury, or poison is given or administered maliciously in the state, and death ensues therefrom out of the state, the act which caused the death, and the malice which influenced the act, the two great essential elements of felonious homicide, have been perpetrated and manifested within our jurisdiction; it seems, therefore, fitting, that in such cases, jurisdiction over the crime should be exercised by the state. The section is

new, but manifestly necessary in any penal system claiming to be complete. Report on the Penal Code 49.

(b) The 48th and 49th sections are intended to obviate difficulties which occur in laying the county, where a crime has been committed, so near county lines, as to render it doubtful in which of two counties it has been actually perpetrated; and to obviate similar difficulties, where the crime has been committed during journeys or voyages by land or water, in carriages or vessels of any kind, which have passed through various counties in the journey or voyage during which the crime has been committed. These sections will be found of real practical value. Report on the Penal Code 49.

vessel shall have passed in the course of the voyage or journey during which such felony or misdemeanor shall have been committed; and every such felony or misdemeanor committed in any of the cases aforesaid, shall and may be inquired of, tried, determined and punished in the county or place within which the same shall be so alleged to have been committed, in the same manner as if it had actually been committed therein. *Ibid.* § 49.

50. If on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence, that the defendant did not complete the offence charged, but was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return, as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment; and no person so tried as herein lastly mentioned, shall be liable to be afterward prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried. (a) *Ibid.* § 50.

51. If upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before whom such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and direct such person to be indicted for felony; in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor. *Ibid.* § 51.

52. No person shall be deemed and adjudged an incompetent witness on the trial of any indictment, for or by reason of such person being entitled, in the event of the conviction of the defendant, to a restitution of his property feloniously taken, or the value thereof, or if fraudulently obtained, to a pecuniary remuneration or compensation therefor, or for or by reason of such witness being liable and subject to the payment of the costs of prosecution. *Ibid.* § 53.

53. No verdict in any criminal court shall be set aside, nor shall any judgment be arrested or reversed, nor sentence delayed, for any defect or error in the precept

(a) The 50th and 51st sections are new, and intended to facilitate the conviction of offenders, and avoid unnecessary delay in the administration of criminal justice. By the law as it now stands, if on the trial of an indictment for felony, it appears that some circumstance is wanted to establish the complete technical offence, the prisoner must be acquitted, although the proofs are perfect of an attempt to commit the crime; and on the other hand, where the indictment charges an attempt to commit a crime, and the proof establishes that the crime has actually been committed, the American courts have generally held that the prisoner must be acquitted, because the misdemeanor charged, is merged in the felony proved. The operation of the first of these doctrines is best exemplified by decided cases. Lord HALD, in his *Pleas of the Crown*, vol. 1, p. 508, thus recited one of these cases: "A. hath his keys tied to the strings of his purse; B., a cut-purse, takes his purse, with the money in it, out of his pocket, but the keys which were hanged to his purse strings, hanged in his pocket; A. takes B. with his purse in his hand, but the strings hanged to his pocket by the keys; it was ruled that this was no felony, for the keys and purse strings hanged in the pocket of A., whereby A. had still in law the possession of his purse, so that

licet cepit non asportavit. So, where a thief went into a shop, took up some goods, intending to steal them, but before he had removed them from the spot on which they lay, discovered they were tied to the counter by a cord; upon being tried for stealing, it was held that the property never was either completely severed from the possession of the owner, nor completely in the possession of the prisoner, and he was acquitted." *Sleight's Criminal Law* 29. In regard to the other doctrine sought to be changed by this section, viz.: that a misdemeanor charged is merged in a felony proved, it has been frequently held in this country that where, on an indictment for an assault, attempt or conspiracy, with intent to commit a felony, it appeared that the felony was actually committed, it was the duty of the court to charge the jury, that the misdemeanor had merged, and that the defendant must be acquitted. *Wharton's American Criminal Law*, § 564, 2294. In England, however, this doctrine has been shaken, if not repudiated by the cases of *Rex v. Neale*, 1 *Dennison's Cr. Cas.* 36, and *Rex v. Button*, 11 *Ad. & Ellis (N. S.)* 829. The section under consideration will, if adopted, destroy the future operation of a subtle fiction, having no origin in substantial common sense. Report on the Penal Code 50.

issued from any court, or in the *venire* issued for the summoning and returning of jurors, or for any defect or error in drawing, summoning or returning any juror, or panel of jurors, (a) but a trial, or an agreement to try on the merits, (b) or pleading guilty, or the general issue (c) in any case, shall be a waiver of all errors and defects in, or relative or appertaining to the said precept, venire, drawing, summoning and returning of jurors. Ibid. § 54.

54. If any person shall be committed for treason or felony, or other indictable offence, and shall not be indicted and tried some time in the next term, session of oyer and terminer, general jail delivery, or other court where the offence is properly cognisable, after such commitment, it shall and may be lawful for the judges or justices thereof, (d) and they are hereby required on the last day of the term, sessions or court, to set at liberty the said prisoner upon bail, unless it shall appear to them, upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be produced; (e) and if such prisoner shall not be indicted and tried the second term, session or court (g) after his or her commitment, unless the delay happen on the application or with the assent of the defendant, or upon trial he shall be acquitted, he shall be discharged from imprisonment: (h) *Provided always*, That nothing in this act shall extend to discharge out of prison, any person guilty of, or charged with treason, felony or other high misdemeanor in any other state, and who by the constitution of the United States ought to be delivered up to the executive power of such state, nor any person guilty of, or charged with a breach or violation of the laws of nations. (i) Ibid. § 55.

55. Upon the trial of any indictment for making or passing, and uttering, any false, forged or counterfeited coin or bank note, the court may receive in evidence to establish either the genuineness or falsity of such coin or note, the oaths or affirmations of witnesses who may, by experience and habit, have become expert in judging of the genuineness or otherwise, of such coin or paper, and such testimony may be submitted to the jury without first requiring proof of the handwriting or the other tests of genuineness, as the case may be, which have been heretofore required by law; and in prosecutions for either of the offences mentioned or described in the 164th, 165th, 166th and 167th sections of the "Act to consolidate, revise and amend the penal laws of this commonwealth," the courts shall not require the commonwealth to produce the charter of either of said banks, but the jury may find that fact upon other evidence, under the direction of the court. Ibid. § 55.

(a) See 2 S. & R. 800. 4 P. L. J. 512.

(b) A trial on the merits is a waiver of all irregularities and defects in the mode of summoning and returning the jurors. 5 C. 429. After a trial it is too late to object to mistakes in the process as to the Christian and surname of some of the jurors by whom the verdict was rendered. 10 H. 94. If a person, not on the panel, be called and permitted to sit, the irregularity is cured by this section. 8 H. 286. But if a stranger answer to the name of one of the panel, and be sworn as a juror, it is a mistrial, and not within the statute. *Com. v. Spring*, 10 Leg. Int. 54-6. 1 Am. L. R. 424. See 4 P. L. J. 621.

(c) If the prisoner stand mute, and the plea of not guilty be entered by the court, it is within the act. 5 Wh. 67. See 2 Ash. 90.

(d) The application must be made to the court in which the prisoners were indicted. 2 Wh. 502. 8 Y. 264. 7 W. & S. 110.

(e) This section only applies where there has been wilful delay on the part of the commonwealth. 16 S. & R. 805. 7 W. 866. Not where the trial is delayed by the prisoner. 3 Y. 266. 16 S. & R. 804. 2 Wh. 501. 7 W. 866. 1 D. 9.

(g) A prisoner can only claim his discharge on the last day of the second term after his

arrest, when there has been a competent and regularly constituted court before whom he could have been indicted and tried. 5 C. 129.

(h) The act was designed to prevent wrongful restraints of liberty growing out of the malice and procrastination of the prosecutor; but not to shield a prisoner, in any case, from the consequences of any delay made necessary by the law itself; and, therefore, where the array of grand jurors was quashed at two successive terms after the arrest of the prisoner, for informality in selecting and drawing them, he is not entitled to a discharge. 5 C. 129.

(i) This section is a transcript of the 8d section of the act of 18th February 1785, 2 Sm. 277. The words, "or other indictable offence," after the word "felony," have been introduced in order to harmonize the language of the law with the actual practice under it, which has been to extend the provisions of the 8d section of the habeas corpus act, not only to commitments for treason or felony, but to commitments for all criminal offences. *Ex parte Walton*, 2 Wh. 501. The only change in the proviso of this section is the substitution of the words, "the constitution of the United States," for the words, "the confederation," of the original act. Report on the Penal Code 51.

56. No witness in any case who enters his or her recognisance, in such sum as the magistrate may demand, to appear and testify in such prosecutions as require his testimony, shall be committed to prison by the judge, alderman or magistrate before whom any criminal charge may be preferred: *Provided however*, That in all cases triable in the oyer and terminer, where a positive oath is made, reduced to writing and signed by the deponent, setting forth sufficient reasons or facts to induce the firm belief on the part of the judge, magistrate or alderman, that any witness will abscond, elope or refuse to appear upon the trial, that then and in such case the judge, magistrate or alderman may exact bail of said witness to testify. Ibid. § 56.

57. Upon the trial of any indictment for murder or voluntary manslaughter, (a) it shall and may be lawful for the defendant or defendants to except to any decision of the court upon any point of evidence or law, (b) which exception shall be noted by the court, and filed of record as in civil cases, (c) and a writ of error to the supreme court may be taken by the defendant or defendants, after conviction and sentence. Ibid. § 57.

58. If during the trial upon any indictment for murder or voluntary manslaughter, the court shall be required by the defendant or defendants to give an opinion upon any point submitted and stated in writing, it shall be the duty of the court to answer the same fully, and file the point and answer with the records of the case. (d) Ibid. § 58.

59. No such writ shall be allowed, unless special application be made therefor, and cause shown within thirty days after sentence pronounced; and if the supreme court be sitting in banc in any district, the application shall be made, and cause shown there; if the said court be not sitting, application may be made to, and cause shown before one of the judges of that court, and upon the allowance of such writ, the said court or judge shall fix a time and place for hearing the said case, which time shall not be more than thirty days thereafter; if the said court shall be at that time sitting in banc in any district of the state, the said court or judge, upon the allowance of any such writ, shall make all such proper orders, touching notice to the commonwealth, and paper-books, as may be considered necessary. Ibid. § 59.

60. The writ of error shall issue from the prothonotary's office of the proper district, and all orders, decrees and judgments in the case shall also be entered of record there; but the application and final hearing may be made and had before the said supreme court while sitting in any other district. Ibid. § 60.

61. Upon the affirmance of the supreme court of the judgment in any case, the same shall be enforced pursuant to the directions of the judgment so affirmed, and the said court may make any further order requisite for carrying the same into effect; and if the supreme court shall reverse any judgment, they shall remand the record, with their opinion, setting forth the causes of reversal, to the proper court for further proceedings. Ibid. § 61.

V. OF COSTS.

62. In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned "*ignoramus*," the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals (e) by the petit jury on indictments for the

(a) A bill of exceptions to the admission or rejection of evidence, on the trial of one charged by indictment with a criminal offence, other than murder or voluntary manslaughter, is not the subject of consideration on a writ of error, although the bill may have been sealed by the court below. 2 W. 285.

(b) The prisoner must show that a substantial error was committed on the trial, in the admission or rejection of evidence, by which he has been injured: it is not sufficient that an abstract or technical error has taken place. 5 C. 429.

(c) The supreme court is limited to a review of the points so noted and filed of record by the court below. 5 C. 429. 1 Wr. 108. The

act does not authorize an exception to the charge of the court. 6 Pittsburgh Leg. J. 178. The opinion of the court below on a motion for a new trial, is not part of the record; nor can the record be amended by a fact stated therein. 1 Wr. 108.

(d) This section does require the court to write out its charge to the jury. 6 Pittsburgh Leg. J. 178.

(e) If the act be charged to have been done feloniously, the jury have no power over the costs. 6 W. 580. Nor where on an indictment for a felony, a count for a misdemeanor is joined. 2 C. 154. The statute extends to the case of a defective indictment. 4 B. 194. 4 S. & R. 127. And to an acquittal on a plea of the statute of limitations. 2 C. 171. The

offences aforesaid, the jury trying the same shall determine, by their verdict, whether the county, (a) or the prosecutor, or the defendant shall pay the the costs, (b) or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return or verdict; (c) and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days. (d) Ibid. § 62.

63. In all prosecutions where the petit jury trying the same shall acquit the defendant, and shall determine, by the verdict, that the prosecutor (e) shall pay the costs, the defendant's bill for his subpoenas, serving the same, and attendance of his material and necessary witnesses, shall be included in the costs and paid accordingly. Ibid. § 63.

64. The costs of prosecution accruing on all bills of indictments charging a party with felony, returned "ignoramus" by the grand jury, shall be paid by the county; and the costs of prosecution accruing on bills of indictment charging a party with felony, shall, if such party be acquitted by the petit jury on the traverse of the same, be paid by the county, (g) and in all cases of conviction (h) of any crime, all costs (i) shall be paid by the party convicted; but where such party shall have been discharged, according to law, (k) without payment of costs, the costs of prosecution shall be paid by the county; and in cases of surety of the peace, the costs shall be paid by the prosecutor or the defendant, or jointly between them, or the county, as the court may direct. Ibid. § 64.

65. In all cases where two or more persons have committed an indictable offence, the names of all concerned (if a prosecution shall be commenced) shall be contained in one bill of indictment, for which no more costs shall be allowed than if the name of one person only was contained therein. Ibid. § 65.

jury cannot convict one of two defendants, and acquit the other, and direct the latter to pay the costs. 13 S. & R. 301. The court may set aside a verdict of acquittal, so far as it imposes costs on the prosecutor. 2 Gr. 58.

(a) If the jury acquit the defendant, and may nothing as to the costs, the county is not liable. 8 P. R. 865. See 27 Leg. Int. 100.

(b) This does not include the costs of a former bill, on which judgment was arrested. 2 C. 171.

(c) No person can be sentenced to pay costs as prosecutor, unless named by the jury. 7 W. 485. But where the grand jury ignored a bill for assault and battery, and directed the person upon whom it was alleged to have been committed, to pay the costs, it was held sufficient; although they omitted to designate him as prosecutor. Com. v. Carr, Quarter Sessions, Phila., 28 October 1847. MS. The act does not apply to persons concerned in prosecutions in their official capacity; 2 Am. L. R. 248; 11 Leg. Int. 58; and hence, in a prosecution for keeping a disorderly house, the jury cannot impose the costs on the constable who made the return. Com. v. Barr, Quarter Sessions, Lancaster, January 1848. MS.

(d) See 2 P. R. 240. 13 S. & R. 303. This section is taken from the 1st and 2d sections of the act of 8th December 1804, 4 Sm. 204; and the act of 12th April 1859, P. L. 528. The only change made in these laws is, that the like privilege of giving security for the payment of costs in ten days is given to the defendant, who, although acquitted, is or-

dered to pay the costs, as is given to the prosecutor in case he is ordered to pay the costs. Report on the Penal Code 58.

(e) If, on the trial on an indictment for a misdemeanor, the jury acquit the defendant, and direct the costs of prosecution to be paid by the county, the latter is not liable to the defendant's witnesses for their fees. They are no part of the costs of prosecution. 12 C. 317.

(g) See 10 C. 440.

(h) This includes convictions for drunkenness and vagrancy. 4 C. 178. 5 C. 88. Provided the defendant be sentenced to hard labor, and the commitments follow the sentence, but not otherwise. 12 C. 849. The case of a prosecutor on a bill returned ignoramus is not within the act; nor that of a defendant acquitted, but ordered to pay the costs by the petit jury; nor where the prosecutor is ordered to pay costs on an acquittal. 4 S. & R. 541. Nor where the case is determined by nolle prosequi. 12 S. & R. 94. 6 H. 493. Or the indictment is quashed. 8 R. 487. See 9 Wr. 372. But it extends to cases where the party may be discharged under the insolvent laws; or where judgment has been arrested, or reversed on error. 12 S. & R. 95. Or where the defendant has been pardoned, after conviction. 4 S. & R. 449.

(i) This does not include costs of an attachment against a witness for contempt. 2 S. & R. 292.

(k) Unless the discharge be a legal one, the county is not liable. 6 P. L. J. 237.

VI. GENERAL PROVISIONS.

66. In every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the ground of such insanity; and if they shall so find and declare, the court before whom the trial is had shall have power to order him to be kept in strict custody, in such place and in such manner as to the said court shall seem fit, at the expense of the county in which the trial is had, so long as such person shall continue to be of unsound mind. Ibid. § 66.

67. The same proceedings may be had, if any person indicted for an offence shall, upon arraignment, be found to be a lunatic, by a jury lawfully impannelled for the purpose; or if, upon the trial of any person so indicted, such person shall appear to the jury, charged with such indictment, to be a lunatic, the court shall direct such finding to be recorded, and may proceed as aforesaid. Ibid. § 67.

68. In every case in which any person charged with any offence shall be brought before the court to be discharged for want of prosecution, and shall by the oath or affirmation of one or more credible persons, appear to be insane, the court shall order the district attorney to send before the grand jury a written allegation of such insanity in the nature of a bill of indictment; and thereupon the said grand jury shall make inquiry into the case, as in cases of crimes, and make presentment of their finding to said court thereon; and thereupon the court shall order a jury to be impannelled to try the insanity of such person; but before a trial thereof be ordered, the court shall direct notice thereof to be given to the next of kin of such person, by publication or otherwise, as the case requires, and if the jury shall find such person to be insane, the like proceedings may be had as aforesaid. Ibid. § 68.

69. If the kindred or friends of any person who may have been acquitted as aforesaid on the ground of insanity, or in the default of such, the guardians, overseers or supervisors of any county, township or place, shall give security in such amount as shall be satisfactory to the court, with condition that such lunatic shall be restrained from the commission of any offence by seclusion or otherwise, it shall be lawful for the court to make an order for the enlargement of such lunatic, and his delivery to his kindred or friends, or as the case may be, to such guardians, overseers or supervisors. Ibid. § 69.

70. The estate and effects of every such lunatic shall, in all cases, be liable to the county for the reimbursement of all costs and expenses paid by such county in pursuance of such order; but if any person acquitted on the grounds of insanity, shall have no estate or effects, the county, township or place to which such lunatic may be chargeable under the laws of this commonwealth relating to the support and employment of the poor, shall, after notice of his detention aforesaid, be liable for all costs and expenses as aforesaid, in like manner as if he had become a charge upon any township not liable for his support under the laws aforesaid. Ibid. § 70.

71. In all cases of felony heretofore committed, or which may hereafter be committed, it shall and may be lawful for any person injured or aggrieved by such felony, to have and maintain his action against the person or persons guilty of such felony, in like manner as if the offence committed had not been feloniously done; and in no case whatever, shall the action of the party injured, be deemed, taken or adjudged to be merged in the felony, or in any manner affected thereby. Ibid. § 71.

72. The imprisonment awarded as part of the punishment of any offender, shall not stop or avoid the awarding or taking out of execution to levy such respective sums recovered against them, as such offenders refuse or neglect to pay, when such writs are taken out, which executions shall be directed to the sheriff or coroner of the proper county, requiring him to levy the sums due upon such recoveries as aforesaid, of the lands and tenements, goods and chattels of such offenders, returnable to the next term or session of the court where such conviction was had, which shall be executed accordingly; (a) and the lands, goods and chattels thereby seized

(a) A conveyance made to elude the provisions of this section, would be fraudulent and void at common law. 5 B. 114.

shall be sold and conveyed by the said officers, and such sales shall be as available and effectual in law as any other sales of land taken and sold for the payment of debts, by virtue of writs of execution awarded out of the courts of common pleas in the respective counties. Ibid. § 72.

73. If any person who hath been, or shall be legally indicted in any court of criminal jurisdiction within this commonwealth, of treason, felony of death, robbery, burglary, sodomy or buggery, or as accessories before the fact to any of the same offences, did not or will not appear to answer to such indictment, or having appeared, shall escape before trial, the same indictment, record and proceedings shall be removed by writ of *certiorari* into the supreme court of this commonwealth, and it shall and may be lawful for the same court to award a writ of *capias*, directed to the sheriff of the county where the fact shall be charged to have been committed; and if the party indicted shall be supposed, by the indictment, to inhabit or be conversant in any other county, then also to the sheriff of such county; which writ or writs shall be delivered to the said sheriff or sheriffs, at least two months before the day of the return thereof, commanding the said sheriff or sheriffs to take the person so indicted as aforesaid, if he may be found in his or their bailiwicks, and him safely keep, so that he may have his body before the justices of the said supreme court, at the next supreme court to be holden for the said commonwealth, to answer to the said indictment, or prosecute his traverse thereupon, as the case may be, and to be further dealt with as the law shall direct; and if the same sheriff or sheriffs shall make return to the same writ or writs of *capias*, that the person indicted as aforesaid, cannot be found in his bailiwick, then, after such return, a second writ of *capias* may issue out of the said supreme court, and be delivered at least three months (a) before the return day thereof, to the sheriff of the county where the fact shall be charged to have been committed; and in case the party shall be supposed, by the indictment, to inhabit or be conversant in any other county, then another writ of *capias* shall also issue, and be delivered at least three months before the return day thereof, to the sheriff of such county; which writ or writs of *capias* shall be returnable before the justices of the same court, (b) on the first day of the second term next after the teste of the said second writ of *capias*, so that a term shall intervene between the teste of the return days of the same writ or writs, whereby the said sheriff or sheriffs shall be commanded to take the said person so indicted as aforesaid, if he may be found in his or their bailiwicks, and him safely keep, so that he may have his body before the justices of the said supreme court at the day of the return thereof, to answer or prosecute his traverse as aforesaid; but if he cannot be found in his or their bailiwicks, then to cause public proclamation to be made on three several days (c) in one of the courts of quarter sessions of the peace to be held for the said counties respectively, between the teste and return days of the same writ or writs, that the party so indicted shall appear before the said justices of the said supreme court, at a supreme court to be holden at the time and place contained in the same writs, to answer such indictment or prosecute his traverse thereof, as the case may be, or through default thereof, he will at the return of the same writ or writs be outlawed, and attainted of the crime whereof he was indicted as aforesaid; and the said second writ of *capias*, directed to the sheriff of the county where the crime hath been, or shall be charged to have been committed, shall contain a further clause commanding the said sheriff, in case the person indicted as aforesaid cannot be found in his bailiwick, to cause public advertisement to be made in one or more of the public newspapers of this state, once a week, in six succeeding weeks, between the teste and return of the said second writ of *capias*, specifying therein the coming of the said second writ of *capias* to his hands, with the teste thereof, and the time and place of return to be made thereof, naming the person indicted as aforesaid, with his addition of degree, mystery (d) and place of abode, (e) as contained in the writ, stating the nature of the offence charged against him, and commanding him to appear before the justices of the said supreme court, at the day and place directed by the said second writ of *capias*, to answer to the said indictment or prosecute his traverse

(a) See 1 D. 88, 92.

(b) 1 D. 88, 92.

(c) 1 D. 88, 92.

(d) 2 D. 92.

(e) 2 D. 92. 1 D. 60.

thereof, as the case may be, or through default thereof at the return of the said second writ of *capias*, he will be outlawed and attainted of the crime whereof he shall have been indicted as aforesaid; and if upon the return of the same writ or writs last mentioned, by the said sheriff or sheriffs, that the directions of the said writ or writs had been fully complied with and pursued, and the person indicted as aforesaid shall not yield himself to one of the said sheriffs, so that he may have his body before the justices of the said supreme court at the day and place as directed by the said writ or writs, or having surrendered himself, shall escape from his custody, or having been bailed on his surrender or caption, shall not appear, so that through want of his appearance at the time and place the said supreme court shall appoint for his trial, no trial of his offence can be had, the justices of the said supreme court shall in either of these cases pronounce and declare the said person indicted as aforesaid, and not appearing at the time and place appointed for his trial as aforesaid, to be outlawed and attainted of the crime whereof he shall have been indicted as aforesaid; the said supreme court to pronounce the judgment of outlawry against the principal offender, previously to the declaration of outlawry against the accessory, against whom, in all other respects, it shall be lawful to carry on the proceedings together, and at the same time the said supreme court shall declare the legal punishment for the same crime; and wherever imprisonment shall be a part of the sentence for any of the said offences, the term thereof shall commence from the time the person outlawed shall, subsequent to his outlawry, actually be in the custody of the sheriff of the county where the offence was or shall be committed, which sentence shall be fully and particularly entered upon the records of the said supreme court; and the said sentence of outlawry shall have the legal effect of a judgment upon verdict or confession against the person so outlawed, for the offence whereupon he shall have been outlawed, unless and until the same outlawry shall be afterwards avoided by the judgment of the same court, on plea pleaded in the nature of a writ of error.

When any person outlawed as aforesaid, shall be taken either by *capias utlagatum*, or otherwise, or being in the sheriff's custody, shall be brought to the bar of the supreme court, the court shall, upon the suggestion and prayer of the attorney-general, award execution (a) to be done upon him, unless the prisoner shall plead either *ore tenus*, or in writing, as his counsel shall advise, that he was not the person who was outlawed, or shall assign errors, in fact or in law, sufficient to prevent the award of execution, in which case the court shall proceed to determine the same either by an inquest or by their own judgment, agreeably to law; and the prisoner shall by such plea have all the benefit and advantage of all legal matters in his favor, as if he or she had brought a writ of error and had assigned the several matters pleaded as errors: *Provided*, If any person outlawed shall within the space of one year next after the outlawry pronounced against him, yield him to one of the justices of the supreme court, and offer to traverse the indictment whereon the said outlawry shall be pronounced as aforesaid, that then he shall be received to the same traverse; and being thereupon found not guilty, by the verdict of a jury, of the offence for which he shall have been outlawed as aforesaid, he shall be clearly acquitted and discharged of the said outlawry, and of all penalties and forfeitures by reason of the same, as fully as if no such outlawry had been had, anything hereinbefore contained to the contrary thereof notwithstanding.

All the costs and charges of the said proceedings to outlawry shall be borne and paid by the county where the crime is laid to have been committed: *Provided* *alacays*, That if the person or persons so outlawed shall have real or personal estate, the same or so much thereof as shall be necessary, shall be sold in the manner provided by the seventy-second section of this act, and the net proceeds of such sales shall be applied to the payment of the said costs and charges, or so far as the same shall extend, in exoneration of the county. (b) *Ibid.* § 78.

(a) 1 D. 87, 91.

(b) This section is taken from the 1st, 2d and 3d sections of the act of 23d September 1791, 8 Sm. 87, and is nearly a transcript thereof. They form in themselves as good a system of outlawry as can now be suggested, and are so skilfully and ably drawn, as to

require no amendment of importance. Although proceedings in outlawry have been rarely resorted to in our state, yet they are indispensably necessary in every complete system of criminal jurisprudence. Report on the Penal Code 54.

74. Whenever any person shall be sentenced to imprisonment at labor by separate or solitary confinement, for any period not less than one year, the imprisonment and labor shall be had and performed in the state penitentiary for the proper district: *Provided*, That nothing in this section contained shall prevent such person from being sentenced to imprisonment and labor, by separate or solitary confinement, in the county prisons now or hereafter authorized by law to receive convicts of a like description: *And provided also*, That no convict shall be sentenced by any court of this commonwealth, to either of the penitentiaries thereof, for any term which shall expire between the fifteenth of November and the fifteenth of February of any year. (a) *Ibid.* § 74.

75. No person shall be sentenced to imprisonment at labor, by separate or solitary confinement, for a period of time less than one year, except in the counties where, in the opinion of the court pronouncing the sentence, suitable prisons have been erected for such confinement and labor; and all persons sentenced to simple imprisonment for any period of time, shall be confined in the county jail where the conviction shall take place: *Provided*, That in the counties where suitable prisons for separate or solitary confinement at labor do not exist, and the sentence shall be for less than one year, simple imprisonment shall be substituted in all cases for the separate and solitary confinement at labor required by the "Act to consolidate, revise and amend the penal laws of this commonwealth." *Ibid.* § 75.

76. Whenever, hereafter, any person shall be condemned to suffer death by hanging, for any crime of which he shall have been convicted, the said punishment shall be inflicted upon him within the walls or yard of the jail of the county in which he shall have been convicted; and it shall be the duty of the sheriff or coroner of the said county to attend and be present at such execution, to which he shall invite the presence of a physician, the district attorney of the county, and twelve reputable citizens, who shall be selected by the sheriff; and the said sheriff shall, at the request of the criminal, permit such ministers of the gospel, not exceeding two, as he may name, and any of his immediate relatives, to attend and be present at such execution, together with such officers of the prison, and such of the sheriff's deputies as the said sheriff or coroner, in his discretion, may think it expedient to have present; and it shall be only permitted to the persons above designated to witness the said execution: *Provided*, That no person under age shall be permitted, on any account, to witness the same. And after the execution, the said sheriff or coroner shall make oath or affirmation, in writing, that he proceeded to execute the said criminal, within the walls or yard aforesaid, at the time designated by the death warrant of the governor; and the same shall be filed in the office of the clerk of the court of oyer and terminer of the aforesaid county, and a copy thereof published in

(a) Whilst the 74th and 75th sections, except the proviso to the 74th section, are new in form, no material alteration is made in the law as it now stands. The 74th section requires that sentences of imprisonment at labor by separate or solitary confinement for a period of time not less than one year, shall be performed in the state penitentiary for the proper district, or in such county prisons as are now, or may hereafter be authorized to receive convicts of a like description; and the 77th section prohibits sentences of imprisonment at labor by separate or solitary confinement for a less period of time than one year, except in the counties where suitable prisons have been or shall hereafter be erected for such confinement and labor. This section also provides that in all cases where the sentence is for simple imprisonment only, the offender shall be confined in the county where the conviction shall take place. The sections taken together require: 1. That all persons sentenced to simple imprisonment, shall be confined in the county where the offender is

convicted. 2. That no person shall be sentenced to imprisonment at labor by separate or solitary confinement for a less period than one year, except in the counties where, in the opinion of the court passing the sentence, prisons are provided suitable for such confinement and labor. 3. That all imprisonment at labor by separate or solitary confinement, where the sentences exceed one year, shall be in the state penitentiary for the proper district, except in the counties in whose prisons convicts of a like description are authorized to be imprisoned, and in those counties such convicts may be sent to the county prisons as heretofore. The provision contained in the last proviso to the 74th section, is copied from the 1st section of the act 18 February 1847. P. L. 126. Report on the Penal Code 54. In New York, a similar law to that contained in this proviso, was held to be merely directory, and a failure to comply with its requirements, not to avoid the sentence. 1 Park. Cr. R. 374.

two or more newspapers, one, at least, of which shall be printed in the county where the execution took place. Ibid. § 76.

77. All indictments which shall hereafter be brought or exhibited for any crime or misdemeanor, murder and voluntary manslaughter excepted, shall be brought or exhibited within the time and limitation hereafter expressed, and not after; (a) that is to say, all indictments and prosecutions for treason, arson, sodomy, buggery, robbery, burglary, perjury, counterfeiting, forgery, uttering or publishing any bank note, check or draft, knowing the same to be counterfeited or forged, shall be brought or exhibited within five years next after the offence shall have been committed; and all indictments and prosecutions for other felonies not named or excepted heretofore in this section, and for all misdemeanors, perjury excepted, shall be brought or exhibited within two years next after such felony or misdemeanor shall have been committed: (b) *Provided however*, That if the person against whom such indictment shall be brought or exhibited, shall not have been an inhabitant of this state, or usual resident therein, during the said respective terms for which he shall be subject and liable to prosecution as aforesaid, then such indictment shall or may be brought or exhibited against such person at any period within a similar space of time during which he shall be an inhabitant of, or usually resident within this state: *And provided also*, That indictments for misdemeanors committed by any officer of a bank, or other corporation, may be commenced and prosecuted at any time within six years from the time the alleged offence shall have been committed. (c) Ibid. § 77.

78. All fines imposed upon any party, by any court of criminal jurisdiction, shall be decreed to be paid to the commonwealth; but the same shall be collected and received, for the use of the respective counties in which such fines shall have been imposed as aforesaid, as is now directed by law. (d) Ibid. § 78.

(a) The finding of an informal presentment is not sufficient to take the case out of the statute. 1 Cr. C. C. 485. See 7 P. F. Sm. 443. Nor will a former indictment, on which a nolle prosequi was entered. 3 McLean 469.

(b) The limitation need not be specially pleaded; it may be taken advantage of on the general issue. 4 C. 259. See 3 Cr. C. C. 442. 5 Cr. C. C. 38, 60, 368.

(c) This section considerably extends the existing laws relating to the limitation of criminal prosecutions; these only relate to misdemeanors, in all of which prosecutions must be commenced within two years, if the alleged offender be accessible to justice, except in forgeries, perjuries and misdemeanors by bank officers, the limitations in the latter cases being six years; the present section extends the principle to all crimes, murder and voluntary manslaughter excepted. Where the alleged offender is accessible to justice, prosecutions should not be unnecessarily delayed; such delays do not often take place from worthy motives; charges are often kept suspended over the heads of the accused to subvert the ends of the accuser, and the accused kept in a state of moral slavery, to which no human being should be subjected; it is true, that stale prosecutions are looked upon with an unfavorable eye by courts and juries, but the very existence of this feeling in criminal tribunals is a strong argument in itself in favor of reasonable limitations in criminal prosecutions. In the more serious class of felonies and misdemeanors the limitation has been extended to five years; in those of less malignity the limitation of two years has been adopted. Report on the Penal Code 55. See 1 Brewst. 329. 1 P. F. Sm. 255.

(d) It will be perceived that in prescribing the punishment of the various crimes, the

maximum amount to be inflicted has only been defined; the principle found in some codes, that upon conviction, a certain minimum amount of punishment shall, under any state of circumstances, be imposed on the culprit, being entirely excluded; a broad discretion being thus given to the courts, in order that the extent of punishment imposed should, in every case, bear a due relation to the relative enormity of the offence. It is this enlightened and humane principle which distinguishes modern criminal jurisprudence from the system of blind and indiscriminate severity, which it has happily superseded; a system which seemed to regard a criminal as a noxious excrescence on society, to be ruthlessly extirpated, rather than as a diseased member, to be rendered, if possible, whole. In all modern penal legislation, the truth of this principle has been admitted, but in its mode of application there has been much variance; in some, a maximum extent of punishment has been prescribed by the lawgiver, leaving its modification to the intelligent and experienced discretion of the criminal tribunals; in others, a maximum and minimum extent of punishment have been provided, greater or less than which, the tribunals are forbidden to inflict under any possible state of circumstances; in some, the extent of punishment, within certain prescribed limits, is referred to the discretion of the jury by whose verdict the criminal has been convicted; in others, crimes have been divided into degrees, more or less minute, to which graduated punishments have been assigned, and the jury trying the offender have been required, in the event of his conviction, to determine the degree of his guilt. In effect, the two last systems are the same, as the

power to determine the degree of punishment as affixed by law, gives substantially the power to impose the punishment to be inflicted for the crime.

Neither of these systems has been absolutely adopted in Pennsylvania; a mean between the first two has been taken; in minor crimes, maximum punishments only have been prescribed; the minimum principle being introduced in reference to those of a graver nature. In all these systems, the leading object of the lawgivers has been to produce a harmonious relation between the real magnitude of the crime and the severity of its punishment; the difference between them being only as to the most effective means of accomplishing an object equally desired by all.

Amongst them, the commissioners give the decided preference to that which simply determines the maximum punishment to be inflicted on the crime, leaving all intermediate degrees of punishment to be determined by the criminal tribunals, according to the greater or less atrocity of the circumstances attending the commission of the crime. That such an important discretionary authority would be more steadily, uniformly and consistently exercised, by an upright, learned, responsible and experienced tribunal, than by a jury, is a proposition not likely to be disputed by any one familiar with judicial proceedings.

The sole apparent advantage to be derived from requiring, by law, that a party convicted of a crime shall receive a given amount of punishment, whatever may be its intrinsic character, and under whatever circumstances of extenuation it may have been committed, is to prevent parties convicted of crimes of heinous character from obtaining immunity through the weakness or dishonesty of judges. The instances of the former are rare in this commonwealth; of the latter, none is believed by us ever to have existed; the purity of our judiciary is one of the things which calumny has, as yet, left untouched. To guard against a theoretical and problematical evil, it does not seem wise or expedient to introduce a positive and actual one; whoever has been long and extensively engaged in the practical administration of criminal justice, under the maximum and minimum systems of punishments, has found occasions in which the statutory minimum punishment has greatly exceeded that which ought to have been inflicted

on the offender under the special circumstances of the case.

The experienced criminal magistrate knows that the same nominal crimes present almost infinite shades of atrocity; whilst in some, no extenuating circumstance softens the malignity of the offence, or challenges mercy for the offender, in others, the established facts are barely sufficient to constitute the technical crime charged, and the attendant circumstances, such as to appeal strongly to the best regulated sympathies. In such cases, it not unfrequently happens that the jury, knowing the extent of the punishment which *must* follow a conviction, and regarding it as greater than the intrinsic turpitude of the offence calls for, acquit a culprit, whom, under a different system of punishment, they would have convicted. Even when juries, reasoning on sounder principles, convict such an offender, and the court has imposed the lowest statutory punishment they are authorized to inflict, the executive is invoked to correct, by his pardon, the excessive severity of such punishment, and yields to the solicitation, not because he does not believe a crime has been committed, requiring, for the sake of public example, that some punishment should have been inflicted upon the offender, but because, from the inflexibility of the law, the punishment has been disproportioned to the offence.

The duty of a criminal judge is not simply to punish an offender within the limits prescribed by law, but it is equally his duty to graduate the punishment according to the criminal capacity, general intelligence, past conduct and character of the culprit, and the aggravating or extenuating circumstances of each particular case. All positive and arbitrary minimum punishments, necessarily interfere with the free and full exercise of this judicial duty, and should find no place in a truly philosophical code of crimes and punishments; besides, minimum punishments do but restrain judicial mercy, whilst within the maximum limit fixed by law, judicial severity is left without control. All the members of this commission have been, more or less, extensively engaged in the administration of criminal justice; the principle advocated is not, therefore, with them an abstract and untried theory, but the conviction of long experience and observation in actual criminal administration. Report on the Penal Code 5-7.

ACTS OF CONGRESS FOR THE NATURALIZATION OF ALIENS.(a)

ACT 14 APRIL 1802. Purd. 1021.

SECT. 1. Any alien, being a free white person, (b) may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise :

I. That he shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, (c) or of the territorial districts of the United States, or a circuit or district court of the United States, [three] years (d) at least before his admission, that it was *bonâ fide* his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty whereof such alien may at the time be a citizen or subject. (e)

II. That he shall, at the time of his application to be admitted, (g) declare on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly by name the prince, potentate, state or sovereignty, whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court. (h)

III. That the court admitting such alien shall be satisfied (v) that he has

(a) Intimately connected with the subject of naturalization, is, what is usually denominated the right of expatriation. It is the doctrine of the English law, that natural born subjects owe an allegiance which is intrinsic and perpetual, and which cannot be divested by any act of their own. But the act 27 July 1868, declares that the right of expatriation is a natural and inherent one of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness; and that any declaration or decision impairing or restricting it, is inconsistent with the fundamental principles of this government. 2 Bright. Dig. 32.

(b) The naturalization laws do not exclude females from the right of citizenship. 9 Md. 74. A married woman may be naturalized. 1 Cr. C. C. 372. And that, without the concurrence of her husband. 16 Wend. 617. But the statutes of naturalization do not apply to Indians. 7 Opin. 746. The act of 14 July 1870 extends the naturalization laws to aliens of African nativity, and to persons of African descent. This being an exception to the general law, it would seem, that a colored person, applying for naturalization, ought to prove, affirmatively, that he comes within the provisions of the act. He should show, either that he is of pure African blood, or of mixed negro and white blood; for a person of mixed African and Asiatic blood, or of mixed negro and Indian blood, &c., would seem not to be entitled to naturalization under this statute.

(c) Congress having prescribed a uniform rule of naturalization, may give to the state courts jurisdiction under it. 5 Eng. 621. And to the territorial courts. 1 Cong. El. Cas. 407. The process of naturalization is a judicial act which congress cannot *authoritatively* confer on a state court; but it may be exercised by

the state courts if not prohibited by the exclusive jurisdiction of the courts of the United States. They derive no new *judicial* power from the act of congress, but only exercise a power already inherent in them as courts having common law jurisdiction. 18 B. Mon. 603. 13 How. Pr. R. 429. 6 C. 475. In entertaining this jurisdiction, however, they act exclusively under the laws of the United States, and should be deemed, *quoad hoc*, courts of the United States. 3 Park. Cr. R. 358. A state law restricting its courts and their clerks from entertaining this jurisdiction is not unconstitutional. 4 Gray 559.

(d) Now two years: see act of 1824.

(e) An omission of the name of the sovereign will not invalidate the declaration. 8 Blackf. 395.

(g) It is not sufficient that he took the oaths at the time of making his declaration. 2 N. & M. 351.

(h) It is not necessary that the record of naturalization should show all the legal prerequisites were complied with, the judgment being conclusive of such compliance. 7 Cr. 420. 4 Pet. 406. 13 Wend. 524. 5 N. Y. 263, 278. 6 Cr. 176. But see 18 Geo. 239. A certificate of naturalization irregularly obtained may be set aside. 2 N. & M. 351. Naturalization cannot be proved by parol. 2 Cr. C. C. 139. 13 Leg. Int. 140.

(i) The § 2 of this act prescribed a form for the registry of aliens, desirous of becoming citizens of the United States. 2 Stat. 154. Whilst in force, this was not the only evidence admissible on an application for naturalization. 4 Pet. 393. Act 26 May 1824, § 2. 4 Stat. 69. It was repealed, however, by the act 24 May 1828, § 1. 4 Stat. 310. Mr. Dunlop, in his Digest of the laws of the United States, inserts the § 4-7 of the act 18

resided (a) within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction, that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. (b) *Provided*, That the oath of the applicant shall, in no case, be allowed to prove his residence.

IV. That in case the alien applying to be admitted to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application shall be made, which renunciation shall be recorded in the said court: *Provided*, That no alien who shall be a native citizen, denizen or subject of any country, state or sovereign, with whom the United States shall be at war at the time of his application, shall be then admitted to be a citizen of the United States: (c) *Provided also*, That any alien who was residing within the limits and under the jurisdiction of the United States, before the twenty-ninth day of January, one thousand seven hundred and ninety-five, may be admitted to become a citizen, on due proof made to some one of the courts aforesaid, that he has resided two years at least, within and under the jurisdiction of the United States, and one year at least immediately preceding his application, within the state or territory where such court is at the time held; (d) and on his declaring, on oath or affirmation, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty, whereof he was before a citizen or subject: And moreover, on its appearing to the satisfaction of the court, that during the said term of two years he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and where the alien applying for admission to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his moreover making in the court an express renunciation of his title or order of nobility, before he shall be entitled to such admission: All of which proceedings required in this proviso to be performed in the court, shall be recorded by the clerk thereof: *And provided also*, That any alien who was residing within

June 1798, (1 Stat. 567-8), for the registry of aliens, as still in force. He appears to base his opinion, that these sections are not repealed by § 5 of the act in the text, which repeals "all laws heretofore passed respecting naturalization," on the idea that a law for the registry of aliens, is not one respecting naturalization. But this would appear to be too narrow and technical a view of the legislation of congress; the act of 1798 is entitled "An act supplementary to and to amend the act, entitled 'An act to establish a uniform rule of naturalization;' and to repeal the act heretofore passed on that subject." It constituted a part of the system then in force respecting the naturalization of aliens; and it was beyond doubt the intention of congress to repeal it by the act of 1802. The concurrent and universal practice since that time, dispensing with the registry required by the act of 1798, shows the general opinion entertained of its repeal; and to hold it to be in force at this late day would be productive of so much confusion and uncertainty, that nothing but the clearest and most convincing reasoning would be sufficient to demonstrate such a position.

(a) Under this act, these five years' residence must have been uninterrupted. 1 Cr. C. C.

186. Ibid. 219. But this is now altered by the act 26th June 1848. 1 Bright. Dig. 36. And see 1 Cr. C. C. 243. 18 Geo. 239.

(b) The residence and good moral character of the applicant cannot be established by affidavits; but must be proved in court by the testimony of witnesses. 7 Hill 137. The powers conferred upon the courts to naturalize aliens are judicial, and not ministerial, and require an examination into each case, sufficient to satisfy the court. 18 Barb. 444. 3 Park. Cr. R. 358.

(c) An alien enemy cannot be permitted to make the preparatory declaration. 2 Gall. 11. See 5 B. 371. 2 Br. 218. By act 30th July 1813, persons resident within the United States on the 18th June 1812, who had previously made a declaration of their intention to become citizens, or who were on that day, by existing laws, entitled to become citizens without such declaration, were enabled to be naturalized, notwithstanding they were then alien enemies. 3 Stat. 53.

(d) A deposition that the deponents have known the applicant "since the year 1793, in New York," is not evidence that he was residing in the United States before the 29th of January 1795. 1 Cr. C. C. 89.

the limits, and under the jurisdiction of the United States, at any time between the said twenty-ninth day of January, one thousand seven hundred and ninety-five, and the 'eighteenth day of June, one thousand seven hundred and ninety-eight, may, within two years after the passing of this act, be admitted to become a citizen, without a compliance with the first condition above specified.

SECT. 3. Every court of record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, (a) shall be considered as a district court within the meaning of this act; and every alien who may have been naturalized in any such court, shall enjoy, from and after the passing of this act, the same rights and privileges as if he had been naturalized in a district or circuit court of the United States.

SECT. 4. The children of persons duly naturalized (b) under any of the laws of the United States, (c) or who previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling (d) in the United States, be considered as citizens of the United States, (e) and the children of persons who now are, or have been citizens of the United States, be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States: (g) *Provided also*, That no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the late war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state, in which such person was proscribed.

ACT 26 MARCH 1804. Purd. 1022.

SECT. 1. Any alien, being a free white person, who was residing within the limits and under the jurisdiction of the United States, at any time between the eighteenth day of June one thousand seven hundred and ninety-eight, and the fourteenth day of April one thousand eight hundred and two, and who has continued to reside within the same, (h) may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act, entitled "An act to establish a uniform rule of naturalization, and to repeal the acts heretofore passed on that subject."

SECT. 2. When any alien who shall have complied with the first condition specified in the first section of the said original act, and who shall have pursued the directions prescribed in the second section of the said act, may die before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law. (i)

ACT 8 MARCH 1813. Purd. 1022.

SECT. 13. If any person (k) shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, any certificate or evidence of citizenship referred to in this act; or shall pass, utter, or use as true, any false, forged, or counterfeited certificate of citizenship, or shall make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally

(a) A court of record without any clerk or prothonotary, or other recording officer, distinct from the judge, is not competent to receive an alien's preliminary declaration. 2 Curt. C. C. 98. The county courts of Texas are district courts within the meaning of the act of congress. 16 Tex. 470.

(b) This applies to the children of a widow who has been naturalized. 9 Md. 74.

(c) This act is prospective in its operation, and applies to subsequent as well as precedent naturalization. 8 Paige Ch. 433. *Contra*, 9 Md. 74.

(d) It is sufficient that the minors were residents of the United States at the time of the passage of the act. 6 Cr. 177. 2 Am. L.

R. 713.

(e) The naturalization of a father, *ipso facto*, makes his son, then residing in the United States, and under twenty-one years of age, a citizen. 5 Eng. 621. See 13 Leg. Int. 140.

(g) See 9 Md. 74.

(h) See 1 Cr. C. C. 219.

(i) They cannot be admitted to take the oaths, if their native sovereign be then at war with the United States. 5 B. 371.

(k) This section is general in its character, and is not confined to seamen employed in the public or private vessels of the United States. 1 Pitts. L. J., 4 June 1853. See 3 Am. L. Rev. 777.

issued, and to whom it may of right belong, every such person shall be deemed and adjudged guilty of felony; and on being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a period not less than three, or more than five years, or be fined in a sum not less than five hundred dollars, nor more than one thousand dollars, at the discretion of the court taking cognisance thereof (a)

ACT 22 MARCH 1816. Purd. 1022.

SECT. 2. *Provided*, That nothing herein contained shall be construed to exclude from admission to citizenship any free white person who was residing within the limits and under the jurisdiction of the United States at any time between the eighteenth day of June one thousand seven hundred and ninety-eight, and the fourteenth day of April one thousand eight hundred and two, (b) and who, having continued to reside therein without having made any declaration of intention before a court of record as aforesaid, may be entitled to become a citizen of the United States, according to the act of the twenty-sixth March one thousand eight hundred and four, entitled "An act in addition to an act, entitled 'An act to establish a uniform rule of naturalization, and to repeal the acts heretofore passed on that subject.'" Whenever any person, without a certificate of such declaration of intention as aforesaid, shall make application to be admitted a citizen of the United States, it shall be proved to the satisfaction of the court, that the applicant was residing within the limits and under the jurisdiction of the United States, before the fourteenth day of April one thousand eight hundred and two, and has continued to reside in the same, or he shall not be so admitted. And the residence of the applicant within the limits and under the jurisdiction of the United States, for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States; which citizens shall be named in the record as witnesses. And such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where the applicant has resided, for at least five years as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant: otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

ACT 26 MAY 1824. Purd. 1022.

SECT. 1. Any alien, being a free white person and a minor under the age of twenty-one years, who shall have resided in the United States three years, next preceding his arriving at the age of twenty-one years, (c) and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the condition of the first section of the act to which this is in addition, three years previous to his admission: *Provided*, Such alien shall make the declaration required therein at the time of his or her admission, and shall further declare on oath, and prove, to the satisfaction of the court, that for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States, and shall, in all other respects, comply with the laws in regard to naturalization.

SECT. 2. No certificate of citizenship, or naturalization, heretofore obtained from any court of record within the United States, shall be deemed invalid in consequence of an omission to comply with the requisition of the first section of the act, entitled "An act relative to evidence in cases of naturalization," passed the twenty-second day of March one thousand eight hundred and sixteen.

* (a) Wilful false swearing by a person giving material testimony in a naturalization proceeding, before a state court, is perjury at common law, and may be punished as such by indictment in the state courts. 6 C. 475. *Contra*, 8 Park. Cr. R. 358, where it is said to be an offence only against the laws of the

United States, and punishable exclusively in the federal courts.

(b) See 4 McLean 75.

(c) This act only applies to those who were minors at the time of their arrival in the United States. 4 Eng. 191.

SECT. 3. The declaration required by the first condition specified in the first section of the act, to which this is an addition, shall, if the same has been *bona fide* made before the clerks of either of the courts in the said condition named, be as valid as if it had been made before the said courts, respectively. (a)

SECT. 4. A declaration by an alien, being a free white person, of his intended application to be admitted a citizen of the United States, made in the manner and form prescribed in the first condition specified in the first section of the act to which this is in addition, two years before his admission, shall be a sufficient compliance with the said condition: anything in the said act, or in any subsequent act, to the contrary notwithstanding.

ACT 24 MAY 1828. 1 Bright. Dig. 36.

SECT. 2. Any alien, being a free white person, who was residing within the limits, and under the jurisdiction of the United States, between the 14th day of April 1802, and the 18th day of June 1812, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without having made any previous declaration of his intention to become a citizen: *Provided*, That whenever any person, without a certificate of such declaration of intention, shall make application to be admitted a citizen of the United States, it shall be proved to the satisfaction of the court, that the applicant was residing within the limits, and under the jurisdiction of the United States, before the 18th day of June 1812, and has continued to reside within the same, or he shall not be so admitted; and the residence of the applicant within the limits, and under the jurisdiction of the United States, for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States; which citizens shall be named in the record as witnesses; and such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where the applicant has resided for at least five years, as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

ACT 10 FEBRUARY 1855. 1 Bright. Dig. 132.

SECT. 1. Persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers will or shall be, at the time of their birth, citizens of the United States, (b) shall be deemed and considered, and are hereby declared to be, citizens of the United States: *Provided, however*, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States. (c)

SECT. 2. Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.

ACT 17 JULY 1862. 2 Bright. Dig. 32.

SECT. 21. Any alien of the age of twenty-one years and upwards, who has enlisted, or shall enlist in the armies of the United States, either the regular or volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.

(a) This applies to future no less than past cases. 1 W. & M. 323

(b) This applies to the children born abroad not only of citizens by birth, but also of naturalized citizens. 10 Richardson Eq. 38.

(c) See an able article on the subject from the pen of Mr. Horace Binney, in 2 Am. L.

R. 198. The offspring of a citizen, born subsequent to the 14th April 1802, in a foreign government to which their father had removed *animo manendi*, and who returned with their father after they became of age, were held to be aliens, in 80 Verm. 718.

ACTS OF CONGRESS FOR THE AUTHENTICATION OF RECORDS.

ACT 26 MAY 1790. Purd. 1024.

SECT. 1. The acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto. (a) The records and judicial proceedings (b) of the courts of any state, (c) shall be proved or admitted in any other court within the United States, (d) by the attestation of the clerk, (e) and the seal of the court annexed, if there be a seal, (g) together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, (h) that the

(a) No other authentication of an act of the legislature is required, except the annexation of the seal of the state; it is presumed that the person who affixed the seal had competent authority to do so. 11 Wheat. 392. 4 D. 416. 1 W. C. C. 363. A printed pamphlet containing the laws of another state is not admissible in evidence. Pet. C. C. 352. In the courts of the District of Columbia, however, the statute book of one of the states, purporting to be published by authority of its legislature, and deposited in the department of state, under the act of congress requiring the secretary of state to obtain copies of the laws of the several states, is admissible evidence of the laws of such state. 2 Cr. C. C. 346. See 6 Pet. 317. And in the state courts, a printed copy of an act of assembly, printed under the authority of the legislature of another state, may be read in evidence. 12 S. & R. 203. 1 D. 463, 467. 6 B. 327. And see 4 D. 415. 4 Cr. 388. 16 Pet. 56. In the federal courts, the states of the confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof; 9 Pet. 607, 625; 16 How. 65; and the state courts, in determining questions subject to be reviewed in the supreme court of the United States, adopt the same rule, and will take notice of the local laws of a sister state in the same manner that the supreme court would do on a writ of error to their judgment. 4 H. 243, 250. 3 C. 479. Ibid. 526. A printed copy of the Irish statutes, with the oath of a barrister in Ireland, that he had received them from the King's printer in Ireland, and that they are good evidence there, are evidence to show the law of Ireland. 5 S. & R. 523.

(b) The judicial proceedings here referred to, are generally understood to be the proceedings of courts of general jurisdiction, and not those which are merely of municipal authority. 1 Greenl. Ev. § 505. And accordingly, it has been held that the judgments of justices of the peace were not within the meaning of these constitutional and statutory provisions. 10 Barr 157. 2 Pick. 448. 4 N. Hamp. 450. 6 Ibid. 567. 5 Ohio 545. 3 Wend. 267. In Connecticut and Vermont, however, it is held, that if the justice is bound by law to keep a record of his proceedings, they are within the meaning of the act of congress. 5 Day 363. 2 Verm. 573. 6 Ibid. 580. And see 3 Monr. 62. 5 Am. L. R. 577. But the pro-

ceedings of courts of chancery, and of probate, as well as of the courts of common law, may be thus proved. 8 Mart. (N. S.) 308. 5 Ibid. 517. 6 Ibid. 621. 1 R. 881. Pet. C. C. 352. 8 Yerg. 142. 2 A. K. Marsh. 290, 295. This clause is not restricted to the case of judgments. 1 Phila. R. 272.

(c) This does not apply to the records of the courts of the United States. 1 Cr. C. C. 190. But though, in terms, it applies only to the state courts, the rule is equally applicable to those of the United States. 3 McLean 94. And a judgment of a court of the United States is admissible, when authenticated in the manner provided in this act. Hemp. 233.

(d) It seems to be generally agreed that this method of authentication is not exclusive of any other which the states may think proper to adopt. 12 S. & R. 203, 208. 1 D. Chipm. 308. 3 Pick. 293. 6 B. 321. 3 Leigh 816. 2 Johns. Cas. 119. 1 Hayw. 359. 2 Y. 532. 8 C. 485. 7 W. 815. 10 Barr 160.

(e) The clerk who certifies the record, must be the clerk of the same court, or of its successor; the certificate of his under-clerk, in his absence, or of the clerk of any other tribunal, office or body, being held incompetent for this purpose. 4 Bibb 409. 3 Barr 495. 1 Overt. 328. 3 H. & McHen 502. A surrogate acts as a clerk in certifying his proceedings, and as he also acts in the capacity of judge, he must certify as to the authentication. 4 McLean 199. 3 C. 484.

(g) Whenever the court whose record is certified has no seal, this fact should appear, either in the certificate of the clerk, or in that of the judge. Pet. C. C. 353. The seal of the court must be annexed to the record itself; it is not enough that it is annexed to the judge's certificate. 3 W. C. C. 126.

(h) The certificate must be given by the judge, if there be but one; or if there be more than one, then by the chief justice, or presiding judge or magistrate of the court from whence the record comes; and he must possess that character at the time he gives the certificate. A certificate that he is the judge that presided at the time of trial, or that he is the senior judge of the courts of law in the state, is deemed insufficient. 3 Barr 495. 3 Bibb 369. 2 Mart. (N. S.) 497. And so is the certificate of a judge styling himself "one of the judges" of the court. Hemp. 94. See 4 McLean 199. 2 H. 22. 10 C. 74.

said attestation is in due form. (a) And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court (b) within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. (c)

ACT 27 MARCH 1804. Purd. 1024.

SECT. 1. All records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, (d) shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, (e) and by the proper officer; (g) and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the states from whence the same are, or shall be taken.

SECT. 2. All the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings,

(a) A record of another state is not admissible, if the certificate of the presiding magistrate omit to state, that the attestation of the clerk is in due form. *Hemp. 588.* The phrase "due form," means the form of attestation used in the state from whence the record comes. *Pet. C. C. 854.* And the certificate of the presiding judge being the evidence prescribed by law, that this form has been observed, is at once indispensable and conclusive. *7 Cr. 408. 8 McLean 98. 2 W. & M. 4. 4 Sm. 98.* No proof of the judge's signature is required; nor any evidence of his official character necessary. *Ibid. 94.* A certificate that the person whose name is signed to the attestation is clerk of the court, and that the signature is his own handwriting, is not in conformity with the provisions of the act. *Pet. C. C. 852.* Where, however, the record of a judgment of a state court is offered in evidence, in the circuit court, sitting within the same state, the certificate of the clerk and seal of the court is a sufficient authentication. *6 McLean 24.*

(b) See *18 B. Monr. 499.*

(c) A judgment of a state court has the same credit, validity and effect, in every other court within the United States, which it had in the state where it was rendered; and whatever pleas would be good in a suit thereon, in such state, and none others, can be pleaded in any other court within the United States. *8 Wheat. 234. 7 Cr. 481. 2 McLean 511. 2 W. & M. 4. 2 Paine 502. Ibid. 209. Pet. C. C. 74. 8 W. C. C. 17. Ibid. 48. Pet. C. C. 157. 2 D. 802. 2 Am. Lead. Cas. 774. 2 Mich. 165. 9 S. & R. 260. 10 Ibid. 242.* But al-

though this act makes a judgment regularly recovered in another state, and duly authenticated, conclusive evidence of an established demand, as of the date of such judgment, it does not prevent the several states from enacting statutes of limitation, barring actions on such judgments in their courts. *9 How. 522. 13 Pet. 312. 20 How. 28.* Nor does it apply to a judgment recovered against a non-resident joint debtor, without notice to him; such a judgment is not entitled to any faith or credit out of the state in which it was rendered. *11 How. 165. 8 C. 525. 4 D. 261. Pen. 406. 4 Bradf. 174.* So, an action of debt will not lie against an administrator in one state, on a judgment recovered against a different administrator of the same intestate, appointed under the authority of another state. *8 How. 44.* But such judgment is *prima facie* valid, and will stop the running of the statute of limitations against the original cause of action. *13 How. 458. Ibid. 469.*

(d) These are obviously among the public writings recognised by the common law as invested with an official character, and therefore susceptible of proof by secondary means, but which are not of the nature of judicial records or judgments. Of this kind are acts and orders of the executive of the state; the acts of the legislative bodies; the journals of either branch of the legislature; registers kept in public offices; books which contain the official proceedings of corporations, if the public at large are concerned with them; parish registers, and the like. *10 Barr 154.*

(e) See *9 Cr. 122.*

(g) See *1 Burr's Trial 98.*

courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states. (a)

THE RIGHTS AND DUTIES OF JURYMEN.

There have been heavy and general complaints of the want of a popular publication expounding the rights and duties of jurymen. On their intelligence and independence we mainly depend for the security of our lives and properties; our liberties and reputation. If they are ignorant or venal, where shall we look for protection from the profligate and the powerful? "Sir John Hawkes, knight, solicitor-general to the late King William," published a treatise on this subject, in the year 1680, in the form of a dialogue between a barrister at law and a jurymen.

This pamphlet has not been superseded nor set aside by any publication which has appeared since that time, more than a century and a half ago. This is no mean evidence of the intrinsic value of the book. It is to this day frequently published and freely circulated throughout the British islands, unaccompanied by any modern note or comment. Societies for the diffusion of useful knowledge distribute, annually, in England, many thousand copies. The orthography and punctuation have been modernized, but the sense has in no wise been affected.

The original publication of this dialogue having been in the days of William Penn, it may be regarded as being as much addressed to Americans as to Englishmen, and as truly the law in Pennsylvania as in England. These facts and considerations induce a belief that the re-publication of this exposition of the rights and duties of jurymen cannot fail of diffusing much useful information.

Barrister. My old client! a good morning to you: whither so fast? you seem intent upon some important affair.

Jurymen. Worthy sir! I am glad to see you thus opportunely, there being scarce any person that I could at this time rather have wished to meet with.

Barr. I shall esteem myself happy, if in anything I can serve you. The business, I pray?

Jurym. I am summoned to appear upon a jury, and was just going to try if I could get off. Now I doubt not but you can put me into the best way to obtain that favor.

Barr. It is probable I could: but first let me know the reasons why you desire to decline that service.

Jurym. You know, sir, there is something of trouble and loss of time in it:—and men's lives, liberties and estates (which depend upon a jury's *guilty*, or *not guilty*, for the plaintiff, or for the defendant) are weighty things. I would not wrong my conscience for a world, nor be accessory to any man's ruin. There are others better skilled in such matters. I have ever so loved peace, that I have forborne going to law (as you well know) many times, though it hath been much to my loss.

Barr. I commend your tenderness and modesty; yet must tell you, these are but general and weak excuses.

As for your *time* and *trouble*, it is not much; and however, can it be better spent than in doing justice and serving your country? To withdraw yourself in such cases, is a kind of sacrilege, a robbing of the public of those duties which you justly owe it. The more *peaceable* man you have been, the more fit you are: for the office of a jurymen is, conscientiously to judge his neighbor; and needs no more *law* than is easily learnt to direct him therein. I look upon you, therefore, as a man well qualified with estate, discretion and integrity; and if all such as you should use private means to avoid it, how would the king and country be honestly served? At that rate we should have none but fools or knaves intrusted in this

(a) The extension of the act of 1790 to the territories of the United States, is a constitutional exercise of the legislative powers of congress. 8 M. 271.

grand concern, on which (as you well observe) the lives, liberties and estates of all England depend.

Your *tenderness not to be accessory* to any man's being wronged or ruined, is (as I said) much to be commended. But may you not incur it unawares, by seeking thus to avoid it? Pilate was not innocent because he washed his hands, and said, "He would have nothing to do with the blood of that just one." There are faults of omission as well as commission. When you are legally called to try such a cause, if you shall shuffle out yourself, and thereby persons perhaps less conscientious happen to be made use of, and so a villain escapes justice, or an innocent man is ruined, by a prepossessed or negligent verdict; can you think yourself in such a case wholly blameless? *Qui non prohibet cum potest, jubet*: That man abets an evil, who prevents it not, when it is in his power. *Nec caret scrupulo societatis occultæ, qui evidenter facinori definit obviare*: Nor can he escape the suspicion of being a secret accomplice, who evidently declines the prevention of an atrocious crime.

Jurym. Truly, I think a man is *bound* to do all the good he can; especially when he is lawfully called to it. But there sometimes happen nice cases, wherein it may be difficult to discharge one's conscience without incurring the displeasure of the court, and thence trouble and damage may arise.

Barr. That is but a vain and needless fear. For as the juror's privileges (and every Englishman's in and by them) are very considerable; so the laws have no less providently guarded them against invasion or usurpation. So that there needs no more than, first, understanding to know your duty; and, in the next place, courage and resolution to practise it with impartiality and integrity, free from accursed bribery and malice, or (what is full as bad in the end) base and servile fear.

Jurym. I am satisfied, that as it is for the advantage and honor of the *public*, that men of understanding, substance and honesty, should be employed to serve on juries, that *justice* and *right* may fairly be administered; so it is their *own interest*, when called thereunto, readily to bestow their attendance and service, to prevent *ill precedents* from men otherwise qualified; which may by degrees fatally, though insensibly, undermine our just birthrights, and perhaps fall heavy one day upon us, or our posterity. But, for my own part, I am fearful lest I should suffer through my ignorance of the duty and office of a jurymen; and, therefore, on that account principally it is, that I desire to be excused in my appearance; which if I understood but so well as I hope many others do, I would with all my heart attend the service.

Barr. You speak honestly, and like an Englishman. But if that be all your cause of scruple, it may soon be removed, if you will but give yourself a very little trouble of inquiry into the necessary provisions of the law of England relating to this matter.

Jurym. There is nothing (of a temporal concern) that I would more gladly be informed in; because I am satisfied, it is very expedient to be generally known. And first, I would learn *how long* trials by juries have been used in this nation.

Barr. Even time out of mind;—so long, that our best historians cannot date the original of the institution; being indeed cotemporary with the nation itself, or in use as soon as the people were reduced to any form of civil government, and administration of justice. Nor have the several conquests or revolutions, the mixtures of foreigners, or the mutual feuds of the natives, at any time, been able to suppress or overthrow it. For,

1. That juries (the thing in effect and substance, though perhaps not just the number of twelve men) were in use among the Britons, (the first inhabitants of this island,) appears by the ancient monuments and writings of that nation; attesting that their freeholders had always a share in all trials and determinations of differences.

2. Most certain it is, that they were practised by the Saxons, (a) and were then the only courts, or at least an essential and the greater part of all courts of judicature; for so (to omit a multitude of other instances) we find in King Ethelred's

laws: "*In singulis centuriis*," &c., "in every hundred let there be a court, and let twelve ancient freemen, together with the lord, (or rather, according to the Saxon, the greve, i. e. the chief officer amongst them,) be sworn that they will not condemn any person that is innocent, nor acquit any one that is guilty."

3. When the Normans came in, William, though commonly called the Conqueror, was so far from abrogating this privilege of juries,^(a) that in the fourth year of his reign, he confirmed all King Edward the Confessor's laws, and the ancient customs of the kingdom, whereof this was an essential and most material part. Nay, he made use of a jury, chosen in every county, to report and certify on their oaths, what those laws and customs were; as appears in the poem of such his confirmation.

4. Afterwards when the *Great Charter*, commonly called *Magna Charta*, (which is nothing else than a recital, confirmation and corroboration, of our ancient English liberties,) was made and put under the great seal of England, in the ninth year of King Henry the Third (which was *anno Domini* 1255), then was this privilege of trials by juries in an especial manner confirmed and established; as in the fourteenth chapter, "that no amercements shall be assessed but by the oath of good and honest men of the vicinage." And more fully in that golden nine and twentieth chapter: "No freeman shall be taken or imprisoned, nor be disseised of his freehold or liberties, or free customs, or be outlawed or exiled, or any other way destroyed, nor shall we pass upon him, or condemn him, but by the lawful judgment of his peers, &c." Which Grand Charter having been confirmed by above thirty acts of parliament, the said right of juries thereby, and by constant usage and common custom of England, which is the common law, is brought down to us as our undoubted birthright, and the best inheritance of every Englishman. For as that famous lawyer, Chief Justice Coke,^(b) in the words of Cicero, excellently avers, "*major hereditas venit unicuique nostrum a jure et legibus, quam a parentibus*." "It is a greater inheritance, and more to be valued, which we derive from the fundamental constitution and laws of our country, than that which comes to us from our respective parents," for without the former we have no claim to the latter.

Jurym. But has this method of trial never been attempted to be invaded or jostled out of practice?

Barr. It is but rarely that any have arrived to so great a confidence; "for it is a most dangerous thing to shake or alter any of the rules or fundamental points of the common law, which, in truth, are the main pillars and supporters of the fabric of the commonwealth." These are Judge Coke's words.^(c) Yet sometimes it has been endeavored; but so sacred and invaluable was the institution in the eyes of our ancestors, and so tenacious were they of their privileges, and zealous to maintain and preserve such a *vital part* of their birthright and freedom, that no such attempts could ever prove effectual, but always ended with the shame and severe punishment of the rash undertakers. For example:

1. Andrew Horn, an eminent lawyer, in his book, entitled *The Mirror of Justices*, (written in the reign of Edward I., now near four hundred years ago,) in the first chapter and first section, records, that the renowned Saxon king, Alfred, caused four and forty justices to be hanged in one year, as murderers, for their false judgments; and there recites their particular crimes, most of them being, in one kind or other, infringements, violations and encroachments, of and upon the rights and privileges of juries. Amongst the rest, that worthy author tells us, he *hanged one Justice Cadwine, because he judged one Hackwy to death, without the consent of all the jurors; for whereas he stood upon his jury of twelve men, because three of them would have saved him, this Cadwine removed those three, and put others in their room on the jury, against the said Hackwy's consent*. Where we may observe, that though at last twelve men did give a verdict against him, yet those so put upon him were not accounted his jurors, by reason all, or any of them, who were first sworn to try him, could not (by law) be removed, and others put in their stead; and that such illegal alteration was then adjudged a capital crime, and forthwith the said Cadwine was hanged.

(a) See Spelman's Glossar. in the word *Jurata*.

(b) 2 Inst. 56.

(c) 2 Inst. 74.

2. A second instance I shall give you, in the words of the Lord Chief Justice Coke.(a) "Against this ancient and fundamental law, (and in the face thereof,) there was, in the eleventh year of King Henry 7, cap. 8, an act of parliament obtained, (on fair pretences and a specious preamble, as to avoid divers mischiefs, &c.,) whereby it was ordained, 'that from thenceforth, as well justices of assize, as justices of the peace, upon a bare information for the king before them made, without any finding or presentment by the verdict of twelve men, should have full power and authority, by their discretions, to hear and determine all offences and contempts committed or done by any person or persons, against the form, ordinance or effect, of any statute made and not repealed,' &c. By color of which act," (saith Coke,) "shaking this fundamental law," (he means touching all trials to be by juries,) "it is not credible what HORRIBLE OPPRESSIONS and EXACTIONS, to the undoing of MULTITUDES of people, were committed by Sir Richard Empson, Knight, and Edmund Dudley, Esq., (being justices of the peace,) throughout England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they made masters of the king's forfeitures."

But not only this statute was justly, soon after the decease of Henry VII., repealed by the stat. of the 1 Hen. 8, cap. 6, but also the said Empson and Dudley (notwithstanding they had such an act to back them, yet it being against Magna Charta, and consequently void) were fairly executed for their pains; and several of their under agents, as promoters, informers and the like, severely punished, for a warning to all others that shall dare (on any pretence whatsoever) infringe our English liberties.(b) For so the Lord Coke(c) having (elsewhere) with detestation mentioned their story, pathetically concludes: "*Qui eorum vestigiis insistant, exitus perhorrescant.*" "Let all those who shall presume to tread their steps, tremble at their dreadful end." Other instances of a later date might be given, but I suppose these may suffice.

Jurym. Yes, surely; and by what you have discoursed of the long-continued use of juries, and the zealous regards our ancestors had not to part with them, I perceive that they were esteemed a special privilege. Be pleased, therefore, to acquaint me, wherein the *excellency* and *advantages* to the people, by that method of trial above others, may consist.

Barr. This question shows you have not been much conversant abroad, to observe the miserable condition of the poor people in most other nations, where they are either wholly subject to the despotic arbitrary lust of their rulers; or at best under such laws as render their lives, liberties and estates, liable to be disposed of at the discretion of strangers appointed their judges; most times mercenary, and creatures of prerogative; sometimes malicious and oppressive; and often partial and corrupt. Or suppose them ever so just and upright, yet still has the subject no security against the attacks of unconscionable witnesses. Yea, where there is no sufficient evidence, upon bare suspicions, they are obnoxious to the tortures of the rack, which often make an innocent man confess himself guilty, merely to get out of present pain. Is it not then an inestimable happiness to be born and live under such a mild and righteous constitution, wherein all these mischiefs (as far as human prudence can provide) are prevented? where none can be condemned, either by the power of superior enemies, or the rashness or ill-will of any judge, nor by the bold affirmations of any profligate evidence; but no less than twelve honest, substantial, impartial men, his neighbors, (who consequently cannot be presumed to be unacquainted either with the matters charged, the prisoner's course of life, or the credit of the evidence,) must first be fully satisfied in their consciences, that he is guilty; and so all unanimously pronounce upon their oaths? Are not these, think you, very material privileges?

Jurym. Yes, certainly; though I never so well considered them before. But now I plainly see our forefathers had, and we still have, all the reason in the world to be zealous for the maintenance and preservation thereof from subversion or encroachments, and to transmit them entire to posterity. For, if once this bank be broken down or neglected, an ocean of oppression, and the ruins of infinite

(a) 2 Inst. 51.

printed in 1674.

(b) See Sir Rich. Baker's Chron. p. 254,

(c) 4 Inst. 41.

numbers of people, (as in Empson and Dudley's days,) may easily follow, when on any pretence they may be made criminals, and then fined in vast sums, with pretext to enrich the king's coffers, but indeed to feed those insatiate vultures that promote such unreasonable prosecutions. But since you have taught me so much of the *antiquity* and *excellency* of juries, I cannot but crave the continuance of your favor, to acquaint me somewhat more particularly of their *office* and *power* by law.

Barr. I shall gladly comply with so reasonable and just request. "A jury of twelve men are by our laws the only proper judges of the matter in issue before them." (a) As for instance,

1. That testimony which is delivered to induce a jury to believe, or not to believe, the matter of fact in issue, is called in law *EVIDENCE*; because thereby the jury may, out of many matters of fact, *Evidere veritatem*; that is, see clearly the truth, of which they are proper judges.

2. When any matter is sworn, or [when] a deed [is] read, or offered, whether it shall be believed, or not, or whether it be true, or false, in point of fact, the jurors are proper judges.

3. Whether such an act was done, in such or such a manner, or to such or such an intent, the jurors are judges. For the court is not judge of these matters, which are evidence to prove or disprove the thing in issue. And therefore the witnesses are always ordered to direct their speech to the jury; they being the proper judges of their testimony. And in all pleas of the crown (or matters criminal) the prisoner is said "to put himself for trial upon his country;" which is explained and referred by the clerk of the court, to be meant of the jury, saying to them, "Which country you are."

Jurym. Well, then, what is the part of the king's justices, or the court? what are they to take cognizance of, or do, in the trials of men's lives, liberties and properties?

Barr. Their office, in general, is to do equal justice and right; particularly,

1. To see that the jury be regularly returned and duly sworn.

2. To see that the prisoner (in cases where it is permissible) be allowed his lawful challenges.

3. To advise by law, whether such matter may be given in evidence, or not; such a writing read, or not; or such a man admitted to be a witness, &c.

4. Because by their learning, and experience, they are presumed to be best qualified to ask pertinent questions, and, in the most perspicuous manner, soonest to sift out truth from amongst tedious, impertinent circumstances and tautologies: they therefore commonly examine the witnesses in the court; yet not excluding the jury, who of right *may*, and where they see cause, *ought* to ask them any necessary questions; which undoubtedly they may lawfully do with modesty and discretion, without begging any leave. For if *asking leave* be necessary, it implies in the court a right when they list to deny it, and how then shall the jury know the truth? And since we see, that counsel, who too often (*—Pudet hæc opprobria nobis*) for their fees strive only to baffle witnesses, and stifle truth, take upon them daily to interrogate the evidence; it is absurd to think that the jurors should not have the same privilege, who are upon their oaths, and proper judges of the matter.

5. As a discreet and lawful assistant to the jury, (b) they do often recapitulate and sum up the heads of the evidence: but the jurors are still to consider whether it be done truly, fully and impartially; for one man's memory may sooner fail than twelve's. He may likewise state the law to them; that is, deliver his opinion where the case is difficult, or they desire it. But since, *ex facto jus oritur*, all matter of law arises out of matter of fact, so that till the fact is settled there is no room for law: therefore all such discourses of a judge to a jury are, or ought to be, hypothetical, not coercive; conditional, and not positive, viz.: "If you find the fact thus or thus (still leaving the jury at liberty to find as they see cause) then you are to find for the plaintiff; but if you find the fact thus, or thus, then you are to find for the defendant, or the like;" guilty, or not guilty, in cases criminal.

(a) See 4 Inst. 84.

(b) Vaughan's Reports in Bushell's case, fol. 144.

Lastly, they are to take the verdict of the jury, and thereupon to give judgment according to law. For the office of a judge (as Coke well observes) is *jus dicere*, not *jus dare*; not to make any laws by strains of wit, or forced interpretations; but plainly, and impartially, to declare the law already established. Nor can they refuse to accept the jury's verdict when agreed: for if they should, and force the jury to return, and any of them should miscarry for want of accommodation, it would undoubtedly be murder; and in such case the jury may, without crime, force their liberty; because they are illegally confined, (having given in their verdict, and thereby honestly discharged their office,) and are not to be starved for any man's pleasure.

Jurym. But I have been told, that a jury is only judge of naked *matter of fact*, and are not at all to take upon them to meddle with, or regard, *matter of law*, but leave it wholly to the court.

Barr. 'Tis most true, jurors are judges of matters of fact: that is their proper province, their chief business; but yet not excluding the consideration of matter of law, as it arises out of, or is complicated with, and influences the fact. For to say they are not at all to meddle with, or have respect to, law, in giving their verdicts, is not only a false position, and contradicted by every day's experience; but also a very dangerous and pernicious one; tending to defeat the principal end of the institution of juries, and so subtilly to undermine that which was too strong to be battered down.

1. It is false: for, though the direction, as to matter of law separately, may belong to the judge, and the finding the matter of fact does, peculiarly, belong to the jury; yet must your jury also apply matter of fact and law together; and from their consideration of, and a right judgment upon both, bring forth their verdict: for do we not see in most general issues, as upon not guilty—pleaded in trespass, breach of the peace, or felony, though it be *matter in law* whether the party be a *trespasser*, a breaker of the peace, or a felon; yet the jury do not find the fact of the case *by itself*, leaving the law to the court; but find the party guilty, or not guilty, *generally*? So as, though they answer not to the question *singly*, what is law? yet they determine the law, in all matters, where *issue is joined*. So likewise is it not every day's practice, that when persons are indicted for murder, the jury not only find them guilty, or not guilty; but many times, upon hearing, and weighing of circumstances, bring them in, either guilty of murder, *manslaughter*, *per infortunium* or *se defendendo*, as they see cause? Now, do they not, herein, complicate both law and fact? And to what end is it, that when any person is prosecuted upon any statute, the statute itself is usually read to the jurors, but only that they may judge whether or no the matter be within that statute? But to put the business out of doubt, we have the suffrage of that oracle of law. Littleton, who in his Tenures, sect. 368, declares, "That if a jury will take upon them the knowledge of the law upon the matter, they may." Which is agreed to likewise by Coke, in his comment thereupon.^(a) And therefore it is false to say that the jury hath not power, or doth not use frequently to apply the fact to the law; and thence taking their measures, judge of, and determine, the crime, or issue, by their verdict.^(b)

(a) Before the present disputes arose, an able writer of our own times considers this as a settled and allowed rule. See Blackstone's Commentaries, vol. i. p. 8; vol. iii. p. 377, 378, particularly vol. iv. p. 354, 355, 4th ed.

(b) Not only the express assertion of lawyers—and the practice of the courts, prove, that juries are authorized to determine the law, so far as it relates to the fact; but, in the third place, the words, in which verdicts must be given, indicate, that they have this power. If juries had been appointed to judge of fact only, the words "done," or "not done," or words of a like import, would have been substituted for the words "guilty," or

"not guilty." However, as our ancestors have placed it in their option to determine the law, so far as it is connected with the fact; the language of their verdicts comprehends, when necessary, their sentiments upon both. If an action is said to be criminal, it is necessary to determine whether the action happened:—so that when a jury declares that a man is guilty, the fact is implied; because they cannot affirm guilt, where there is no fact. When a jury declares a man not guilty, the determination of the fact is left uncertain; because it is unnecessary; for the law concerns itself with actions, only so far as they are criminal.

2. As juries have ever been vested with such power by law, so, to exclude them from, or disseise them of the same, were utterly to defeat the end of their institution. (a) For then, if a person should be indicted for doing any common innocent act, if it be but clothed, and disguised, in the indictment, with the name of treason, or some other high crime, and proved, by witnesses, to have been done by him, the jury, though satisfied in conscience, that the fact is not any such offence as it is called, yet because (according to this fond opinion) they have no power to judge of law, and the fact charged is fully proved, they shall, at this rate, be bound to find him guilty: and being so found, the judge may pronounce sentence against him, for he finds him a convicted traitor, &c., by his peers. And thus, as a certain physician boasted, that he had killed one of his patients with the best method in the world; so here should we have an innocent man hanged, drawn and quartered, and all according to law.

Jurym. God forbid that any such thing should be practised! and indeed I do not very fully understand you.

Barr. I do not say it ever *hath been*, and I hope it never *will be* practised: but this I will say, that according to this doctrine, it *may be*; and consequently juries may thereby be rendered, rather a snare, or engine of oppression, than any advantage or guardian of our legal liberties against arbitrary injustice; and made mere properties to do the drudgery, and bear the blame of unreasonable prosecutions. And since you seem so dull as not to perceive it, let us put an imaginary case; not in the least to abet any irreverence towards his majesty, but only to explain the thing, and show the absurdness of this opinion.—Suppose, then, a man should be indicted, For that he, as a false traitor, not having the fear of God before his eyes, &c., did, traitorously, presumptuously, against his allegiance, and with an intent to affront his majesty's person, and government, pass by such, or such, a royal statue, or effigies, with his hat on his head, to the great contempt of his majesty and his authority, the evil example of others, against the peace, and his majesty's crown and dignity. Being hereupon arraigned, and having pleaded not guilty, suppose that sufficient evidence should swear the matter of fact laid in the indictment, viz.: That he did pass by the statue, or picture, with his hat on; now imagine yourself one of the jury that were sworn to try him;—what would you do in the matter?

Jurym. Do? why I should be satisfied in my conscience that the man had not, herein, committed any crime, and so I would bring him in, not guilty.

Barr. You speak as any honest man would do: but I hope you have not forgot the point we were upon. Suppose, therefore, when you thought to do thus, the court, or one of your brethren, should take you up, and tell you, that it was out of your power so to do: "For look ye (saith he) my masters! we jurymen are only to find matter of fact; which being fully proved, as in this case before us it is, we must find the party guilty. Whether the thing be treason or not, does not belong to us to inquire; it is said so here, you see, in the indictment; and let the court look to that, they know best. We are not judges of law. Shall we meddle with niceties and punctilios, and go contrary to the directions of the court? So perhaps we shall bring ourselves into a *præmunire*, (as they say,) and perhaps never be suffered to be jurymen again. No, no, the matter of fact you see is proved, and that is our

(a) From the doctrine, that juries, in the case of libels, are not judges of law, as well as fact, necessarily flows the following absurdity: viz., that it is the duty of juries to declare men guilty, or not guilty, in whom they perceive neither guilt nor innocence.—Again: if, because a circumstance is established as a fact, it is to be reputed as a crime, every incident which happens, is a crime. Now, if printing and publishing only be criminal, it is criminal to print and publish the book of Common Prayer, and the Bible.

It is hard to say, on what principles this right of juries can be disputed. "If jurymen, because not bred to the law, are supposed

incapable of knowing what is, or what is not, law; it follows that none but lawyers can justly be punished for a breach of the law; for, surely, that man is rather unfortunate, than faulty, who ignorantly transgresses the law."—Besides, if it is wise to vest the determination of law, where it concerns facts, in the jury, when any civil or criminal suit is in question; certainly it is wise to intrust the jury with the same power, in all suits which particularly concern the state; because, in such suits, the determination is always of more consequence, and judges are more likely to be under an influence which is injurious to the rights of the people.

business; we must go according to our evidence, we cannot do less: truly it is something hard, and I pity the poor man, but we cannot help it," &c. After these notable documents, what would you do now?

Jurym. I should not tell what to say to it; for I have heard several ancient jury men speak to the very same effect, and thought they talked very wisely.

Barr. Well, then, would you consent to bring in the man guilty?

Jurym. Truly I should be somewhat unwilling to do it; but I do not see which way it can be avoided, but that he must be found guilty of the fact.

Barr. God keep every honest body from such jurymen! Have you no more regard to your oath, to your conscience, to justice, to the life of a man?

Jurym. Hold, hold! perhaps we would not bring him in guilty generally, but only guilty of the fact; finding no more, but guilty of passing by the statue with his hat on.

Barr. This but poorly mends the matter, and signifies little or nothing: for such a finding hath generally been refused by the court as being no verdict, though, it is said, it was lately allowed somewhere in a case that required favor. But, suppose it were accepted, what do you intend should become of the prisoner? Must not he be kept in prison till all the judges are at leisure, and willing to meet and argue the business? *Ought* you not, and what reason can you give why you *should* not absolutely acquit and discharge him? Nay, I do aver you are bound by your oaths to do it, by saying with your mouths to the court what your conscience cannot but dictate to yourselves, "*not guilty*." For, pray consider, are you not sworn that you will well and truly try, and true deliverance make? (a) There is none of this story of matter of fact distinguished from law in your oath; but you are "*well*," that is, *fully*, and "*truly*," that is, *impartially*, to try the prisoner. So that if upon your consciences, and the best of your understanding, by what is proved against him, you find he is guilty of that crime wherewith he stands charged, that is, deserving death, or such other punishment as the law inflicts upon an offence so denominated, then you are to say he is guilty. But if you are not satisfied that either the act he has committed was *treason or other crime*, (though it be never so often called so); or that the act itself, if it were so criminal, *was not done*: then what remains but that you are to acquit him? for the end of juries is to preserve men from oppression, which may happen as well by imposing or ruining them, for that as a crime, which indeed is none, or at least not such, or so great as is pretended, as by charging them with the commission of that which in truth was not committed. And how do you well and truly try and true deliverance make, when indeed you do but deliver him up to others to be condemned for that which yourselves do not believe to be any crime?

Jurym. Well, but the supposed case is a case unsupposable. It is not to be imagined that any such thing should happen, nor to be thought that the judges will condemn any man, though brought in guilty by the jury, if the matter in itself be not so criminal by law.

Barr. It is most true, I do not believe that ever that case will happen. I put it in a thing of apparent absurdity, that you might the more clearly observe the unreasonableness of this doctrine; but withal I must tell you that it is not impossible that some other cases may really happen, of the same or the like nature, though more fine and plausible. And though we apprehend not that during the reign of his majesty that now is (whose life God long preserve,) any judges will be made that would so wrest the law, yet what security is there but that some successors may not be so cautious in their choice? And though our benches of judicature be at present furnished with gentlemen of great integrity, yet there may one day happen some Tresilian or kinsman of Empson's to get in, (for what has been may be,) who, Empson-like, too, shall pretend it to be for his master's service to increase the number of criminals that his coffers may be filled with fines and forfeitures, and then such mischiefs may arise. And juries, having upon confidence parted with their just privileges, shall then, too late, strive to reassume them, when the number of ill precedents shall be vouched to enforce that as of right which in truth was at first a wrong, grounded on easiness and ignorance. Had our wise and wary

ancestors thought fit to depend so far upon the contingent honesty of judges, they needed not to have been so zealous to continue the usage of juries.

Jurym. Yet still I have heard, that in every indictment or information there is always something of form or law, and something else of fact; and it seems reasonable that the jury should not be bound up nicely to find every formality therein expressed, or else to acquit (perhaps) a notorious criminal. But if they find the essential matter of the crime then they ought to find him guilty.

Barr. You say true, and therefore must note that there is a wide difference to be made between words of course, raised by implication of law and essential words, that either make or really aggravate the crime charged. The law doth suppose and imply every trespass, breach of the peace, every felony, murder or treason, to be done *vi ei armis*, with force and arms, &c. Now, if a person be indicted for murder by poison, and the matter proved; God forbid the jury should scruple the finding him guilty upon the indictment, merely because they do not find that part of it as to force and arms proved! for that is implied as a necessary or allowable fiction of law.

But on the other side, when the matter in issue, in itself, and taken as a naked proposition, is of such a nature, as no action, indictment or information will lie for it singly; but it is worked up by special aggravations into matter of damage or crime; (as that it was done to scandalize the government, to raise sedition, to affront authority or the like, or with such or such an evil intent:) If these aggravations, or some overt act to manifest such ill design or intention, be not made out by evidence, then ought the jury to find the party not guilty. For example:

Bishop Latimer (afterwards a martyr in bloody Queen Mary's days, for the Protestant religion) in his sermon preached before the most excellent King Edward VI., delivered these words: "I must desire your grace to hear poor men's suits yourself. The saying is now, 'That money is heard everywhere:'—'If he be rich, he shall soon have an end of his matter.' Others are fain to go home with weeping tears for any help they can obtain at any judge's hand. Hear men's suits yourself, I require you in God's behalf; and put them not to the hearing of these velvet-coats, these up-skins. Amongst all others, one especially moved me at this time to speak: This it is, sir: A gentlewoman came and told me, that a great man keepeth certain lands of hers from her, and will be her tenant in spite of her teeth. And that in a whole twelvemonth she could not get but one day for the hearing of her matter, and the same day, when it should be heard, the great man brought on his side a great sight of lawyers for his council. The gentlewoman had but one man of law, and the great man shakes him so, that he cannot tell what to do. So that when the matter came to the point, the judge was a means to the gentlewoman, that she should let the great man have a quietness in her land.—I beseech your grace, that ye would look to these matters.

"And you, proud judges! hearken what God saith in his holy book: *Audite illos, ita parvum, ut magnum*, Hear them (saith he) the small as well as the great; the poor as well as the rich; regard no person, fear no man. And why? *Quia Domini judicium est*, The judgment is God's. Mark this saying, thou proud judge; the devil will bring this sentence against thee at the day of doom. Hell will be full of these judges, if they repent not and amend: they are worse than the wicked judge that Christ speaketh of, Luke the 19th, that neither feared God nor the world. Our judges are worse than this judge was; for they will neither hear men for God's sake, nor fear of the world, nor importunateness, nor anything else; yea, some of them will command them to ward [prison] if they be importunate. I heard say, that when a suitor came to one of them, he said, 'What fellow is it, that giveth these folks counsel to be so importunate? He deserves to be punished and committed to ward.' Marry, sir, punish me then; it is even I that gave them counsel. I would gladly be punished in such a cause; and if you amend not, I will cause them to cry out upon you still; even as long as I live."—These are the very words of that good bishop and martyr, Father Latimer: "But now-a-days the judges be afraid to hear a poor man against the rich; insomuch, they will either pronounce against him or so drive off the poor man's suit that he shall not be able to go through with it." (a)

(a) See also Latimer's Third Sermon.

Jurym. Truly they are somewhat bold, but I think very honest ones. But what signify they to our discourse?

Barr. Only this;—Suppose the judges of those times, thinking themselves aggrieved by such his freedom, should have brought an indictment against him, setting forth, that “falsely and maliciously, intending to scandalize the government, and the administration of justice, in this realm, and to bring the same into contempt, he did speak, publish and declare the false and scandalous words before recited.”

Jurym. I conceive, the judges had more wit than to trouble themselves about such a business.

Barr. That is nothing to the purpose; but suppose, I say, by them or anybody else, it had been done; and his speaking the words had been proved; and you had then been living, and one of the jury?

Jurym. I would have pronounced him not guilty, and been starved to death before I would have consented to a contrary verdict; because the words in themselves are not criminal, nor reflecting upon any particulars; and as for what is supposed to be laid in the indictment or information, (“that they were published or spoken to scandalize the government and the administration of justice, or to bring the same into contempt,”) nothing of that appears.

Barr. You resolve as every honest, understanding, conscientious man would do in the like case; for when a man is prosecuted for that which, in itself, is no crime, how dreadfully soever it may be set out, (as the inquisitors in Spain use to clothe innocent Protestants, whom they consign to the flames, with Sanbenito's garments all over bepainted with devils; that the people beholding them in so hellish a dress may be so far from pitying them, that they may rather condemn them in their thoughts as miscreants not worthy to live, though in truth they know nothing of their cause);—yet, I say, notwithstanding any such bugbear artifices, an innocent man ought to be acquitted, and not he and all his family ruined, and perhaps utterly undone, for words or matters, harmless in themselves, and possibly very well intended, but only rendered criminal by being thus hideously dressed up and wrested with some far-fetched, forced and odious construction.

Jurym. This is a matter well worthy the consideration of all juries; for indeed I have often wondered to observe the adverbs in declarations, indictments and informations, in some cases to be harmless vinegar and pepper, and in others, hrebane steeped in *aqua fortis*.

Barr. That may easily happen, where the jury does not distinguish legal implications, from such as constitute or materially aggravate the crime; for if the jury shall honestly refuse to find the latter in cases where there is not direct proof of them: (viz., that such an act was done falsely, scandalously, maliciously, with an intent to raise sedition, defame the government or the like,) their mouths are not to be stopt, nor their consciences satisfied with the court's telling them—You have nothing to do with that; it is only matter of form or matter of law: you are only to examine the fact, whether he spoke such words, wrote or sold such a book or the like. For now, if they should ignorantly take this for an answer, and bring in the prisoner guilty, though they mean and intend, of the naked fact or bare act only; yet the clerk recording it demands a further confirmation, saying to them, thus: “Well, then, you say A. B. is guilty of the trespass or misdemeanor, in manner and form as he stands indicted; and so you say all?” To which the foreman answers for himself and his fellows, “Yes.” Whereupon the verdict is drawn up—“*juratores super sacramentum suum dicunt*,” &c. “The jurors do say upon their oaths, that A. B. maliciously, in contempt of the king and the government, with an intent to scandalize the administration of justice, and to bring the same into contempt or to raise sedition,” &c., (as the words before were laid,) spake such words, published such a book or did such an act, against the peace of our lord the king, his crown and dignity.

Thus a VERDICT, so called in law, *quasi veritatis*, because it ought to be the voice or saying, of TRUTH (*verè dictum*) itself, may become composed in its material part of falsehood. Thus twelve men ignorantly drop into a perjury. And will not every conscientious man tremble to pawn his soul under the sacred and dreadful solemnity of an oath, to attest and justify a lie upon record to all posterity? Besides the

wrong done to the prisoner, who thereby perhaps comes to be hanged, (and so the jury in *foro conscientie* are certainly guilty of his murder;) or at least by fine or imprisonment, undone, with all his family, whose just curses will fall heavy on such unjust jurymen and all their posterity, that against their oaths and duty occasioned their causeless misery. And is all this, think you, nothing but a matter of formality?

Jurym. Yes, really, a matter of vast importance and sad consideration; yet I think you charge the mischiefs done by such proceedings a little too heavy upon the jurors. Alas, good men! they mean no harm; they do but follow the directions of the court: if anybody ever happen to be to blame in such cases, it must be the judges.

Barr. Yes, forsooth! that's the jurymen's common plea; but do you think it will hold good in the court of Heaven? It is not enough that we mean no harm, but we must do none neither; especially in things of that moment. Nor will ignorance excuse, where it is affected, and where duty obliges us to inform ourselves better, and where the matter is so plain and easy to be understood.

As for the judges, they have a fairer plea than you, and may quickly return the burden back upon the jurors: for "we," may they say, "did nothing but our duty, according to usual practice: the jury, his peers, has found the fellow guilty, upon their oaths, of such an odious crime, and attended with such vile presumptions and dangerous circumstances. They are judges: we took him as they presented him to us; and according to our duty pronounced the sentence that the law inflicts in such cases, or set a fine, or ordered corporeal punishment upon him, which was very moderate, considering the crime laid in the indictment, or information, and of which they had so sworn him guilty. If he were innocent, or not so bad as represented, let his destruction lie upon the jury," &c. At this rate, if ever we should have an unconscionable judge, might he argue; and thus the guilt of the blood, or ruin of an innocent man, when it is too late, shall be bandied to and fro, and shuffled off from the jury to the judge, and from the judge to the jury; but really sticks fast to both, but especially on the jurors; because the very end of their institution was to prevent all dangers of such oppression; and in every such case they do not only wrong their own souls, and irreparably injure a particular person, but also basely betray the liberties of their country in general. For as *without* their ill compliance and act, no such mischief can happen; so *by* it, ill precedents are made, and the plague is increased; honest juries are disheartened, or seduced by custom from their duties; just privileges are lost by disuser; and perhaps within a while some of themselves may have a hole picked in their coats, and then they are tried by another jury, just as wise and honest, and so deservedly come to smart under the ruining effects and example of their own folly and injustice.

Jurym. You talk of folly, and blame jurymen, when indeed they cannot help it. They would sometimes find such a person guilty, and such an one innocent, and are persuaded they ought so to do; but the court overrules, and forces them to do otherwise.

Barr. How, I pray?

Jurym. How? why, did you never hear a jury threatened to be fined and imprisoned if they did not comply with the sentiments of the court?

Barr. I have read of such doings, but I never heard or saw it done; and indeed I do not doubt but our seats of justice are furnished with both better men, and better lawyers than to use any such menaces or duress; for undoubtedly it is a base and very illegal practice. But, however, will any man that fears God, nay, that is out an honest heathen, debauch his conscience and forswear himself; do his neighbor injustice; betray his country's liberties, and consequently enslave himself and his posterity; and all this merely because he is hectored and threatened a little?

Jurym. I know it should not sway with any; but alas! a prison is terrible to most men, whatever the cause be; and the fine may be such, if one shall refuse to comply, as may utterly ruin one's family.

Barr. Fright not yourself; there is no cause for this ague fit to shake your conscience out of frame: if you are threatened, 'tis but *brutum fulmen*, lightning without a thunderbolt, nothing but big words; for it is well known THAT THERE IS

NEVER A JUDGE IN ENGLAND THAT CAN FINE OR IMPRISON ANY JURYPMAN IN SUCH A CASE.

Jurym. Good sir! I am half ashamed to hear a barrister talk thus: have not some in our memory been fined and imprisoned? And sure that which has actually been done, is not altogether impossible.

Barr. Your servant, sir! under favor of your mighty wisdom and experience, when I said no judge could do it, I speak the more like a barrister; for it is a maxim in law—*id possumus, quod jure possumus*; "a man is said to be able to do only so much as he may lawfully do." But such fining and imprisoning cannot lawfully be done; the judges have no right or power, by law, to do it; and therefore it may well be said they cannot or are not able to do it.

And whereas you say that some juries in our memory have been fined and imprisoned, you may possibly say true; but it is as true that it hath been only in our memory; for no such thing was practised in ancient times; for so I find it asserted by a late learned judge,^(a) in these positive words: "No case can be offered, either before attainments granted in general or after, that ever a jury was punished by fine and imprisonment by any judge, for not finding according to their evidence and his direction, until Popham's time; nor is there clear proof that he ever fined them for that reason, separated from other misdemeanors." And fol. 152 he affirms, "That no man can show that a jury was ever punished upon an information, either at law or in the Star Chamber, where the charge was only for finding against their evidence, or giving an untrue verdict, unless imbracery, subornation or the like were joined." So that, you see, the attempt is an innovation as well as unjust; a thing unknown to our forefathers and the ancient sages of the law; and therefore so much the more to be watched against, resisted and suppressed whilst young, lest in time this crafty cockatrice's egg, hatched and fostered by ignorance and pusillanimous compliance, grow up into a serpent too big to be mastered, and so blast and destroy the first-born of our English freedoms. And indeed (blessed be God) it hath hitherto been rigorously opposed as often as it durst crawl abroad, being condemned in parliament, and knocked on the head by the resolutions of the judges upon solemn argument, as by and by I shall demonstrate.

Jurym. Well, but are jurors not liable then to fine or imprisonment in any case whatsoever?

Barr. Now you run from the point; we were talking of giving their verdict, and you speak of any case whatsoever. Whereas you should herein observe a necessary distinction, which I shall give you in the words of that learned judge last recited: ^(b) "Much of the office of jurors, in order to their verdict, is MINISTERIAL: as not withdrawing from their fellows after they are sworn; not receiving from either side evidence not given in court; not eating and drinking before their verdict; refusing to give a verdict, &c., wherein if they transgress they may be finable. But the verdict itself, when given, is not an act ministerial, but JUDICIAL, and (supposed to be) according to the best of their judgment; for which they are not finable, nor to be punished but by attainment;" that is, by another jury, in cases where an attainment lies, and where it shall be found that *wilfully* they gave a verdict false and corrupt.

Now that juries, otherwise, are in no case punishable, nor can (for giving their verdict according to their consciences and the best of their judgment) be legally fined or imprisoned by any judge on color of not going according to their evidence, or finding contrary to the directions of the court, is a truth both founded on unanswerable reasons, and confirmed by irrefragable authorities.

Jurym. Those I would gladly hear.

Barr. They are many, but some of the most evident are these that follow. As for reasons:—

1. A jury ought not to be fined or imprisoned, because they do not follow the judge's directions; for if they do follow his directions they may yet be attained: and to say they gave their verdict according to his directions is no bar but the judgment shall be reversed, and they punished for doing that which if they had not done, they should (by this opinion) have been fined and imprisoned by the judge; which is unreasonable.

(a) Lord Chief Justice Vaughan, in his Reports, fol. 146.

(b) Vaughan's Reports, fol. 152.

2. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so they should be doubly punished by distinct judicatories for the same offence, which the common law never admits.

3. To what end is the jury to be returned out of the vicinage (that is, the neighborhood) whence the issue ariseth? to what end must hundreds be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? to what end are they challenged so scrupulously to the array and poll? to what end must they have such a certain freehold, and be *probi, et legales, homines*, and not of affinity with the parties concerned, &c., if after all this, they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge? A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning, unless all men's understandings were equally alike. And if merely in compliance, because the judge says thus or thus, a jury shall give a verdict: though such their verdict should happen to be right, true and just; yet they being not assured it is so, from their own understanding, are *forsworn*, at least in *foro conscientiae*.

4. Were jurors so finable, then every mayor, and bailiff of corporations, all stewards of leets, justices of peace, &c., whatever matters are tried before them, shall have verdicts to their minds, or else fine and imprison the jurors till they have; so that such must be either pleased, humored or gratified, else no justice, or right, is to be had in any court.

5. Whereas a person by law may challenge the sheriff, or any jurymen, if of kin to his adversary; yet he cannot challenge a mayor, recorder, justice, &c., who 'tis possible will have a verdict for their kinsman, or against their enemy, or else fine and imprison the jury till they have obtained it: so that by this means our lives, liberties and properties shall be solely tried by, and remain at the arbitrary disposal of every mercenary or corrupted justice, mayor, bailiff or recorder, if any such should, at any time, get into office.

6. 'Tis unreasonable that a jury should be finable on pretence of their going against their evidence; because it can never be tried, whether or no in truth they did find with, or against, their evidence, by reason no writ of error lies in the case.

7. Were jurymen liable to such arbitrary fines, they would be in a worse condition than the criminals that are tried by them; for in all civil actions, informations and indictments, some appeals, or writs of false judgment, or of error, do lie into superior courts to try the regular proceedings of the inferior. But here can be no after-trial or examination; but the jurymen (if fining at all were lawful) must either pay the fine or lie by it, without remedy to decide whether in his particular case he were legally fined or not.

8. Without a fact agreed, it is as impossible for a judge, or any other, to know the law relating to that fact, or direct concerning it, as to know an accident that hath no subject; for as, where there is no law there is no transgression, so where there is no transgression there is no place for law: for "the law (saith divine authority) is made for the transgressor." And as Coke tells us, *Ex facto jus oritur*; upon stating the fact or transgression, matter of law doth arise or grow out of the root of the fact. Now the jury being the sole judges of fact, and matter in issue before them, not finding the fact on which the law should arise, cannot be said to find against law, which is no other than a superstructure on fact: so that to say they have found against the law, when no fact is found, is absurd—an expression insignificant and unintelligible. For no issue can be joined of matter in law; no jury can be charged with the trial of matter in law barely; no evidence ever was, or can be, given to a jury, of what is law or not: nor can any such oath be given to, or taken by a jury, to try matter in law; nor does an attainit lie for such oath, if false, &c. But if, by finding against the directions of the court in matter of law, shall be understood, that if the judge, having heard the evidence given in court, (for he can regularly know no other, though the jury may,) shall tell the jury upon this evidence the law is for the plaintiff, or for the defendant, and the jury are, under pain of fine and imprisonment, to find accordingly, then it is plain the jury ought of duty so to do. Now if this were true, who sees not that the jury is but a

troublesome delay, of great charge, much formality and no real use in determining right and wrong, but mere echoes to sound back the pleasure of the court; and consequently, that trials by them might be better abolished than continued? which is at once to spit folly in the faces of our venerable ancestors, and enslave our posterity.

9. As the judge can never direct what the law is in any matter controverted, without first knowing the fact, so he cannot possibly know the fact but from the evidence which the jury have: but he can never fully know what evidence they have; for besides what is sworn in court, (which is all that the judge can know,) the jury, being of the neighborhood, may, and oftentimes do, know something of their own knowledge as to the matter itself, the credit of the evidence, &c., which may justly sway them in delivering their verdict; and which self-knowledge of theirs is so far countenanced by law, that it supposes them capable thereby to try the matter in issue, (and so they must,) though no evidence were given on either side in court. As when any man is indicted, and no evidence comes against him, the direction of the court always is, "You are to acquit him, unless of your own knowledge you know him guilty;" so that even in that case they may find him guilty, without any witnesses. Now how absurd is it to think that any judge has power to fine a jury for going against their evidence, when he that so fineth knoweth perhaps nothing of their evidence at all, (as in the last case,) or at least but some part of it? For how is it possible he should lawfully punish them for that which it is impossible for him to know?

Lastly, Is anything more common than for two lawyers, or judges, to deduce contrary and opposite conclusions out of the same case in law? And why then may not two men infer distinct conclusions from the same testimony? And consequently, may not the judge and jury honestly differ in their opinion or result from the evidence, as well as two judges may, which often happens? And shall the jurymen, merely for this difference of apprehension, merit fine and imprisonment, because they do that which they cannot otherwise do, preserving their oath and integrity? especially when by law they are presumed to know better, and much more of the business, than the judge does, as aforesaid.

Are not all these gross contradicting absurdities, and unworthy (by any man that deserves a gown) to be put upon the law of England; which has ever owned right reason for its parent, and dutifully submitted to be guided thereby?

Jurym. If the law, as you say, be reason, then undoubtedly this practice of fining of juries is most illegal, since there cannot be anything more unreasonable: but what authorities have you against it?

Barr. You have heard it proved to be a modern upstart encroachment, so you cannot expect any direct or express condemnation of it in ancient times; because the thing was not then set on foot. And by the way, though negative arguments are not necessarily conclusive, yet that we meet with no precedents of old of juries fined, for giving their verdict contrary to evidence, or the sense of the court, is a violent presumption that it ought not to be done: for it cannot be supposed that this latter age did first of all discover that verdicts were many times not according to the judge's opinion and liking. Undoubtedly they saw that as well as we; but knowing the same not to be any crime, or punishable by law, were so modest and honest as not to meddle with it. However, what entertainment it hath met with, when attempted in our times, I shall show you in two remarkable cases.

1. When the late Lord Chief Justice Keeling had attempted something of that kind, it was complained of, and highly resented by the then parliament, as appears by this copy of their proceedings thereupon, taken out of their journal, as follows:

Die Mercurii, 11 Decembris 1667.

"The house resumed the hearing of the rest of the report touching the matter of restraint upon juries, and that upon the examination of divers witnesses in several cases of restraints put upon juries by the Lord Chief Justice Keeling; and thereupon resolved as followeth:

"First, That the proceedings of the said lord chief justice, in the cases now reported, are innovations in the trial of men for their lives and liberties. And that he hath used an arbitrary and illegal power, which is of dangerous consequence to

the lives and liberties of the people of England, and tends to the introducing of an arbitrary government.

"Secondly. That in the place of judicature the lord chief justice hath undervalued, vilified and contemned Magna Charta, the great *Preserver* of our lives, freedom and property.

"Thirdly. That he be brought to trial in order to condign punishment, in such manner as the house shall judge most fit and requisite."

Die Veneris, 13 Decembris 1667.

"Resolved, &c., That the precedents and practice of fining or imprisoning of jurors for giving their verdicts are illegal."

Here you see it branded in parliament; next you shall see it formally condemned on a solemn argument by the judges. The case [is] thus.

At the sessions for London, Sept. 1670, William Penn and William Mead (two of the people commonly called Quakers) were indicted, "for that they with others, to the number of three hundred, on the 14th Aug. 22 Regis, in Gracechurch street, did with force and arms, &c., unlawfully and tumultuously assemble, and congregate themselves together to the disturbance of the peace; and that the said William Penn did there preach, and speak to the said Mead, and other persons in the open street; by reason whereof, a great concourse and tumult of people, in the street aforesaid, then, and there, a long time did remain, and continue, in contempt of our said lord the king, and of his law, to the great disturbance of his peace, to the great terror and disturbance of many of his liege people and subjects, to the ill example of all others in the like case offenders, and against the peace of our said lord the king, his crown and dignity."

The prisoners pleading not guilty, it was proved, that there was a meeting at the time in the indictment mentioned, in Gracechurch street, consisting of three or four hundred people, in the open street; that William Penn was speaking, or preaching to them; but what he said, the witnesses (who were officers and soldiers sent to disperse them) could not hear. This was the effect of the evidence; which Sir John Howel, the then recorder, (as I find in the print of that trial,) was pleased to sum up to the jury in these words:

"You have heard what the indictment is; it is for preaching to the people in the street, and drawing a tumultuous company after them, and Mr. Penn was speaking. If they should not be disturbed, you see they will go on. There are three or four witnesses that have proved this—that he did preach there, that Mr. Mead did allow of it. After this you have heard by substantial witnesses what is said against them: *Now we are upon the matter of fact, which you are to keep to, and observe, as what hath been fully sworn, at your peril.*"

This trial began on the Saturday; the jury retiring, after some considerable time spent in debate, came in, and gave this verdict,—"*Guilty of speaking in Gracechurch street.*" At which the court was offended, and told them, they "had as good say nothing;" adding,—"*Was it not an unlawful assembly? you mean he was speaking to a tumult of people there?*" But the foreman saying, what he had delivered was all he had in commission; and others of them affirming, that they allowed of no such words as an "unlawful assembly" in their verdict; they were sent back again, and then brought in a verdict in writing subscribed with all their hands, in these words: "*We, the jurors hereafter named, do find William Penn to be guilty of speaking or preaching to an assembly met together in Gracechurch street, the 14th of Aug. 1670. And William Mead not guilty of the said indictment.*"(a)

This the court resented still worse, and therefore sent them back again, and adjourned till Sunday morning; but then too they insisted on the same verdict; so the court adjourned till Monday morning; and then the jury brought in the prison-

(a) *NOTE*.—Though this jury, for their excellent example of courage, and constancy, deserve the commendation of every good Englishman; yet, if they had been better advised, they might have brought the pri-

soners in not guilty at first, and saved themselves the trouble and inconveniences of these two nights' restraint. See *State Trials*, vol. ii. p. 60t, in fol. Vide note to page 742.

ers generally "Not guilty;" which was recorded and allowed of. But immediately the court fined them forty marks a man, and to lie in prison till paid.

Being thus in custody, Edw. Bushel, one of the said jurors, on the ninth of November following, brought his habeas corpus in the court of common pleas. On which the sheriffs of London made return, "That he was detained by virtue of an order of sessions, whereby a fine of forty marks was set upon him, and eleven others, particularly named, and every of them, being jurors sworn to try the issues joined between the king and Penn and Mead, for certain trespasses, contempts, unlawful assemblies and tumults, and who then and there did acquit the said Penn and Mead of the same, against the law of this kingdom, and against full and manifest evidence, and against the direction of the court in matter of law of and upon the premises openly in court to them given and declared; and that it was ordered they should be imprisoned till they severally paid the said fine, which the said Bushel not having done, the same was the cause of his caption and detention." (a)

The court coming to debate the validity of this return, adjudged the same insufficient: for, 1. The words,—"*against full and manifest evidence,*" was too general a clause; the evidence should have been fully and particularly *recited*; else how shall the court know it was so full and evident? they have now only the judgment of the sessions for it that it was so: but, said the judges, "our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs."

2. It is not said, that they acquitted the persons indicted against full and manifest evidence, *corruptly*, and *knowing* the said evidence to be *full* and *manifest*. For otherwise it can be no crime; for that may seem full and manifest to the court which does not appear so to the jury.

3. The other part of the return, viz., that "the jury had acquitted those indicted against the direction of the court in matter of law," was also adjudged to be nought and unreasonable; and the fining the juries for giving their verdict in any case concluded to be illegal, for the several reasons before recited, and other authorities of law urged to that purpose; and all the precedents and allegations brought to justify the fine and commitment, solidly answered. Whereupon the chief justice delivered the opinion of the court, "That *the cause of commitment was insufficient*;" and accordingly the said Bushel, and other his fellow-prisoners, were discharged, and left to the common law for remedy and reparation of the damages, by that *tor-*
ious, illegal imprisonment sustained.

Which case is (amongst others) reported by that learned judge Sir John Vaughan, at that time lord chief justice of the common pleas; setting forth all the arguments, reasons and authorities, on which the court proceeded therein; from which I have extracted most of the reasons which I before recited for this point, and, for the greatest part, in the very words of that reverend author.

Jurym. This resolution hath, one would think, (as you said,) knocked this illegal practice on the head, beyond any possibility of revival; but may it not one day be denied to be law, and the contrary justified?

Barr. No such thing can be done without apparently violating and subverting all law, justice and modesty: for though the *precedent* itself be valuable, and without further inquiry is wont to be allowed, when given thus deliberately upon solemn debate by the whole court; yet, it is not only that, but the sound, substantial and everlasting *reasons*, whereon they grounded such their resolves, that will, at all times, justify fining of juries in such cases to be illegal. Besides, as the reporter was most considerable, both in his quality as lord chief justice, and for his parts, soundness of judgment, and deep learning in the law; so such his book of reports is approved and recommended to the world, (as appears by the page next after the epistle.) by the right honorable the present lord chancellor of England; Sir William Scroggs, now lord chief justice of England; my Lord North, chief justice of the common pleas; and, in a word, by all the judges of England at the time of publishing thereof; so that it cannot be imagined how any book can challenge greater authority, unless we should expect it to be particularly confirmed by act of parliament.

Jurym. You have answered all my scruples; and since I see the law has made

(a) See Bushel's case in Vaughan's Reports at large.

so good provision for jurymen's privileges and safety; God forbid any jurymen should be of so base a temper, as to betray that, otherwise, impregnable fortress, wherein the law hath placed him to preserve and defend the just rights and liberties of his country, by treacherously surrendering the same into the hands of violence or oppression, though masked under ever so fair stratagems and pretences. For my own part, I shall not now decline to appear according to my summons; and therefore (though I fear I have detained you too long already) shall desire a little more of your direction about the office of a jurymen in particular, that I may uprightly and honestly discharge the same.

Barr. Though I think, from what we have discoursed, being digested and improved by your own reason, you may sufficiently inform yourself; yet, to gratify your request, I shall add a few brief remarks, as well of what you ought cautiously to avoid, as what you must diligently pursue, and regard, if you would justly, and truly, do your duty.

First, As to what you must avoid.

1. I am very confident that you would not willingly violate the oath which you take; but it is possible that there are such who as frequently break them as take them, through their *careless custom* on the one hand, or *slavish fear* on the other; against whom I would fully caution you, that you may defend yourself and others against any enemies of your country's liberties and happiness, and keep a good conscience towards God and towards man.

2. It is frequent, that when juries are withdrawn, that they may consult of their verdict, they soon forget that solemn oath they took, and that mighty charge of the life and liberty of men and their estates, whereof then they are made judges; and that, on their breath, not only the fortunes of the particular party, but perhaps the preservation or ruin of several numerous families does solely depend: Now I say, without due consideration of all this; nay, sometimes without one serious thought or consulted reason, offered *pro* or *con*, presently the foreman, or one, or two that call themselves ancient jurymen, (though in truth they never knew what belongs to the place more than a common school-boy,) rashly deliver their opinions; and all the rest, in respect to their supposed gravity and experience, or because they have the biggest estates, or to avoid the trouble of disputing the point, or to prevent the spoiling of dinner by delay, or some such weighty reason, forthwith agree blindfold, or go to holding up of hands or telling of noses, and so the major vote carries away captive both the reason and the conscience of the rest; thus trifling with sacred oaths, and putting men's lives, liberties and properties (as it were) to the haphazard of cross or pile. This practice, or something of the like kind, is said to be too customary amongst some jurors, which occasions such their extraordinary despatch of the weightiest or most intricate matters; but there will come a time when they shall be called to a severe account for their haste and negligence; therefore have a care of such fellow-jurors.

3. Such a slavish fear attends many jurors, that let but the court direct to find guilty or not guilty, though they themselves see no just reason for it; yea, oftentimes though their own opinions are contrary, and their consciences tell them it ought to go otherwise; yet, right or wrong, accordingly they will bring in their verdict; and therefore many of them never regard seriously the course and force of the evidence; what and how it was delivered, more or less, to prove the indictment, &c., but as the court sums it up, they find: as if juries were appointed for no other purpose but to echo back what the bench would have done. Such a base temper is to be avoided, as you would escape being forsworn, even though your verdict should be right; for since you do not know it so to be, by your own judgment or understanding, you have abused your oath and hazarded your own soul, as well as your neighbor's life, liberty or property, because you blindly depend on the opinion or perhaps passion of others, when you were sworn well and truly to try them yourselves. Such an implicit faith is near of kin to that of some in religion, and at least in the next degree as dangerous.(a)

(a) Though judges are likely to be more able than jurymen, yet jurymen are likely to be more *honest* than judges; especially in all cases where the power of the prerogative, or the rights of the people, are in dispute. Our rights, therefore, both as individuals, and as a people, are more likely to be secure, while juries follow the result of their own opinion;

4. There are some that make a trade of being jurymen; that seek for the office; use means to be constantly continued in it; will not give a disobliging verdict lest they should be discharged and serve no more: these standing jurors have certainly some ill game to play. There are others that hope to signalize themselves, to get a better trade or some preferment by serving a turn. There are others that have particular piques, and a humor of revenge against such or such parties: if a man be but miscalled by some odious name, or said to be of an exploded faction—straight they cry hang him, find him guilty, no punishment can be too bad for such a fellow; in such a case they think it merit to stretch an evidence on the tenter-hooks, and strain a point of law, because they fancy it makes for the interest of the government; as if injustice or oppression could in any case be for the true interest of government, when in truth nothing more weakens or destroys it. But this was an old stratagem, “If thou suffer this man to escape thou shalt not be Caesar’s friend;” when Caesar was so far from either needing or thanking them for any such base services that, had he but truly understood them, he would severely have punished their partiality and tyranny.

All these and the like pestilent biasses, are to be avoided and abominated by every honest jurymen.

But now as to the positive qualifications requisite:

1. You that are jurymen, should, first of all, seriously regard the weight and importance of the office; your own souls, other men’s lives, liberties, estates, all that in this world are dear to them, are at stake, and in your hands; therefore, consider things well beforehand, and come substantially furnished and provided with sound and well-grounded consciences,—with clear minds, free from malice, fear, hope or favor; lest, instead of judging others, thou shouldst work thy own condemnation and stand in the sight of God, the Creator and Judge of all men, no better than a murderer or perjured malefactor.

2. Observe well the record, indictment or information that is read, and the several parts thereof, both as to the matter, manner and form.

3. Take due notice of, and pay regard to the *evidence* offered for proof of the indictment, and each part of it, as well to manner and form as matter; and if you suspect any subornation, foul practice or tampering hath been with the witnesses, or that they have any malice or sinister design; have a special regard to the circumstances or incoherences of their tales, and endeavor, by apt questions, to sift out the truth or discover the villany. And for your better satisfaction, endeavor to write down the evidence or the heads thereof, that you may the better recall it to memory.

4. Take notice of the nature of the crime charged, and what law the prosecution is grounded upon, and distinguish the supposed criminal fact which is proved, from the aggravating circumstances which are not proved.

5. Remember that in juries there is no plurality of voices to be allowed: seven cannot overrule or, by virtue of majority, conclude five; no, nor eleven one. But as the verdict is given in the name of all the twelve, or else it is void; so every one of them must be actually agreeing and satisfied in his particular understanding and conscience of the truth and righteousness of such verdict, or else he is forsworn. And therefore if one man differ in opinion from his fellows, they must be kept together, till either they, by strength of reason or argument, can satisfy him or he convince them. For he is not to be hectorred, much less punished by the court into a compliance: for as the Lord Chief Justice Vaughan says well, (Rep. fol. 151,) “If a man differ in judgment from his fellows, whereby they are kept a day and a night, though his dissent may not in truth be so reasonable as the opinion of the rest that agree; yet, if his judgment be not satisfied, one disagreeing can be no more criminal than four or five disagreeing with the rest.” Upon which occasion the said author recites a remarkable case out of an ancient law-book (41 Ass. p. 11): “A juror would not agree with his fellows for two days, and being demanded by the judges if he would agree, said he would first die in prison:

for less danger will arise from the mistakes of jurymen than from the corruption of judges. Besides, improper verdicts will but seldom occur: since juries will avail themselves of

the abilities and learning of the judges, by consulting them upon all points of law; and thus to the advantage of information may add their own impartiality.

whereupon he was committed, and the verdict taken : but upon better advice, the verdict of the eleven was quashed, and the juror discharged without fine ; and the justices said, ' the way was to carry them in carts ' (this is to be understood at assizes, where the judges cannot stay, but must remove in such a time into another county) ' until they agreed, and NOT BY FINING THEM.' And as the judges erred in taking the verdict of eleven, so they did in imprisoning the twelfth ;" and therefore, you see, on second thoughts released him.

6. Endeavor, as much as your circumstances will permit, at your spare hours, to read and understand the fundamental laws of the country ; such as *Magna Charta*, the petition of right, the late excellent act for *Habeas Corpus's*, *Horne's Mirror of Justices*, Sir *Edw. Coke*, in his 2d, 3d and 4th parts of the Institutes of the law of England, and Judge *Vaughan's Reports*. These are books frequent to be had, and of excellent use to inform any reader, of competent apprehension, of the true liberties and privileges which every Englishman is justly entitled unto, and estated in, by his birthright ; as also the nature of crimes, and the punishments severally and respectively inflicted on them by law ; the office and duties of judges, juries and all officers and ministers of justice, &c., which are highly necessary for every jurymen, in some competent measure, to know : for the law of England hath not placed trials by juries, to stand between men and death or destruction, to so little purpose as to pronounce men guilty, without regard to the nature of the offence or to what is to be inflicted thereupon.

For want of duly understanding and considering these things, juries many times plunge themselves into lamentable perplexities ; as it befell the jury who were the triers of Mr. *Udal*, a minister, who, in the 82d year of Queen *Elizabeth*, was indicted and arraigned at *Croydon* in *Surry*,^(a) for high treason, for defaming the queen and her government, in a certain book entitled " A Demonstration of the Discipline, &c." And though there was no direct, but a scrambling shadow of proof ; and though the book, duly considered, contained no matter of treason, but certain words which by a forced construction were laid to tend to the defamation of the government, and so the thing [was] prosecuted under that name ; yet the jury not thinking that in pronouncing him guilty they had upon their oath pronounced him guilty of treason, and to die as a traitor ; but supposing that they had only declared him guilty of making the book ; hereupon they brought him in guilty ; but when, after the judge's sentence of death against him, which they never in the least intended, they found what they had done ; they were confounded in themselves, and would have done any thing in the world to have revoked that unwary pernicious verdict, when, alas ! it was too late. Dr. *Fuller* has this witty note on this gentleman's conviction, " that it was conceived *rigorous* in the *greatest*, which at best," (saith he,) " is *cruel* in the *least* degree." And it seems so Queen *Elizabeth* thought it, for she suspended execution, and he died naturally. But his story survives, to warn all succeeding jurymen to endeavor better to understand what it is they do, and what the consequences thereof will be.

7. As there is nothing I have said intended to encourage you to partiality, or tempt any jurymen to a connivance at sin, and malefactors, whereby those pests of society should avoid being brought to condign punishment, and so the law cease to be a terror to evil-doers, which were in him an horrible perjury, and indeed a foolish pity, or *crudelis misericordia*, a cruel mercy ; (for he is highly injurious to the good, that absolves the bad, when real crimes are proved against them ;) so I must take leave to say, that in cases where the matter is dubious, both lawyers and divines prescribe rather favor than rigor. An eminent and learned judge ^(b) of our own time has in this advice and wish gone before me : *Mallem reverà viginti facinorosos mortem pietate evadere, quàm justum unum injuste condemnari*. " I verily" (saith he,) " had rather twenty evil-doers should escape death through tenderness or pity, than that one innocent man should be unjustly condemned."

I shall conclude with that excellent advice of my Lord *Coke*,^(c) which he generally addresses to all judges, but may no less properly be applied to jurors :—

Fear not to do right to all, and to deliver your verdicts justly according to the

(a) See State Trials, fol. vol. i. p. 161.

(b) Fortescue, cap. 27.

(c) In the Epilogue of his 4th Part of Institutes.

laws; for fear is nothing but a betraying of the succors that reason should afford: and if you shall sincerely execute justice, be assured of three things:

1. Though some may malign you, yet God will give you his blessing.

2. That though thereby you may offend great men, and favorites, yet you shall have the favorable kindness of the Almighty, and be his favorites.

And lastly, That in so doing, against all scandalous complaints and pragmatical devices against you, God will defend you as with a shield.—“For thou, Lord, wilt give a blessing unto the righteous, and with thy favorable kindness wilt thou defend him as with a shield.” Psalm v. 15.

The following article, from the *New York Independent*, written by Theodore Tilton, Esq., recommends itself strongly to every man who is called to perform the responsible duties of a juror.

A WEEK IN A JURY BOX.

It is provoking, when your business is at the thickest, when your engagements are most pressing, when your office most needs your daily presence, to find yourself suddenly imprisoned, shut out from your most clamorous duties, kept from your desk or store from the beginning of Monday to the end of Saturday—on account of a bit of meddlesome paper with this inscription:—

“To MR. ———

“You are hereby summoned to attend a term of the circuit court and court of oyer and terminer, at the court-room, city hall, in the city of Brooklyn, as a petit juror, said term commencing on the 20th day of January 1862, at ten o'clock in the forenoon.

“Fine for non-attendance, twenty-five dollars each day.

W. H. C.,

“Commissioner of Jurors.”

What will you do? Get excused? Not while such a man sits on the bench as the judge who ordered that summons. He excuses nobody on the plea of other engagements. He believes that a man who has important business of his own is just the man to be a juror upon important business of others. He is right. The other day, when one of the busiest men of the city, on being summoned with a like notice, made the common excuse of urgent business, he was denied. He then offered to pay the twenty-five dollars, but the judge said: “I can make it a hundred dollars.” “And I,” responded the merchant, “can pay it.” “But,” interposed the judge, “I can make it five hundred.” “I can pay that,” retorted the gentleman, a little excited. “But,” added the judge, with dignity, “I can imprison you, if you refuse.” “Then,” said the rich man, resigning himself, and smiling, “I will do my duty, and serve.”

It was no more than his duty to serve. He would have failed in his duty had he declined to serve. The judge would have failed in his duty had he not insisted upon the service.

The duty of competent men to serve on juries, without besieging the court with excuses, needs to be urged in these cities; for lawyers and judges have complained, for years past, that valuable and competent men have been too ready to beg off on unworthy pleas.

The fine for failure to attend, when summoned, has been fixed at various sums at various times. The difficulty in setting the price of the penalty is, if it be too high, it is oppressive to a poor man who may be needfully absent; and if it be too low, it will be paid by the rich man, who thus with a trifle may always purchase exemption. The proper inducement to service ought to be, not a fine, whether little or large, but a ready willingness to perform the duty, by poor men and rich, as part of the common duty of all citizens.

The jury is the most valuable part of the court; the part which public justice could least afford to abolish; the part which the people would be least willing to surrender. If the change were proposed that all trials should be by a judge alone, or a jury alone, which would be chosen as the people's last resort? Of course both judge and jury are needed; but if Jefferson Davis should grant us but one, which one would we ask for? Though judges decide questions of law, and juries questions of fact, yet the majority of cases in court involve both law and fact, and need both judge and jury. But the bulk of these cases could be more safely left to a jury alone, than to a judge alone. The Turkish *cadi*, without appeal, makes dangerous decisions; twelve beggars of the street would be safer. We believe that, in general, the decisions of juries give greater satisfaction than the decisions of judges. Of course, after every trial, either plaintiff or defendant must have the sour lip. But the fact is noticeable that the loser usually goes out of court with less grumbling after a verdict than after a judgment. For a jury trial yields an equitable decision based on common sense, rather than a technical judgment based on a written statute. It is, moreover, an appeal to the people; a *vox populi* of twelve voices; an epitome of public opinion; an indication of what the mass of men would say of the case if the mass of men could know the facts.

A good man should have a good excuse for not serving on a jury; a bad man ought to be his own excuse.

We know, there is much corruption in the courts. A growing defection in the administration of public justice has been observable for the last ten years. The ermine has put spots upon itself. But we cannot resist the conviction, that the great majority of all cases carried into courts, to be decided either by judges or juries, are decided carefully, impartially and righteously.

One of the happy peculiarities of the jury-trial is seen in the accidental groupings of the jury-box. For instance, the jury called by the subpoena above quoted, consisted of twelve men called from ten different occupations in life: two merchants, a fisherman, a carpenter, a jeweller, a house-painter, a chandler, two builders, a gardener and an editor, persons in different ranks of fortune—a few rich and one or two very poor; some educated, and others illiterate; some Catholics, one Jew, the others Protestants; all sitting together in the jury-room, taking part in a common discussion, having an equal voice in the debate, and each holding a veto over the other eleven. Such an institution not only promotes justice, but levels all ranks, makes common ground for all classes, equalizes all citizens. It teaches the banker that the law counts him no better than the mortar-carrier. It lifts the poor man into peerage with the aristocracy. The street omnibus, in which every man may ride, the public meeting which every man may attend, the ballot-box at which every man may vote, all teach to the different classes of society the democratic lesson of their common equality; but the lesson has nowhere a more impressive example than in the discussions of the jury-room, when the panel happens to comprise the extremes of poverty and wealth, of rudeness and culture, of humbleness and station. Where can be seen a more significant illustration of the free spirit of our institutions than in the spectacle, sometimes witnessed in court, of the vast interests of a millionaire, or of a great company or corporation, hanging for verdict upon the consenting voice of one obscure, humble mechanic, who has left his jack-plane or his trowel at a summons to sit on a jury to decide, with a poor man's honest sense, a conflict of rich men's claims, involving thousands or millions of dollars? It shows that, while, in some respects, in this country, or in some parts of it, we degrade MAN, denying him his dignity and stripping him of his rights, yet in other instances, the law invests him, regardless of rank or station, with a power and responsibility, that fully shows the high value which our free institutions set upon the humblest citizen, based on his simple right and rank of citizenship.

Trial by jury has many praises for its beneficence to the public, through its security of justice to the suitor; but not so often praised is the other public good that grows out of its effect upon the juror. It is a great educator to the twelve men who compose it. This education is of a kind important for all citizens to learn; yielding not only a wider knowledge of the law, but inspiring men with a more reverent respect for it; aiding the cause of good government, by teaching men to be mindful of men's rights. The protection of men's rights is the chief end of

good government; but the end is attained only in proportion as the people are educated in a thorough loyalty to law. A man who serves on a jury is a more careful citizen afterwards. A man who never serves loses something himself, and the commonwealth loses something through his loss. For a jurymen's reward is not a mere silver dollar a day, but a better knowledge of the law, a clearer sagacity in business, an instructive insight into human nature.

A rough fellow, who had the bad habit of throwing about his arms in street scuffles, happened to be summoned on a jury, in Brooklyn, to sit through the trials of half a dozen fellows like himself, for disorderly conduct on the highway. After the verdict was rendered, and the jury dismissed, he said to a spectator, on leaving the court-room, "The jury-box has taught me a lesson which I mean to heed. The law of the land insists that all men shall keep the peace and behave themselves. The law is right, and I have been wrong. I mean, after this, to mend my behavior." In view of such influence, it is no disadvantage to the community that rude men—boisterous, refractory and irreverent to the law—sometimes find themselves upon juries; for, thus placed, they receive from bar, and bench, and jury-room, many a salutary lesson which is left to make a visible improvement in their future conduct.

It is, therefore, with questionable propriety that the large class of men composing the fire department in these cities, men of bluff and hardy manners, men of a commendable but sometimes over-excited enthusiasm, men who too often are tempted into infractions of the law, are exempted from the common citizen's service of jury duty. The great mass of that impetuous throng who lead or follow their rattling engines over stony streets at midnight, at the stroke of the alarm-bell, are just such persons as need the knowledge, the example and the influence which other men get in the pannelled jury, and which cannot be got so surely anywhere else. Nor is it wisdom in the municipal government of this city, or in the legislative government of this state, to set forth the jury service in any such disesteem as to call it a burden, from which the citizen, fireman or not, may purchase exemption by other forms of duty. Even ministers of the gospel, who, likewise, are a class privileged to decline the commissioner's subpoena, would find no small instruction for their ministry by sitting for a few days in the year under the influences and responsibilities of jury trials and verdicts.

Therefore, good reader, good citizen, when next you get a summons to sit with eleven of your peers—mayhap your betters—do not vex yourself into impatience, or carry an excuse on your lips, but count yourself honored by the call, and do your duty. It is a reasonable service not to be neglected, not to be evaded, not to be shirked, but to be honestly performed. It is such a service rendered to your neighbor as you may need your neighbor to render to you. It is a part of the written law which the Great Lawgiver has ordained, "Whatsoever ye would that men should do unto you, do ye even so to them."

INDEX.

ABANDONMENT.

Of infants, punished, 292.

ABATEMENT.

Definition of plea in abatement, 75.

Abatement of the writ or return, 75.

Pleas to the jurisdiction, 75.

Disabilities of the parties, 76.

Misnomer, misjoinder and non-joinder, 76.

Pendency of former action, 76

Death of parties, 77.

When pleas in abatement must be pleaded, 77.

Plea in abatement in attachment case, 174.

Action between firms not to abate in consequence of one of the plaintiffs being a member of the defendant firm, 659.

Action for negligence not to abate by death of plaintiff, 77, 645.

Partners not to plead misnomer or non-joinder, in abatement, unless their names be registered in the prothonotary's office, 76, 660.

ABBREVIATIONS.

Used in docket entries, 319.

ABDUCTION.

Punishment for abducting a child, 78.

Not to apply to father of illegitimate child, 78.

ABORTION.

A misdemeanor, at common law, 78.

Punishment of, under the penal code, 78.

Punishment of attempting to produce, 78.

Decisions relative to, 79.

ACCESSORY.

Definition of, 53, 79.

Accessory before the fact, who is, 79.

after the fact, who is, 79.

how punished, 79.

how tried, 80-1.

to be deemed guilty of a substantive offence, 80-1.

Wife cannot be accessory to felony, by receiving her husband, 81.

No other relationship will excuse, 81.

Warrant for misprision of felony, 82.

for accessory before the fact, 82.

Commitment for an accessory after the fact, 82.

Docket entry, 83.

ACTION.

Various kinds of actions defined, 83-4.

For what an action lies, 84.

Limitation of actions, 84.

Amicable actions may be entered before justices, 92.

Actions against justices regulated, 518.

Action for negligence may be brought by widow or representatives of party injured, 645.

ACTS OF ASSEMBLY. See *Statutes*.

Disobedience to an act of assembly an indictable offence, 464.

ADMINISTRATORS. See *Executors, &c.***ADULTERATION.**

Punishment for adulterating food, liquors or medicines, 130-31.

To be a defence to action for price of liquors, 131.

ADULTERY.

Definition of, 132.

Punishment of, 132.

Judicial decisions relative to, 132.

When adulterer may be convicted of larceny, 132.

Warrant for, 133.

Commitment, 133.

Docket entry, 133.

ADVICE.

How advice should be given by a justice, 134.

AFFIDAVIT.

Definition of, 53, 71, 558.

In attachment case, 169, 176.

To found attachment against stock, 187.

Affidavit to an account, 558.

to an executor's account, 558.

to petition for divorce, 573.

on appeal, in certain counties, 102, 143.

AFFRAY.

Definition of, 53, 136.

Who may suppress an affray, 136.

Punishment of, 136.

Warrant for, 136.

Docket entry, 137.

AGE. See *Infant*.

When infant is of age to do certain acts, 53, 60, 464.

AGENT. See *Principal and Agent*.

Penalty for selling goods by sample, 137-8.

Agents to be licensed, 137.

AGREEMENT.

Definition of, 54.

Effect of special agreement, to waive stay of execution, 96.

General form of agreement, 558.

Agreement for purchase of a reversion, 559.

Covenant not to commit waste, or grant new leases, 559.

that counsel shall approve title, 559.

that vendor may receive arrears, 559.

Agreement for making a quantity of shoes, 559.

to bear equal charges in a lawsuit, 566.

of defending an action, 560.

ALIMONY.

Definition of, 54, 71.

Petitions for divorce and alimony, 574.

AMENDMENT. See *Abatement*.

When party may amend, 139.

On appeal from a justice, 101.

When indictments may be amended, 782-4.

AMICABLE ACTION.

Amicable actions may be entered before justices, 92.

ANSWER.

Of garnishee in attachment, 188.

APPEAL.

When an appeal lies from the judgment of a justice, 95, 97, 140.

Within what time an appeal must be entered, 101, 141.

Bail to be given on appeal, 99, 141.

Recognition of bail on appeal, 142.

APPEAL—Continued.

- Sufficiency of bail to be determined by the justice, 142.
 Affidavit, 143.
 When appeal must be filed in court, 101, 143.
 Cause of action cannot be changed, 144.
 Plaintiff cannot discontinue *his* appeal, and proceed on the original judgment, 144.
 Costs on an appeal, 100, 102, 144, 145.
 What will exempt defendant from costs on appeal, 144.
 When tender of judgment must be made, 144.
 One of two defendants may appeal, 99.
 A stakeholder need not appeal, but must allow his name to be used, 140.
 Recognisance of bail, on appeal by corporation, 99, 142.
 Females must give bail, 142.
 Proceedings on neglect to file appeal, 101.
 Guardian may appeal without security, 99, 142.
 Appeal in landlord and tenant case, 536-7, 540, 543.
 Bail to be absolute, 536, 543, 545.

APPRENTICE.

- Definition of, 146.
 Authority of the master, 149.
 Apprentices how bound, 146.
 Time of service, 147.
 Remedies for misconduct, 150.
 Of absconding apprentices, 152.
 Penalties for harboring runaways, 153.
 When executors may assign indenture, 153.
 Who may bind and be bound apprentice, 147-8.
 Validity of indentures, 148.
 Who may act as next friend, 148.
 Construction of indenture, 148.
 Assignment and cancelling of indentures, 153, 154.
 Innkeepers not to trust apprentices—penalty for so doing, 153.
 Complaint of apprentice, 154.
 Notice to the master, 155.
 Warrant against master, 155.
 against apprentice, 156.
 Recognisance of master, 156.
 of apprentice, 156.
 Docket entry, 156.
 Assignment of indenture, 157.
 Punishment for maltreatment of, 292.

ARBITRATION.

- Definition of, 54.
 Rule of reference, how served on corporation, 278.
 When cause before a justice may be referred, 94, 98.
 Referees, how chosen, 94.
 How notified, 94.
 Penalty for neglect to notify referees, 94.
 How vacancies supplied, 98.
 How referees to be sworn or affirmed, 98.
 Referees may fine for disorderly conduct, 98.
 Form of certificate, 98.
 How recoverable, 98-9.

ARREST.

- Definition of, 54.
 Who may be arrested for debt, 158.
 Where plaintiff resides out of the state, 158.
 Arrest in criminal cases, 497.
 Justice may arrest on his own view, 497.
 Arrest may be made on Sunday, upon criminal warrant, 498.
 Or in the night time, 498.

ARSON.

- Definition of, 71, 160.
 Punishment of, 159-60.
 Not bailable by justices, 160.
 Information for arson, 160.
 Warrant, 161.
 Commitment, 161.

ASSAULT AND BATTERY.

- Definition of, 71, 162.
- What will justify a battery, 162.
- Punishment of, 163.
- Of aggravated assaults, 163.
- Complaint, 163.
- Warrant, 163.
- Duty of justice, in case of, 163-4.
- Docket entry, in case of, 330.
- Justices have no jurisdiction, in actions of, 766.
- Limitation of action for, 596.

ASSETS.

- Definition of, 55, 71.

ASSIGNMENT.

- Of indenture of apprenticeship, 157.
- Void assignments, 164.
- Assignment to be recorded within thirty days, 164, 563.
- Preferences prohibited, 165.
- Except for wages, 166.
- Proceedings on an assignment, 166.
- Of the assignment of a bond, 224.
- Punishment of fraudulent assignment, 434.
- Definition of assignment, 563.
- Assignment for benefit of creditors, 563.
 - by indorsement, 564.
 - of moneys due upon account, 564.
 - of note in satisfaction, the surplus to be returned to the assignor, 565.
 - of bond by indorsement, 568.
 - of a lease, 577.
 - of a mortgage, 582.
 - of a due-bill, 587.
 - by members of limited partnership, void in certain cases, 668.
 - of bail-bond to constable, 776.

ASSUMPSIT.

- Definition of, 55, 71, 167.
- Consideration for, 168.
- Promise may be made to a third person, 168.
- Evidence of promise to pay the debt of another, 447-8.

ATTACHMENT.

- Definition of, 71.
- Attachment against witness, 190.
- When, and how issued, 190.
- Form of attachment against, 190.
- Proceedings on, 190-1.
- Proceedings to attach stock, 179-80, n.

ATTACHMENT, DOMESTIC.

- Nature of, 169.
- Against whom it may be issued, 169.
- Proceedings in domestic attachment, 169-70.
- Oath of creditor, 171.
- Writ of domestic attachment, 171.
- Constable's return, 171.
- Appointment of freeholders, 171.
- Summons against garnishee, 172.
- Notice to creditors, 172.
- Order to sell perishable goods, 172.
- Appraisement, 172.
- General order to sell, 173.
- Advertisement of sale, 173.

ATTACHMENT AGAINST ABSENT AND FRAUDULENT DEBTORS.

- When it may issue, 173.
- Plaintiff to make affidavit, and give bond, 173-4.
- When to be made returnable, 175.
- How served, 175.
- Constable's return, 175.
- Forthcoming bond may be given, 175.
- Proceedings on return, 175.

ATTACHMENT—Continued.

- When judgment by default to be opened, 175.
- Effect of, when defendant is not personally served, 176.
- Duration of lien of, 176.
- Plaintiff's affidavit, 176.
- Bond, 177.
- Attachment, 177.
- Forthcoming bond, 178.
- Affidavit to open judgment, 178.
- Notice of rehearing, 178.
- Docket entry, 179.

ATTACHMENT IN EXECUTION.

- Proceedings to levy stock, 179–80.
- to attach a debt due defendant, &c., 180.
- Manner of service, 180.
- Effect of attachment, 180, 184.
- Execution on judgment in attachment, 181.
- Legacies may be attached, 181.
- Proceedings to attach legacy, 181, 184.
- Corporations to be subject to attachment, 181.
- Attachment law extended to justices, 182.
- Proceedings before justices, 182.
- What may be attached, 183.
- Practice on attachment in execution, 185–6.
- Writ of attachment and return, 187.
- Affidavit to levy stock, 187.
- Recognisance, 187.
- Interrogatories to garnishee, 188.
- Rule to answer and notice, 188.
- Answers of garnishee, 188.
- Execution against garnishee, 189.
- Docket entry and fees, 189.

ATTORNEY. See *Letter of Attorney.*

- Definition of attorney at law, 55, 191.
- Court may admit attorneys, 191.
- Oath of attorney at law, 191.
- Warrants of attorney, 192.
- Justice cannot enter judgment on warrant of attorney, 87, 89.
- Authority of attorney to bind his client, 191–2.
- May maintain an action for his services, 192.
- What professional communications privileged, 384.
- Not entitled to be heard before justice on criminal charge against prisoner, 499.
- Power of attorney to defend a suit, 579.
- to institute a suit, 580.
- to conduct action already brought, 580.
- Not privileged from arrest, 692.
- District attorneys to be elected, 315.
- Their powers and duties, 315.

AUCTION.

- Duties of auctioneers, 193.
- Penalty for giving liquors at auction, 193.
- Fines, how appropriated, 193.
- Executors may sell by auction, 193.
- Rights and liabilities of purchaser at auction, 193–4.

BACKING OF WARRANTS.

- Definition of, 55.
- Backing of warrants legalized, 780.

BAIL.

- Definition of, 55, 194.
- Bail on appeal from a justice, 99, 142, 195.
- Sufficiency of, to be determined by the justice, 143.
- When special bail can be demanded, 194.
- Authority of special bail, 194.
- Bail for stay of execution, 106, 195.
- Form of bail-piece, 195.
- Bail in criminal cases, 196.
- When a justice may take bail, 196, 782.
- When a prisoner may be committed, and requisites of commitment, 196.

Can't be charged for contempt under P.S.J. 1910/11

in 782

BAIL—Continued.

- Justices must docket the name, abode and occupation of bail, 197.
- Bail in criminal cases may surrender with the same effect as in civil action, 196.
- Justice can only require security till the next court, 197.
- Docket entry in action against bail, 328.
- When constable may take bail, 90, 775.
- Bail-bond, 90, 775.
- Bail to be given by corporations, 99, 278.
- Judgment to be for the use of bail paying the same, 106.
- Bail on appeal in landlord and tenant case, 536, 543, 545.

BAILMENT.

- Definition of, 55, 200.
- Rights and liabilities of bailees, 200-1.
- Effect of warehouse receipt, 200-1.

BANKRUPTCY.

- Definition of, 202.
- Voluntary bankruptcy, 202.
- Involuntary bankruptcy, 203.
- Acts of bankruptcy, 203-4.
- Bankrupt firms and corporations, 204.
- Effect of, 205.
- Assignments in, 206-8.
- Form of letter of attorney, 206.
- Discharge, 208.
- What acts will bar a discharge, 208-10.
- Probate of debts, 210-12.
- Form of probate, without security, 212.
- Distribution, 212-13.
- Criminal proceedings, 213-14.

BANKS.

- Punishment of embezzlement by bank officers, 214-15, 363-4.
- What notes may be issued by banks, 214.
- One-fifth of bank notes to be redeemed in gold, 214.
- Penalty for passing foreign notes of a less denomination than five dollars, 214-15.
- To be punishable also by indictment, 215.
- Nature of bank notes, 215.
- When treated as money, 215-16.
- Liabilities of banks, 216.
- Nature of bank checks, 216.
- Effect of payment in bank notes in certain cases, 215.
- Cashiers not to engage in any other business, 215.

BARRATOR.

- Who are common barrators, 217.
- Punishment of barratry, 217.
- When a justice may be punished as a barrator, 217.

BATTERY. See *Assault and Battery*.

- Definition of, 55.

BAWDY HOUSE.

- Punishment for keeping, 649.
- for letting a house for, 649.
- Form of indictment, 650.

BENEFICIAL SOCIETIES.

- Nature of, 218.
- When members entitled to relief, 218.
- Power of expulsion, 218.

BIBLE.

- When entries in a family bible are evidence, 219.

BIGAMY.

- Definition of, 55, 71.
- Punishment of, 219.
- Evidence in case of, 219.

BILL.

- Definition of single and penal bill, 55.
- Bill of sale of chattels, 565.

BILL—Continued.

- Form of due-bill, 587.
- Assignment of due-bill, 587.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- Definition of bill of exchange, 220.
- Of the parties to a bill, 220.
- When payable, 220.
- Difference between foreign and inland bills, 220.
- Of the indorsement of a bill, 220-1.
- Effect of discharging one party to a bill, 223.
- Consideration of forged bill may be recovered back, 223.
- What bills are negotiable, 220.
- Acceptance of a bill, 221.
- Days of grace, 221.
- Presentment for payment, 222.
- Notice of dishonor, 222.
- Evidence in action on a bill or note, 222-3.
- Damages on protested bills, 223-4.

BOARDING.

- Lien on baggage for, 469.

BONDS.

- Definition of a bond, 56, 224, 565.
- Of impossible conditions, 224.
- When bond presumed to be paid, 224, 568.
- Of the assignment of a bond, 224-5, 568.
- Bond in attachment case, 177, 178.
- Insolvent's bond, 478.
- Bail-bond to constable, 775.
- Forthcoming bond on execution, 255.
- Justices to give bond, 506.
- Form of bond and warrant, 565.
- Bond to indemnify against indorsement, 566.
- to save harmless from paying rent where title is in question, 566.
- for the payment of annuity during life, 567.
- Refunding bond, 567.
- Bond to the county for a bastard child, 567.
- Assignment of bond by indorsement, 568.

BOOK ENTRIES. See Books.

- When evidence, 373, 654.

BOOKS.

- Of the books required by a justice, 226.
- How to be kept, 226.
- When books of original entry are evidence, 373, 654.
- How they should be kept, 654.
- Magistrate's Law Library, 226.

BREAD AND FLOUR.

- Penalty for adulterating bread, 130.
- Loaf bread to be sold by weight, 227.
- Duties of clerk of the market, 227.
- Warrant against a baker, 227.
- Indian meal to be sold by weight, 227.

BRIBERY.

- Definition of, 56, 228.
- To be felony, in certain cases, 228.
- Punishment, 228.
- Bribery at elections punished, 228-9.

BROKER.

- Definition of, 56.

BUILDING ASSOCIATIONS.

- Nature and objects of, 229.
- Incorporation of, 230-1.
- Powers of, 230-4.

BURGLARY.

- Punishment of, 235.

BURGLARY—Continued.

What amounts to burglary, 235.
Warrant for burglary, 236.

BURIAL GROUNDS.

Punishment for injuring, 236.
Or removing bodies from, 236.

CARRIERS.

Who are common carriers, 242.
Duties and liabilities of, 242-3.
May limit their responsibility by notice, 242-3.
Lien of carriers, 243.
Duties and liabilities of carriers of passengers, 243-7.
Punishment for wilful misconduct or gross negligence, 245, 645.

CATTLE.

Diseased, how disposed of, 237.
Impounding of, 237.
Penalties, 237.

CERTIFICATE.

Of limited partnership, 562.

CERTIORARI.

Nature of the writ, 237.
How directed and before whom returnable, 103, 238.
Affidavit and bail, 104, 238.
Duty of justice on receipt of writ, 104, 238.
Return to, 104, 238.
What is cause for reversal on, 103, 239-41.
When parol evidence will be heard, 239.
Within what time it must be issued, 104, 239-40.
Execution, on affirmance or non-pros, 105, 240.
Costs of a second action, 105, 240.
When a supersedeas, 241.
Judgment of the common pleas to be final, 104.
Not to issue from supreme court, 103, 239.
Justices liable for false return to, 241, 643.
Effect of, in landlord and tenant cases, in Philadelphia, 536.

CHECKS. See Banks.**CITIES.**

To form parts of counties, 289.
Their privileges reserved, 289.

CLERK OF THE MARKET. See Bread and Flour. Markets.**COLLATERAL SECURITIES. See Debt.****COMMITMENT.**

Definition of, 56, 63, 72.
Requisites of valid commitment, 196-7.
General form of commitment, 198.
Discharge of prisoner, 267.
Commitment for adultery, 133.
 for arson, 161.
 accessory after the fact, 82.
 for bastardy, 432.
 for horse-stealing, 459.
 for robbery, 719.
 for threats, 749.
 to house of refuge, 462.

COMMON LAW.

Upon what grounded, 56, 247.
In force, in Pennsylvania, 123, 247.
Nothing to be done at common law, where remedy given by statute, 124, 247.

COMMON SCOLD.

Common scold may be indicted, 247.
Punishment, 247.

COMPOUNDING CRIMINAL OFFENCES.

Compounding felony, definition of, 57, 248.

How punishable, 248.

What offences may be settled between the parties, 248.

CONCEALED WEAPONS.

Punishment for carrying concealed weapons in certain places, 249.

Persons carrying concealed weapons to be deemed guilty of an intention to riot, in certain cases, 249.

CONCERT SALOONS.

To be licensed, 754.

Females not to be attendants, 754.

CONSIDERATION. See *Bills of Exchange. Contract. Promissory Notes.***CONSPIRACY.**

Definition of, 57, 250.

Punishment of, 250.

Who are conspirators, 250.

Evidence in case of, 250.

Indictment, how framed, 250-1.

Docket entry in case of, 330.

What may be indicted as a conspiracy, 464.

CONSTABLE. See *Return.*

General duties of, 251-2.

How elected, 252.

When election to be held, 252.

Qualifications of, 252.

To notify persons elected, 253.

Penalty for refusing to serve, 253.

To be appointed by the court, 253.

Court to appoint in case of vacancy, 253.

Official bond, 253.

Limitation of action against sureties, 254.

Penalties, how recoverable, 254.

Appointment of deputies, 254.

When additional security may be required, 254.

Removal for misconduct, &c., 254.

Duties on execution, 108, 255.

May take forthcoming bonds, 255.

To indorse time of levy on execution, 256.

To give bill of particulars on demand, 256, 409.

Proceedings in case of false return, 256.

Process against constables to whom directed, 256-7.

Prothonotary to issue execution on transcript of judgment against, 257.

Proceedings on neglect to pay over surplus, 257.

Misdemeanor, to retain money, 257-8.

Proceedings against constables' sureties, 258.

Surety paying judgment to become the owner thereof, 258.

Not to purchase at their own sales, 258.

Penalty for so doing, 258.

Not to sell at auction, except on execution or distress, 258.

When to serve process from the courts, 259.

To give notice of township elections, 259.

Compensation therefor, 259.

To clear election polls, 259.

To report disturbances at elections, 260.

Penalty for neglecting so to do, 260.

Courts to examine them under oath, 260.

Penalty for neglect of election duties, 260.

To serve notice of township elections, 260.

Compensation for attending at elections, 260.

Actions against constables, 260-1.

Limitation, 261.

How process against constables to be served, 261.

To return retailers of liquors, 261.

Who to be returned, 262.

Compensation for returning retailers of liquors, 262

for making their returns, 262.

for attending the courts, 262.

To be appointed to attend the courts, 262.

CONSTABLE—Continued.

- When to collect school taxes, 262.
- Decisions relative to constables, 262-5.
- Their powers and authority, 262.
- Liability of, 264.
- Liability of their sureties, 265.
- Warrant for refusing to serve as constable, 265.
- Summons against, 266.
- Execution against, 266.
- Warrant against, for neglect of duty, 266.
- Supersedeas, 266.
- Discharge of prisoner, 267.
- Responsibility, in case of an escape, 367-8.
- Warrant for an escape, 368.
- Their fees, 405, 408.
- May receive fees, for service of process, in advance, 409.
- Notice of constable's sale, 118.
- Summons to be directed to constable, 90.
- Manner of service, 90.
- Constable may take bail on *capias*, 90, 775.
- To assign bail-bond, 90.
- When justices to issue process against constables, 109, 256.
- To serve certificates of penalties under the poor laws, 687
- Fees for so doing, 687.

CONSTITUTION.

- Of the United States, 15.
- Of Pennsylvania, 37.

CONTINUANCE.

- What necessary to entitle a party to continuance, 57.
- Bail on an adjournment, 96.

CONTRACT.

- Definition of, 267.
- Governed by the *lex loci*, 268.
- Contract made on Sunday, void, 267, 746.
- Construction of contracts, 268.
- Consideration, 269.

CONVERSION. See *Trover and Conversion*.**CONVICTION.** See *Summary Conviction*.**CONVICTS.**

- Landing of foreign convicts, punishable by indictment, 270.
- Actions against convicts, 270, 798.
- Civil remedy not to merge in felony, 270, 798.

CORONERS.

- Office and duties of, 271.
- To give bond and recognisance, 271.
- When to execute the office of sheriff, 271.
- When justice may hold inquest, 271.
- Of inquest *super visum corporis*, 271-3.
- His fees, 274.
- Precept for jury, 274.
- Oath of jurors, 275.
- Subpoena, 275.
- Oath of witness, 275.
- Inquisition of murder, 275.

CORPORATIONS.

- Definition of corporation, 275.
- Bail to be given by corporations on appeal, 99, 142, 278.
- Municipal corporations may appeal without bail, 99.
- Suits against corporations regulated, 276-7.
- Summons against, 278.
- Service of process on, 276-7.
- Execution against, how enforced, 277.
- Rules of reference, and notices, on whom served, 278.
- Actions by and against, 276.
- By-laws of, when valid, 275.
- Counties and townships to be corporations for certain purposes, 289.

CORPORATIONS—Continued.

Form of execution against corporations, 390.

Punishment of offences by officers and members of corporations, 278-80, 363.

COSTS.

On an appeal from a justice, 99, 102, 144.

When defendant exempted from costs on appeal, 99, 144.

After reversal on certiorari, 105, 240.

Costs to be indorsed on execution, and stated on docket, 109.

Costs of return may be indorsed on execution, 109.

How account of costs to be kept, 109.

When costs demandable, 280-1.

What costs are recoverable, 281-2.

When informers not liable to costs, 466.

Costs of witnesses, 282.

in actions against justices, 519.

in proceedings under the poor laws, 683.

in criminal cases, 282.

COUNTERFEITING.

Offences against the coin, 283.

Counterfeiting bank notes, 285-8.

public brands, 288.

trade marks, 288.

stamps, 730.

COUNTIES AND TOWNSHIPS.

Cities to form parts of counties, 289.

Counties and townships to be corporations for certain purposes, 289.

For what uses they may hold property, 289.

By whom corporate powers to be exercised, 289.

How suits to be brought, 289.

Executions, how enforced, 289.

Taxes cannot be apportioned, 290.

COVENANT.

Definition of, 291.

When void, 291.

When action of covenant lies, 291.

How construed, 291-2.

COVERTURE.

When pleadable in abatement, 76.

Occurring *after* suit brought, husband may become party, 76.

Married woman cannot make an attorney, 577.

May act as attorney, 577.

CRIMINAL PROCEDURE.

Process, 779.

Backing warrants, 780.

Disposition of stolen property, 780.

Surety of the peace, 781.

Bail, 782.

Settlement of criminal cases, 782.

Grand jurors may administer oaths, 782.

Form of indictments, 782, 785-6.

Amendment of indictments, 782-4.

Arraignment, 786.

Standing mute, 787.

Indorsement of prosecutor's name, 787.

Nolle prosequi, 787.

Pleas of former acquittal, or former conviction, 787.

Courts of criminal jurisdiction, 787.

Powers of the courts, 788.

Removal of indictment to supreme court, 789.

Proceedings on the trial, 789.

Challenges, 789-90.

Separate trials, 790.

Jurors, 791.

Trials for treason, 791.

Trial of accessories, 791-2.

Venue, 792.

Evidence, 793.

CRIMINAL PROCEDURE—Continued.

- Conviction for attempts, 794.
- Misdemeanor not to merge in felony, 794.
- Witnesses, 794, 795.
- Verdict not to be set aside for defect of jury process, 794
- Within what time prisoners to be tried, 795.
- Evidence of experts, 795.
- Error in criminal cases, 796.
- Costs, 796-7.
- Insane criminals, 798.
- Actions against convicts, 798.
- Outlawry, 799.
- Sentences, 801.
- Capital punishment, 801.
- Limitation of prosecutions, 802.
- Fines to be for the use of the counties, 802.

CRUELTY.

- Abandoning infants, 292.
- Maltreatment of infants and apprentices, 292.
- Cruelty to animals, 292-3.

CUSTOM AND USAGE.

- When binding, 57, 294.
- When the court will notice a custom, 294.

DAMAGES.

- Definition of, 57, 295.
- When a justice may give damages, 295.
- When recoverable, 295.

DEBT.

- Definition of, 57, 296.
- Different kinds of, 296.
- When action of debt lies, 296.
- Joint and several liability of debtors, 296.
- Right of appropriation, 297-8.
- Extinguishment and satisfaction of debts, 298.
- Of collateral securities, 298-9.
- Summons in debt, 744.

DEED.

- Definition of, 57, 304, 568.
- When and how to be recorded, 300, 304, 569.
- How acknowledged or proved, 300-2, 304-5.
- Forgery of acknowledgment punished, 300.
- Of subscribing witnesses, 304.
- Effect of interlineation, 306.
- When evidence, 306.
- When acknowledgment may be falsified, 305.
- Form of deed, 569.
- Ground-rent deed, 569.
- Form of acknowledgment, 302-3.
- Attestation of deed, 304.
- Receipt on a deed, 304.
- Grant of a right of way, 571.
- Covenant to keep the way in repair, 571.
- Release of dower, 571.
- Letter of attorney to acknowledge a deed, 579.
- Deeds by married women, how executed, 614.
- Of the nature and requisities of a deed, 719.
- What passes by a deed, 720.

DEFALCATION. See *Set-off*.**DEFAMATION.** See *Slander*.

- Definition of, 58.

DEFAULT.

- Definition of, 58.
- When justices to give judgment by default, 92.

DEPOSITION.

- Definition of, 58.

DEPOSITION—Continued.

- How taken, under rule of court, 376.
- Notice of taking depositions, 376.
- Form of caption, 377.
- How exhibits to be verified, 377.
- When depositions may be read, 378.
- Party or attorney not to be present, 378.
- How taken, in action before a justice, 97, 379.
- Justices may issue commissions to take depositions out of the state, 97.
- Powers of commissioners, 92.

DISORDERLY HOUSE.

- Punishment for maintaining, 648.

DISTRESS.

- Definition of, 58, 310.
- When allowed, 310.
- What may be distrained, 310–11.
- Goods exempted from distress, 311.
- When distress to be made, 311–12.
- When goods fraudulently removed distrainable, 311.
- Proceedings on a distress, 312–13.
- Proceedings to compel landlord to defalk, 313.
- Warrant to distrain, 314.
- Summons to landlord to defalcate, 314.
- Waiver of exemption law, 314.

DISTRICT ATTORNEYS.

- Misdemeanors by, how punished, 315.
- Proceedings against, 315.
- When to enter *nolle prosequi*, 315.

DIVORCE.

- Definition of, 58, 572.
- Different kinds of, 58, 572.
- When the courts may decree a divorce, 572.
- Of alimony, 572.
- Petitions for divorce, 572–4.

DOCKET.

- Definition of, 58.
- Of the books required by a justice, 316.
- How to be kept, 100, 316.
- What must be entered on the docket, 110, 316–17.
- Of a justice's docket, on his removal from office, 111–12.
- Proceedings to enforce delivery, 113.
- Proceedings in case of loss or destruction of docket, 114.
- When evidence, 318.

DOCKET ENTRY.

- In case of accessory to a felony, 83, 331.
 - of adultery, 133.
 - of an affray, 137.
 - of master and apprentice, 156.
 - of attachment, 179.
 - of attachment in execution, 189.
 - of recognisance, 199.
 - of civil suit, 317, 319.
 - of actions for goods sold, 319–20, 324, 326.
 - of trover and conversion, 320.
 - of trespass, 321.
 - of action for penalty, 322, 325, 763.
 - of landlord and tenant, 323, 325, 541, 545, 550.
 - of action for work and labor, 322, 323, 326.
 - of reference, 326.
 - of action on promissory note, 324, 328.
 - of action for horse hire, 327.
 - of action on an assignment, 327.
 - of nonsuit, 327.
 - of action against bail, 328.
 - of action for money paid, 328.
 - of rent, 329.
 - of rule to show cause, 329.

DOCKET ENTRY—Continued.

- In case of conspiracy and forgery, 330.
- of assault and battery, 330.
- of perjury, 331.
- of malicious mischief, 331.
- of riot, 331.
- of larceny, 332.
- of assaulting and threatening, 332.
- of action for firing woods, 420.

DOGS.

- Proceedings in reference to mad dogs, 333.
- Liabilities of owners of dogs, 333.
- When dogs the subject of larceny, 333.
- Order to destroy a dog, 334.

DOMESTIC ATTACHMENT. See *Attachment, Domestic***DOWER.**

- Definition of, 58, 571.
- Devise or bequest to widow is in lieu of dower, 571.
- Widow to elect, 571.
- Form of release of dower, 571.

DRUNKENNESS.

- Effect of, in criminal cases, 335-6.
- In case of contract, 336.
- Effect of insanity produced by, 336.
- Penalty for intoxication, 334.
- How enforced, 334.
- Limitation, 334.
- Form of conviction, 334.
- Execution to levy forfeiture, 335.
- Penalty for public drunkenness, 335.
- When it disqualifies a witness, 382.
- Penalty for furnishing liquors to drunkards, 467.
- Penalty for marrying a person whilst intoxicated, 611.

DUELLING.

- Disqualification incurred by duelling, 337.
- Punishment on conviction, 337.
 - of seconds, &c., 337.
 - of concealment, 337.
 - of inciting to a duel, 337.
- Any challenge to fight, a misdemeanor, 337.

EAVES-DROPPING.

- Definition of, 58, 338.
- Indictable at common law, 338.

ELECTIONS.

- Bribery at elections punished, 228.
- Election of constables, 252-4.
- Constables to give notice of township elections, 259.
- Election of justices of the peace, 502-5.
- Election of inspectors of the general election, 338.
- Provisions relating to the general elections, 342, 361.
- Registry of electors, 340.
- Mode of conducting elections, 344.
- Of the qualified electors, 346.
- Duties of peace officers, 348.
- Closing of the polls, 349.
- Meeting and duties of return judges, 350.
- Election of township officers, 352.
- Contested elections of county and township officers, 355.
- Wagers on elections, 356.
- Penalties for misconduct, 357.
- How places of election to be changed, 353.

EMBEZZLEMENT.

- By officers of municipal corporations punished, 362.
- By trustees, 363-4.
- By bankers, brokers, attorneys, merchants or agents, 363.

EMBEZZLEMENT—Continued.

- By officers of corporations, 363.
- By bank officers, 363-4.
- By employees of railroad companies, 364.

EMBRACERY.

- Punishment of, 365.
- What amounts to, 365.

ENGROSSING.

- Definition and punishment of, 366.

ESCAPE.

- Punishment for an, or for aiding or permitting, 366-7.
- Responsibility of sheriffs and constables, 367-8.
- Warrant for an escape, 368.

ESCROW.

- Definition of, 58.

EVIDENCE.

- Definition of evidence, 369.
- General rules of evidence, 369.
- Of written evidence, 370.
- When parol evidence admissible to affect a written contract, 372.
- Book entries, when evidence, 373.
- Of accounts, 376.
- Depositions, how taken, 376.
- Of handwriting, 379.
- Of hearsay evidence, 380.
- Of witnesses, 381.
- Evidence of experts, 382.
- When party may be a witness, 383.
- Competency of witnesses, 383-4.
- In case of adultery, 132.
- Of indenture of apprenticeship, 147.
- Of promise to pay the debt of another, 447.
- When entries in a family bible are evidence, 219, 371.
- Evidence in case of bigamy, 219.
- In action on a bill of exchange or note, 373.
- Evidence in case of conspiracy, 251.
- When deed may be read in evidence, 306, 371.
- Docket entry, how proved, 318, 371.
- What sufficient to convict of duelling, 337.
- On prosecution for fornication and bastardy, 431.
- When record of judgment evidence, 487.
- Evidence before justices, 93.
 - in action on judgment of justice of an adjoining state, 89.
- When identity of name evidence of personal identity, 89.
- Evidence in action for malicious prosecution, 608.
- Notarial certificates, when evidence, 677.
- Evidence in penal actions, 674.
- Evidence on prosecution for perjury, 675.
- When declaration of agent will be evidence, 690.
- Evidence in action for negligence, 646.
- Evidence in prosecution for seduction, 728.
- Of the evidence on a summary conviction, 739.
- How records of other states authenticated, 809.

EXACTION. See Extortion.

- Definition of, 58.

EXECUTION.

- In attachment in execution, 181, 182, 186.
- Form of execution against garnishee, 189.
- Bail for stay of execution, 105, 386.
- Of the execution after affirmance on certiorari, 105.
- Constable to indorse time to levy on, 255.
- Return to must be in writing, 386.
- Execution against a constable, 266.
- Duties of constable on execution, 108, 255, 385.
- Executions, how enforced against counties and townships, 289.
- In case of school districts, 289 n.
- Of the stay of execution, 105, 386.

EXECUTION—Continued.

- Execution in case of trespass, 390.
- How issued against plaintiff, 328 n.
- Execution to levy fine for intoxication, 325.
- Execution for debt, 385.
- Not to issue, after five years, without revival of judgment, 108.
- Of the service of an execution, 108, 385.
- Legal requirements of an execution, 385.
- When execution a lien, 387.
- What may be taken in execution, 386-7.
- Of the property exempt from execution, 388.
- Exempted property to be appraised, 388.
- Form of appraisement, 389.
- Bail for stay of execution, not entitled to stay, on judgment against him, 106.
- Execution against corporation, 390.
 - by executrix against administrators, 394.
 - by surviving administrators against executors, 394.
 - for damages for firing woods, 420.
- When fixtures liable to execution, 422.
- When justices to issue execution, 108.
- Constable may take forthcoming bond, 255.
- Goods pledged may be taken in execution, 673.

EXECUTORS AND ADMINISTRATORS.

- Executors *de son tort*, who, 59.
- Administrator sued as executor may plead in abatement, 77.
- Executors and administrators may appeal without bail, 140.
- When they may assign indenture of apprenticeship, 153.
- May sell at auction, 193.
- Set-off admitted, in actions by or against, 307.
- When set-off allowed, 307.
- Who shall be executors or administrators, 391.
- Their duties and liabilities, 391-3.
- Oath, 391.
- Bond of administrators, 391.
- Summons, administratrix against executors, 393.
 - surviving executor against administrators with the will annexed, 394.
- Execution, executrix against administrators, 394.
 - surviving administrators against executors, 394.
- Executor of special partner may continue the business, 669.
- Medicine and medical attendance to be first paid out of decedent's estate, 677.

EXTORTION.

- Definition of, 58, 395.
- Difference between *exaction* and *extortion*, 58.
- Punishment of extortion, 395.
- Extortion by persons working on roads punished, 395.
- Taking fees before service, when not to be deemed extortion, 395.

FACTORIES.

- What shall be deemed a day's labor in, 396-7.
- At what age minors may be employed, 396-7.
- Penalty for employing minors under age, 397.
- Penalty on parents and guardians for permitting minors to be so employed, 397.

FACTORS.

- Punishment for pledging goods consigned, or embezzling the proceeds, 398.
- Information, 398.
- Rights and responsibilities of factors, 398-9.

FALSE IMPRISONMENT.

- Definition of, 59.
- What is a false imprisonment, 399.
- Justices have no jurisdiction in actions for, 766.
- Limitation of actions for, 596.

FALSE PERSONATION.

- Punishment of, 399.

FALSE PRETENCES.

- Frauds at common law, 400.
- Provisions of the penal code, 400.
- What constitutes an intent to defraud, 403.
- What constitutes a false pretence, 400.
- What are valuable things within the act, 402.

FEES.

- In case of attachment, 179.
- of attachment in execution, 189.
- Attorneys not entitled to fees as witnesses, 192.
- Constable to give bill of particulars, 256.
- Table of fees in various cases, 319-332.
- Fees may be taken before services performed, in certain cases, 409.
- Penalty for taking illegal fees, 395.
- Bill of particulars to be given, 409.
- Sheriffs' and constables' poundage, 409.
- Tables of fees to be posted in offices, 409.
- Fees of justices of the peace and aldermen, 403, 406, 409.
- Fees of constables, 405, 408-9.
- Decisions relative to illegal fees, 409-10.
- In action for firing woods, 420.
- Notice of intended action against an alderman for taking illegal fees, 520.
- Justices have jurisdiction of actions for taking illegal fees, 491.
- Fees of prothonotaries, when and how recoverable, 703-4.

FELONY.

- Definition of, 59.
- Civil remedy not to merge in, 798.

FEMALE.

- Must give bail on appeal, 195.
- Not to be liable to arrest for debt, 411.

FEME SOLE TRADER.

- Who be deemed, 411.
- How sued, 411.
- When married woman may be so decreed, 411.
- Decisions relating to feme sole traders, 412.

FENCES.

- How fences to be constructed, 412.
- Division fences, 412.
- Penalty for malicious destruction of, 413, 604.
- Decisions relative to, 413-14.

FERRIES.

- Penalty for cutting ferry rope, 415.
- Owners to sink their ropes, 415.
- Information for cutting ferry rope, 415.
- Warrant, 415.
- Information against keeper of ferry, 415.
- Warrant, 415.
- Sailing boats to strike their masts, 416.
- Information against master for refusing to do so, 416.
- Warrant, 416.

FIRE.

- Penalty for setting off or selling fireworks, 418.
- for firing guns at certain times, 418.
- for firing woods, 418.
- Information for firing woods, 419.
- Warrant, 419.
- Warrant for damages, 419.
- Warrant for freeholders to estimate damages, 419.
- Return of freeholders, 420.
- Execution, 420.
- Docket entry, 420.

FIRES.

- Justices to inquire into origin of, 417.
- Inquest, 417.
- To bind over parties implicated, 417.
- Compensation, 417.
- Penalty for injuring fire alarm telegraph, 417.

FISH.

- Protection of fish ponds, 421.
- Preservation of trout, 421.
- Penalty for catching trout out of season, 446.
- How recoverable, 446.

FIXTURES.

- What are fixtures, 421-2.
- Incidents of fixtures, 421.
- When liable to execution, 421.
- Tenant must remove fixtures during his term, 422
- When they pass by a sale of the realty, 719.

FLOATING LUMBER.

- Lumbermen may register their marks, 423.
- Rights of owners, 423-4.
- Compensation for securing floating lumber, 424.
- Penalty for fraudulent use of marks, 424.
- Responsibilities of boom companies, 425.
- Effect of bill of sale, 425.

FORCIBLE ENTRY AND DETAINER.

- Definition of, 59, 426.
- How punishable, 426.
- Decisions relative to forcible entry and detainer, 427.

FORESTALLING.

- Definition and punishment of, 366.

FORGERY.

- Definition of, 60, 428.
- What amounts to forgery, 428.
- Warrant for forgery, 429.
- Punishment of forgery, 428.
- Consideration of forged instruments may be recovered back, 428.

FORNICATION AND BASTARDY.

- Who may be convicted of, 430.
- Mother may be a witness, 430.
- Where indictable, 430.
- Decisions relative to, 431.
- Punishment for concealing death of bastard, 430.
- Warrant for bastardy, 432.
- Commitment, 432.
- Warrant for concealing the death of a bastard child, 432.

FORTUNE TELLING.

- Punishment of, and of analogous offences, 433.
- Evidence in case of, 433.

FRAUD. See *False Pretences.*

- Definition of, 60.
- Of frauds at common law, 400.
- Statutory frauds, 434.
- Proceedings where fraudulent judgment is confessed before a justice, 87.
- Fraudulent conveyances void, as against creditors, 436.
- Punishment for fraudulently assigning or secreting goods, 435.
- for fraudulent destruction of written instruments, 434.
- for fraudulent insolvency, 434.

FREEHOLD.

- When pleadable in stay of execution, 105.
- Who are freeholders, 437.
- Practice on plea of freehold, 437.
- Privileges of freeholders, 437.

FUGITIVES FROM JUSTICE.

- Cannot be indicted in Pennsylvania, 60.
- To be delivered up, on demand of the executive, 438.
- Penalty for obstructing agent, 438.
- Decisions relative to fugitives, 438-9.

GAMBLING.

- Of gambling-houses, 440.
- Penalty for keeping, 440.
- To be deemed public nuisances, 649.
- Who to be deemed common gamblers, 440.
- Punishment for gambling, 440.
- Gambling apparatus may be seized, 440.
- Witness not liable to prosecution, 440.

GAMBLING—Continued.

- Gambling-houses may be broken open, 441.
- Gambling apparatus may be destroyed, 441.
- No replevin to issue, 441.
- Punishment for enticing to visit gambling-houses, 440.
- Penalty for cock-fighting and certain games, 441.
- Appropriation of penalties, 442.
- Penalty on tavern-keepers for promoting gambling, 442.
- Money lost at play not recoverable, 442.
- Gaming contracts void, 442.
- Wagers on elections to be void, 356.
- Penalty for betting on elections, 356.
- Duties of officers, 356.
- Billiard rooms and bowling saloons, 443.
- Decisions relative to gambling, 444.

GAME.

- Penalty for killing, out of season, 445-6.
- How recoverable, 446.

GARNISHEE.

- Definition of, 72.
- Summons against, in domestic attachment, 172.
- Proceedings against, in attachment in execution, 185.
- Who may be made garnishee, 183.
- Interrogatories, 188.
- Rule to answer, and notice, 188.
- Answers, 188.
- Execution against, 189.

*Liability of garnishee and
how to recover from
the P. S. J. in 172*

GROUND-RENT.

- Actions for, before justices, 291.
- Who may sue for, 291.
- Who liable for, 291.
- When to bear interest, 291.
- Form of ground-rent deed, 569.

GUARANTY.

- Definition of, 447.
- Construction of, 448.
- Rights of guarantors, 447-8.
- To be in writing, 447.

GUARDIANS.

- May appeal without security, 99.

HANDWRITING.

- Evidence of, 379.
- Comparison of hands, when evidence, 379.

HAWKERS AND PEDLARS.

- Who may be licensed, 449-50.
- Penalty for peddling without license, 450.
- Licenses, how granted, 449.
- Tin and clock pedlars, 451.

*(see 12 P. S. 8 Page 15-
Part 67 controlled by act 172
to see 20)*

HOMICIDE.

- Definition of, 60, 452.
- Different kinds of, 60, 452.
- Justifiable homicide, what, 60, 452.
- Excusable homicide, what, 60, 452.
- Felonious homicide, what, 61, 452.
- Felo de se, who is, 61.
- Manslaughter, definition of, 61, 63, 452.
- Voluntary manslaughter, 61, 452.
- Involuntary manslaughter, 61, 452.
- When the production of an abortion will be murder, 78.
- Punishment for concealing death of bastard, 430.
- Murder at common law, 452.
- Degrees of murder, 452-3.
- Punishment of murder in the first degree, 453.
- in the second degree, 453.
- of manslaughter, 453.
- of attempt to kill, 453.

*see P. S. J. 1724 rule
in 1724 rule 172*

HORSE-RACING.

- Penalty for horse-racing, 455.
- Horses may be seized, 455.
- Wagers to be void, 455.
- May be recovered back, 455.
- Penalty for printing advertisement of, 455.
- Persons guilty of fast driving liable criminally, 456, 645.

HORSE-STEALING.

- Sale of stolen horses not to change property, 458.
- Punishment for horse-stealing, 458, 553.
- Reward for apprehending and convicting offenders, 458.
- Person entitled to reward may be a witness, 458.
- Information for horse-stealing, 458.
- Warrant, 458.
- Commitment, 459.

HOUSE OF REFUGE.

- Who may be committed to, 459-61.
- Duties of justices, 459, 461.
- Revision of commitments, 459, 461.
- Form of commitment, 462.

HUSBAND AND WIFE. See *Accessory. Coverture. Marriage.*

- Incompetent as witnesses against each other, 383-4, 499.
- Exceptions to the rule, 384, 499.
- Property of married woman to be for her separate use, 614.
- How it may be conveyed, 614-15.
- Liability of husband, 614.
- Married woman may make will, 615.
- How suit to be brought for debt of married woman, 615.
- by a married woman, 616.
- Decisions relative to marriage, 616.
- When a wife is excused for criminal misconduct, 613.
- Proceedings for desertion, 683.

IMPRISONMENT. See *Arrest. False Imprisonment.*

- Definition of, 61.
- How and where sentence to imprisonment to be inflicted, 798.

INCEST.

- Definition of, 62.
- Punishment of, 463.
- Evidence in case of, 463.

INDICTMENT.

- Definition of, 62.
- Who is the subject of an indictment, 464.

INDORSEMENT. See *Bills of Exchange. Bonds. Promissory Notes.*

- When agent may make, 220.
- Form of qualified, 221.
- Rights of indorsers, 221, 700.
- Liabilities of indorsers, 697.
- What notes to be negotiable, 698.
- Consideration of forged, may be recovered back, 700.

INFANT.

- When of age to do certain acts, 53, 60, 464.
- When bound by their contracts, 464-5.
- Infancy, how pleaded, 465.
- When the subject of a criminal prosecution, 464.
- Cannot make an attorney, 577.
- May act as attorney, 577.
- Abandonment of, punished, 292.
- Maltreatment of, punished, 292.

INFORMATION.

- For arson, 160.
- assault and battery, 163.
- pledging goods by a factor, 398.
- cutting ferry rope, 415.
- refusing to sink ferry rope, 415.
- not striking mast of a sailing boat, 416.

INFORMATION—Continued.

For firing woods, 419.
 horse-stealing, 458.
 perjury, 676.

INFORMER.

Definition of, 62, 466.
 When not liable to costs, 466.
 When incompetent as witness, 466.
 May bring action in his own name, 466.

INNS AND TAVERNS.

Innkeepers not to harbor or trust apprentices, 467.
 Penalty for so doing, 467.
 Penalty on tavern-keepers for promoting gaming, 466.
 Good entertainment to be kept, 466.
 Debts for liquors not recoverable, 467.
 Penalty for selling liquor without license, 467, 468, 469.
 By what measure liquors to be sold, 467.
 Penalty for adulterating liquors, 130-1.
 Lien on horses, 469.
 Penalty for furnishing liquors to minors, lunatics or intemperate persons, 467, 468.
 Who may give notice not to furnish liquors to such persons, 467.
 Penalty for furnishing, after notice, 468.
 Civil responsibility for damages, 468.
 Compensations to informers, 468, 469.
 When licenses may be revoked, 468.
 Decisions relative to innkeepers, 470.
 Petition for a tavern license, 580.
 Licenses to be framed, 468.
 Intemperate persons not to be employed in, 468.
 Innkeepers may provide safes for security of valuable property, 469.
 May give certain notices, 469.
 In default, not to be liable, 470.
 Lien on baggage for boarding, 470.

INSOLVENTS.

Jurisdiction of the courts, how exercised, 472.
 Proceedings to obtain discharge from custody, 473.
 Petition, and proceedings thereon, 474.
 Oath of insolvent debtor, 474.
 Effect of discharge, 475.
 Of after-acquired property, 476.
 When relief given to persons sentenced by a criminal court, 476.
 Allowance to poor and insolvent debtors, 477.
 Petition to give bond, 478.
 Bond of insolvent, 478.
 Petition for discharge, 479.
 Notice to creditors, 480.
 Form of discharge, 480.

INSTALLMENTS.

When action lies for money payable by instalments, 481.

INTEREST.

Definition of interest, 481.
 Rates of interest in the different states, 481-2.
 Usurious interest not recoverable, 482.
 Judgments and verdicts to bear interest, 482.
 Tender suspends interest, 483.
 What claims bear interest, 482.
 Decisions relative to interest, 482.
 Of compound interest, 484.

INTERROGATORIES.

To garnishee in attachment, 188.
 How propounded to witnesses under commission, 377.
 When to be filed, on rule to take depositions, in a suit before a justice, 97.

JAIL.

Where sentence of imprisonment to be endured, 484.
 Effect of second conviction, 485.
 Authorities relative to, 485.

JUDGMENT.

- Judgments to bear interest, 482.
- When justices may open judgment, 487.
- When record of judgment conclusive evidence, 487.
- Decisions relative to judgments, 486-7.
- When justice may give judgment exceeding \$100, 87, 487.
- Judgment is valid until reversed, 486.
- Lien of judgment, 488.
- Judgment to be for the use of bail paying the same, 106.
- Of the judgment in a summary conviction, 740.

JURISDICTION.

- Definition of, 490.
- Want of, may be taken advantage of at any time, 492.
- Waiver will not give jurisdiction, 490.
- Civil jurisdiction of justices, 84-9, 490.
- Criminal jurisdiction, 507.
- Decisions relative to the jurisdiction of justices, 490.
- Jurisdiction of justices, under U. S. laws, 522.

JURY.

- Rights and duties of jurymen, 811.
- A week in a jury-box, 830.
- Jury trials, before justices, in certain counties, 115-16.

JUSTICES OF THE PEACE.**THEIR ELECTION, QUALIFICATION, &C.**

- Fees of justices, 403-9.
- How and when elected, 495, 502.
- Contested elections, 503.
- Number of, how increased, 504.
- Elections to supply vacancies, 505.
- Justices' commissions, 505, 516.
- Justices' bonds, 506.
- Removal and residence, 507, 520.
- Jurisdiction of aldermen, 507.

THEIR CIVIL JURISDICTION.

- Pleas in abatement before justices, 75.
- Appeals from the judgments of justices, 99, 140.
- To enter tender of judgment on the docket, 100, 144-5.
- Not to issue process against the body, 91, 158.
- Duties in domestic attachment, 169.
- Proceedings against absent and fraudulent debtors, 173.
- Jurisdiction in attachment in execution, 182.
- Cannot enter judgment on warrant of attorney, 89, 192.
- Duties on certiorari, 103, 237.
- To indorse costs on execution, 109, 256.
- Including return thereof, 109.
- To keep account of costs, 280, 318-32.
- When justices may give damages, 295.
- Of set-off before a justice, 95, 309.
- Manner of keeping the docket, 110, 316.
- Duties in taking depositions, 97, 376.
- Have jurisdiction at action on insolvent bond, 86, 491.
- When they may open judgments, 487.
- When they may enter judgment for more than \$100, 87, 487.
- Their civil jurisdiction, 84, 87, 494.
- Duties in relation to swine running at large, 750.
- Proceedings in a civil suit before a justice, 116.
 - contested civil case, 119.
- Jurisdiction in actions on contracts, 84, 114, 490.
- Party suing in court for less than \$100 to lose costs, 87.
- Jurisdiction to compel landlord to defalcate, 88.
- Actions for rent, 88.
- Actions for penalties, 88.
- Actions on foreign judgments, 89.
- Process and service, 89.
- Bail-piece, effect of, 90.
- Process in case of non-residents, 91.
- Amicable actions, 92.
- Judgments by default, 92.
- Proceedings on the trial, 93.

JUSTICES OF THE PEACE—Continued.

- When judgment to be final, 94.
- When cause may be referred, 94.
- How judgment to be given, 94.
- When parties may appeal, 95.
- Effect of special agreements in writing, 96.
- Bail on adjournment, 96.
- Depositions, how taken, 97.
- Proceedings before referees, 98.
- How vacancies to be filled, 98.
- How referees to be sworn, 98.
- Powers of referees, 98.
- Justices to issue subpoenas to appear before referees, 99.
- How certain penalties recoverable, 99.
- Right of appeal, 99.
- When rehearing to be granted, 99.
- Bail on appeal, 99.
- Costs on appeals, 100.
- How and when appeal to be perfected, 101. ✚
- Proceedings on neglect to file appeal, 101.
- Stay of execution, 105.
- Bail for stay of execution, 106.
- Transcripts to bind real estate, 106.
- To receive and pay over amount of judgments, 107.
- When execution to issue, 108.
- Proceedings against constable for false return, &c., 109.
- When judgment to be revived, 108.
- Liability of constable on execution, 109.
- Transcripts to other counties, 111.
- Satisfaction of judgments, 111.
- To give transcripts on demand, 110.
- Proceedings to supply lost docket, 114.
- Transfer of dockets, 111.
- On removal from office, 111.
- In case of temporary absence, 113.
- How to proceed on transcript, 112.
- Proceedings on attachment, 173.
- Attachment in execution, 179.
- Proceedings to attach stock, 179.
- Cannot issue execution on transcript of another acting justice of same county, 113.
- Jurisdiction under U. S. laws, in suits for debts, 522.
- In suits for penalties and forfeitures, 522.
- Process to recover seamen's wages, 523.
- Certificate of clerk of the district court, 523.
- Proceedings to recover possession of demised premises, 527, 542.
- Forms, 531-5, 538-41, 544-5, 549-50.
- Duties in relation to mill-dams, 642.
- To record fines for the use of the poor, 686.
- Duties under the poor laws, 686.
- Jurisdiction in trespass and trover, 765.
- Parties may refer, 765.
- With consent of both parties, 767.
- Proceedings where title to lands will come in question, 766.
- Duties in actions for cutting timber trees, 756.

See Page 546
(6 21 & 22 227)

THEIR CRIMINAL JURISDICTION.

- Duties in criminal cases, 495-7.
- To issue warrant in case of affray, 136.
- Duties in apprentice cases, 150.
- Power to settle criminal cases, 496, 509.
- To issue warrants to seize gambling apparatus, 440.
- Their authority as conservators of the peace, 493.
- Criminal jurisdiction, 495.
- May arrest on their own view, 497.
- May depute a private person to serve a criminal warrant, 497.
- When defendant to be committed for a further hearing, 498.
- May bind over persons found tippling on Sundays, 745.
- May commit vagrants and disorderly persons, 770.
- Proceedings in a criminal case before a justice, 501.
- Power to take recognisances, 507.
- When to make their returns, 508.
- Justices to back warrants, 508.

JUSTICES OF THE PEACE—Continued.

Not to be liable to action for so doing, 509.

Jurisdiction under U. S. laws, 522.

Justices' courts in certain counties, 510-14.

MISCELLANEOUS PROVISIONS RELATING TO.

How justices should give advice, 134.

Not to act as agent for either party, 141 n. 517

When a justice may be punished as a barrator, 217.

Of the books required by a justice, 226.

Manner of keeping docket, 100, 316.

When entitled to notice of action, 518.

When liable for taking illegal fees, 395, 409-10.

May indorse on execution, fees for return of the same, 109.

To take acknowledgment and proof of deeds, 300.

Liable for a false return to certiorari, 241, 585-6.

Duties of justice, on removal from office, 111-13.
in case of temporary absence, 113.

Proceedings against justice for neglect to pay over money, 521.

To act for coroner in certain cases, 509.

Proceedings to enforce delivery of docket, on removal from office, 113.

Power to administer oaths, 517.

Actions against justices regulated, 518.

Notice of intended action to be given, 518.

Justice may tender amends, 519.

Limitation of actions against justices, 520.

Form of notice of intended action for taking illegal fees, 520.

Jurisdiction under U. S. laws, 522.

Penalty for marrying a minor without the consent of parent, 610.

To give marriage certificate on demand, 611.

To pay over fines for the use of the poor, 686.

Penalty for neglect, 686.

LABORERS.

What to be deemed a day's work, 397.

LANDLORD AND TENANT. See Lease.

Relation of, 524.

Docket entry, in proceeding under act of 1830, 323, 545.
in action for rent, 329.

When landlord guilty of forcible entry, 427.

When landlord may be compelled to defalcate, 88, 313.

Jurisdiction of justices in actions for rent, 88.

Proceedings to recover possession of demised premises, 527, 536-7.

When proceedings may be had, 529.

When notice to quit must be given, 529.

What must be proved, 531, 540.

Proceedings where a third party claims title, 528.

Effect of appeal, 536-7, 540.

Proceedings in case of lost lease, 537.

Form of record, 540.

Proceedings to obtain possession for non-payment of rent, 542.

Defendant may appeal, 543.

Bail on appeal, 543.

Proceedings on fraudulent removal of goods, 547.

Proceedings where tenant removes without leaving goods to secure the rent, 548.

Landlord may distrain for rent, 310.

Warrant to distrain, 314.

One year's rent to be paid out of proceeds of execution, 550.

Sheriff's vendee to be deemed the landlord, 551.

Summons to landlord to defalcate, 314.

Docket entry, 325.

Tenant cannot dispute landlord's title, 534.

Effect of certiorari, 536, 540.

Form of notice to quit, 530, 539.
complaint to two justices, 531.

venire, 531.

sheriff's return, 532.

oath of jurors, 532.

inquisition, 532.

warrant to deliver possession, 533.

record of proceedings, 535.

LANDLORD AND TENANT—Continued.

- Form of summons to a third party claiming title, 534.
- notice to furnish date of leasing, 538.
- affidavit of tenant, 538.
- complaint under act of 1863, 539.
- summons, 539.
- docket entry, 540.
- writ of restitution, 541.
- notice to quit for non-payment of rent, 543.
- complaint, 544.
- summons, 544.
- writ of possession, 544.
- docket entry, 545.
- complaint, where tenant has removed without leaving goods to secure the rent, 549.
- form of precept in such cases, 549.
- writ of possession, 550.
- docket entry, 550.
- Limitation of action for rent, 596.
- Penalty for casting rubbish in privy well, by tenant, 607.

LAND MARKS.

- Penalty for removing land marks, 604.
- Warrant, 605.

LARCENY.

- Definition of larceny, 554.
- Docket entry in case of, 332.
- Punishment of larceny, 552.
- Decisions relative to, 554.
- When the finder of goods is guilty of larceny, 555.
- Conviction of notorious thieves, 514.

LAW TERMS.

- Vocabulary of, 53.
- Explanation of, 70.
- Translation of, 73.

LEASE.

- Definition of, 62, 524, 575.
- What passes by a lease, 524.
- Of the commencement of the lease, 525.
- When rent is payable, 525.
- Covenants in a lease, 525-6.
- Tenant must make repairs, 526.
- Common form of lease, 575.
- Lease by tenants in common, 575.
- Covenant to sell the inheritance, 576.
- Warrant to enter judgment in ejectment, 576.
- Waiver of acts exempting goods from distress, 314.
- Assignment of a lease, 577.

LETTER OF ATTORNEY.

- Definition of letter of attorney, 577.
- Minors and married women cannot make attorneys, 577.
- General form of letter of attorney, 577.
- Letter of substitution, 578.
- To receive money on a bond, 578.
- To receive dividends on stock, 578.
- To convey lands, 578.
- To acknowledge a deed, 579.
- To satisfy a mortgage, 579.
- To lease lands, 579.
- Revocation of a power of attorney, 579.

LEWDNESS.

- Punishment for publishing obscene libels, 591.
- open lewdness, 591.
- When indictable, 592.
- Punishment for advertising nostrums for secret diseases, &c., 592.
- Punishment for advertising nostrums for preventing conception, or procuring abortion, 592.

LIBEL.

- Definition of, 62, 593.
- Constitutional provision respecting libels, 593.
- Decisions respecting libels, 593.
- Warrant for publishing libel, 594.
- Limitation of actions for libel, 596.
- Punishment for publishing an obscene libel, 591.
- Punishment for libel, 593.

LIEN. See *Mechanics' Lien.*

- Definition of, 62, 594.
- Different kinds of, 62, 594.
- Attorney has no lien on money in hands of sheriff, 192.
- But he has a lien on papers in his hands, or money collected, 192.
- Lien of common carriers, 243.
- Lien of innkeeper, 469-70.
- Lien of judgment, 488.
- Lien of execution, 256.
- Who are entitled to a lien, 594.
- When property may be sold by persons having a lien, 595.

LIMITATION.

- Limitation of actions, 596.
- Of personal actions, 596.
- When the statute begins to run, 597.
- What will remove the bar of the statute, 599.
- Of actions against constables, 261.
- Of actions against justices, 520.
- Limitation of actions on penal statutes, 599.
- of criminal prosecutions, 600, 802.
- Sealed instruments not within the statute, 597.
- When sealed instruments presumed to be paid, 597, 725.

LIMITED PARTNERSHIP. See *Partnership.***LIQUORS.**

- Punishment for adulteration of, 130-1.
- Or for sale of unwholesome, 130.
- Adulteration of, to be a defence to action for sale, 131.

LOTTERIES.

- Penalties for selling lottery tickets, 601.
- To be deemed a public nuisance, 649.
- Purchaser a competent witness, 601.
- Form of indictment, 601.
- Judicial decisions relating to, 601.

LUMBER. See *Floating Lumber.***MALICE.**

- Definition of, 63.

MALICIOUS MISCHIEF.

- Docket entry in case of, 331.
- A misdemeanor at common law, 602.
- Statutory provisions for the punishment of, 602-4.
- Warrant for malicious mischief, 605.
- Punishment of malicious trespasses, 605-7.
- casting rubbish in privy wells, 607.
- mutilating show-bills, &c., 607.

MALICIOUS PROSECUTION.

- When the action will lie, 608.
- Malice and want of probable cause must be shown, 608.
- What is probable cause, 608.

MANSLAUGHTER. See *Homicide.***MARKETS.**

- Duties of clerk of the market, 609.
- When butter to be seizable, 609.
- Party grieved may appeal, 609.
- Provisions bought in a town not to be resold in market, 366.
- Penalty for exposing to sale unwholesome provisions, 130, 609.
- Power to regulate markets, 609.

MARRIAGE. See *Coverture. Husband and Wife.*

- How marriages to be celebrated, 610.
- Penalty for marrying servant without consent of master, 610.
- Penalty for marrying minor without consent of parent, 610.
- Penalty for marrying a person whilst intoxicated, 611.
- Transcript of record of marriage to be given, 611.
- Fees, 611.
- Penalty for refusal, 611.
- Effect of marriage contract, 611-13.
- Marriage ceremony, 613.
- Certificate of marriage, 613.

MAYHEM.

- Punishment of, 620.
- Punishment of attempt to commit, 620.
- Trials for, 620.
- Evidence, 620.

MEASURES. See *Weights and Measures.***MECHANICS' LIEN.**

- Lien of mechanics and material-men, 581, 621.
 - for alterations and repairs, 624.
 - on leaseholds and fixtures, 625.
- When claims may be apportioned, 570.
- Of the claim, 628.
- Proceedings on the claim, 630.
- Claims for extra compensation, 633.
- Forms of mechanics' claims, 581, 635-41.

MEETINGS.

- Penalty for disturbing religious, social or political meetings, 713.

MILK.

- Municipal corporations may provide for inspection of, 641.
- Penalty for adulteration of, in certain places, 641.

MILL-DAMS.

- Owner of boat suffering damages to be compensated, 642.
- Decisions relative to, 642.

MISDEMEANOR.

- Definition of, 63.
- What amounts to a misdemeanor, 602.
- Refusal to give transcript a misdemeanor in office, 110.

MISNOMER.

- Definition of, 63.
- When pleadable in abatement, 76.
- Party may amend, 76.

MITTIMUS. See *Commitment.***MONEY.**

- When bank notes treated as money, 215, 643.
- Effect of receipt of counterfeit note, 216, 643.
- What is money, 643.
- Rule as to foreign money, 643.

MORTGAGE.

- Definition of, 64, 581.
- Priority of, 581.
- When and how to be recorded, 581.
- Letter of attorney to satisfy a mortgage, 579.
- Form of mortgage, 581.
- Assignment of mortgage, 582.

MURDER. See *Homicide.***NAME.** See *Misnomer.*

- When identity of name evidence of personal identity, 644.
- Addition of junior no part of name, 644.
- Mistake of name will not avoid contract, 644.
- Names of parties may be amended, 644.
- How names of persons may be changed, 644.
- Illegitimates to take their mother's, 644.

NATURALIZATION.

Acts for the naturalization of aliens, 804.

NEGLIGENCE.

Action for negligence to survive, 645.

May be brought by widow or personal representatives, 645.

Evidence in actions for, 646.

Damages, 646.

Responsibility of corporations for acts of their servants, 645.

When justices have jurisdiction, 295, 491.

Punishment for gross negligence, whereby any one is injured, 645.

NOLLE PROSEQUI.

Power of district attorneys to enter, 315.

NON-JOINDER.

When pleadable in abatement, 76.

NON-RESIDENTS.

Service of process on, 91.

NONSUIT.

Definition of, 73.

Compulsory nonsuit of a justice is conclusive, 486.

Docket entry, in case of, 327.

NOTARY PUBLIC.

Official acts of notaries to be evidence, 647.

Decisions relative to notaries, 647.

NOTICE.

Of taking depositions, 376.

When justice entitled to notice of action, 410, 518.

To creditors of insolvent, 480.

Of constable's sale, 118.

What is a sufficient notice of intended action against a justice, 519.

How served, 519.

Form of notice of intended action for taking illegal fees, 520.

Notice to quit, at the expiration of term, 530.

to furnish date of tenancy, 538.

to quit, on failure to comply, 539.

when tenant is unable to comply, 539.

for non-payment of rent, 543.

of dissolution of partnership, 562.

where one partner leaves the firm, 562.

of limited partnership, 563.

Notice must be in writing, 648.

What amounts to notice, 648.

Notice to quit by purchaser at sheriff's sale, 706.

NUISANCE.

Definition of, 64, 649.

Different kinds, 64, 649.

Justices have no jurisdiction of actions for, 491.

What amounts to a nuisance, 649-50.

Penalty for the obstruction of a private road by railroad company, 649.

Punishment for maintaining a public nuisance, 648-9.

OATH. See Affidavit.

Definition of, 64, 651.

Oath in domestic attachment, 171.

Form of administering oath to witnesses, 651-2.

When affirmation may be taken, 651.

Oath of executors or administrators, 391.

Oath of insolvent debtor, 474.

Power of justices to administer oaths, 492.

Oath of jurors in landlord and tenant case, 532.

Oath of jurors in proceedings to obtain possession by purchaser at sheriff's sale, 707.

OFFICER.

When public officer liable for misfeasance, 643.

Responsibility of public officer, 653.

When acts of officers *de facto* valid, 653.

Punishment of various misdemeanors by public officers, 652-3.

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5 Nov 8 11nd*

ORIGINAL ENTRIES.

When evidence, 373, 654.

How book of original entries should be kept, 654-6.

PARDON.

Sentence endured, to have the effect of, 484.

PARENT AND CHILD.

Duties and rights of parents, 657.

Duties of children, 658.

When mothers to exercise parental rights, 657.

PARTNERSHIP.

When set-off allowed in actions by or against partners, 307-8.

Construction of guarantee to partners, 448.

An infant may be a partner, and effect thereof, 465.

Articles of copartnership, general form, 560.

Not to trust one whom the copartner shall forbid, 561.

Not to release any debt without consent, 561.

Not to be bound, or indorse bills, 561.

Neither party to assign his interest, 561.

Parties to draw quarterly, 561.

Principal clerk to be receiver, 561.

That majority of partners shall bind the whole, 561.

Agreement to continue partnership, 561.

Form of dissolution of partnership, 562.

Notice of dissolution, 562.

where one of the partners leaves the firm, 562.

What constitutes a partnership, 660.

Of the different kinds of partners, 661.

Of dormant partners, 661.

How far the acts of one partner bind the other, 661-3.

Of the dissolution of a partnership, 653-5.

Powers of the individual members, after dissolution, 664.

Actions between partners, 659, 665.

Actions by and against partners, 659, 665.

Not to plead misnomer or non-joinder, in abatement, unless their names be registered in the prothonotary's office, 660.

Limited partnership, 667-71.

Certificate of limited partnership, 562.

Notice of limited partnership, 563.

PARTY WALL.

When action will lie for value of party wall, 672.

Not a lien on the building, 672.

By whom suit must be brought, 672.

To pass by conveyance of the land, 672.

PAWNS OR PLEDGES.

Goods pledged may be taken in execution, 673.

Of actions for goods pawned, 673.

Decisions relative to pledges, 673.

PEDLARS. See *Hawkers and Pedlars.***PENALTY.**

Definition of, 65.

Docket entry in action for, 322, 325, 763.

Summons for penalty, 325, 744.

Penalty for taking illegal fees, 395.

When incurred, 396, 410.

Penalty for gaming, 441.

Justices to have jurisdiction of actions for penalties, 88.

Actions for penalties, how instituted, 88.

Limitation of actions on penal statutes, 599, 674.

Evidence in actions for penalties, 674.

How penalties recoverable, 674.

What the record must contain, 675.

Penalties under the poor laws, how recoverable, 686-7.

Penalty for destroying fences, 413-14.

for obstructing private road by railroad company, 649.

for passing small notes of other states, 214.

for marrying a minor without the consent of parent, 610.

for selling by false weights or measures, 776.

PENALTY—Continued.

Penalty for altering regulation of weights or measures, 776.
for selling by short weight or measure, 777.

PERJURY.

Definition of perjury, 675.
Definition of subornation of perjury, 675.
When prosecution for perjury may be instituted, 675.
Two witnesses required, 675.
Information for perjury, 676.
Warrant, 676.
Warrant for subornation of perjury, 676.
Punishment of perjury, 675.
Docket entry in case of, 331.

PHYSICIANS.

Can sue for fees in Pennsylvania, 677.
Medical attendance to be first paid by executors, 677.
Coroner may employ surgeon to make *post mortem* examination at the expense of the county, 677.
Qualifications of, in certain places, 677.

POISONS.

Regulations for sale of, 678.
Penalty for violation, 678.
Punishment for administering stupefying mixtures, with felonious intent, 678.

POOR.

Overseers may bind poor children apprentice, 154.
Duties of overseers of the poor, 678-86.
Duties of justices under the poor laws, 679-86.
How settlement may be gained, 680.
Housekeepers to give notice to overseers, 681.
Orders of removal, 681.
Appeals allowed, 682.
Costs, how recoverable, 683.
What relatives liable for support of poor persons, 683.
Proceedings where husband deserts his wife, 683-5.
Who shall be deemed vagrants, 770.
Penalties for the use of the poor, how recoverable, 686-7.
Penalties to be paid to overseers by justices and sheriffs, 686-7.
Penalty for neglect of duty by overseers, 686.
Gifts and devises to the poor validated, 686.
Actions against overseers regulated, 686.
Forms of orders, 688.
Summons for delinquent overseers, 688.
Conviction, 688.
Disposition of bodies of paupers, in certain places, 687.

PRESUMPTION.

When sealed instruments presumed to be paid, 725.

PRINCIPAL AND AGENT.

When the relation takes place, 689.
Responsibilities of agents, 689.
When acts of agent will bind the principal, 689.
When declarations of agent evidence, 690.

PRIVILEGE.

Of witnesses, 690.
Of suitors, 690.
Of freeholders, 691.
Of foreign ministers and consuls, 691.
Of other persons, 692.

PRIZE FIGHTING.

Punishment of, 715.
How prevented, 715.

PROCESS. See Summons.

Definition of, 65, 692.
To recover seamen's wages, 523.
Decisions relative to process, 692-3.
Punishment for neglecting to execute, 692.
for obstructing the execution of, 692.

*cell entries contain Pa-
Book 1 Blackstone
Page 122*

PROFANENESS.

- Blasphemy, how punished, 694.
- Profane cursing or swearing, 694.
- Mode of conviction, 694.
- Application of penalties, 695.
- Decisions relative to, 695.

PROMISSORY NOTE. See Bills of Exchange, &c.

- Definition of, 65, 696.
- Received as collateral security, may be sued, without resorting to the original debtor, 299.
- Effect of receipt of note for a precedent debt, 299.
- Docket entry in action on, 324, 328.
- Evidence in action on note, 373.
- When justices have jurisdiction of actions on notes given for land, 86, 491.
- Bond to indemnify against indorsement, 566.
- Form of due-bill, 587.
- Forms of promissory notes, 587.
- Judgment note, 587.
 - with waiver of exemption, 587.
- Action on note, how brought, 587.
- Limitation of action on, 596.
- Liability of the maker, 696.
 - of the indorser, 697.
- When certain notes shall be deemed payable, 701.
- When want of notice may be pleaded, 700.
- Of the negotiability of a note, 698.
- Of the consideration of a note, 698.
- When consideration given for a forged note may be recovered back, 700.
- Of protest and notice, 700.
- Of actions on promissory notes, 702.
- Of notes payable in specific articles, 701.

PROTHONOTARY.

- Authority and duties of prothonotaries, 703.
- When they can recover costs, 703.
- Partnerships to be registered in prothonotary's office, 660.

PURCHASERS AT SHERIFFS' SALES.

- Proceedings to obtain possession, 704-9.
- Rights of purchaser as landlord, 551.
- Notice, 706.
- Petition, 706.
- Precept, 707.
- Return of sheriff, 707.
- Oath of jurors, 707.
- Inquisition, 707.
- Record, 708.
- Writ of possession, 708.

RAPE.

- Punishment of rape, 709.
- Evidence, 709.
- Punishment of attempt to commit, 709.
- Decisions relative to, 709.
- Warrant for rape, 710.

RECEIPT.

- Definition of, 66, 711.
- Not conclusive evidence, 711.
- Receipt on a deed, 304.
- Forms of receipts, 588.
- Decisions relative to receipts, 711.

RECEIVING STOLEN GOODS.

- Punishment of, 553-4.
- Punishment of receivers of property fraudulently disposed of, 363.
- Evidence on indictment for, 556.

RECOGNISANCE.

- Definition of, 66, 197.
- In criminal cases, 83, 133, 137, 198-9.
- On appeal from a justice, 142.
- In apprentice cases, 150, 156-7.

RECOGNISANCE—Continued.

- To levy attachment against stock, 187.
- When justices may take recognisances in criminal cases, 196.
- What a recognisance must contain, 197.
- Recognisance to appear at court, 198-9.
 - to keep the peace, and be of good behavior, 198-9.
 - to give evidence, 198-9.
- Form of, to be sent to court, 199.
- Docket entry of recognisance, 199.
- Recognisance on appeal by corporation, 278.
 - for stay of execution, 320, 321.
- When to be returned, 508.

RECORD.

- Definition of, 66.
- What is a debt of record, 296.
- How proved in evidence, 370.
- Proceedings to supply lost record, 114.
- Record in landlord and tenant case, 535.
- What the record must contain in a penal action, 674.
- Record in proceedings to obtain possession by purchaser at sheriff's sale, 708.
- Record of summary conviction, 741.
- Punishment of falsifying a record, 712.
- How records of other states authenticated, 809.

REFEREES. See Arbitration.**REGRATING.**

- Definition and punishment of, 366.

REPLEVIN

- Definition of, 66, 73.
- Justices have no jurisdiction in, 766.
- Limitation of action of replevin, 596.

RETURN.

- Of constable, to criminal warrant, 82.
- Rescue, 82.
- To attachment in execution, 187.
- To certiorari, 238.
- What is a sufficient return to a summons, 90, 241.
- To summons, 319-29.
- To execution, 386, 390.
- Must be in writing, 256, 386.
- Of freeholders, to warrant to assess damages for firing woods, 420.
- Sheriff's return to venire in landlord and tenant case, 532.
- Sheriff's return to venire in proceedings to obtain possession by purchaser at sheriff's sale, 707.
- When justices to make their returns, 508.

REVIVAL.

- Of judgment, when necessary before a justice, 108.

REVOCATION.

- Of a power of attorney, 579.

RIOT.

- Definition of, 66, 712.
- Docket entry in case of, 331.
- Punishment of rioters, 712-13.
- Authority and duty of public officers in case of riot, 713.
- Decisions relative to, 714.
- Warrant to arrest rioters, 715.
- How suppressed, 715.

ROADS.

- Extortion by persons working on roads punished, 395.
- Roads, how laid out and opened, 582-3.
- Petition for a public road, 583.
- Order of court thereon, 584.
- Return of the jury, 584.
- Petition for damages, 584.
- Order of court, 584.
- Petition for a private road, 585.

ROADS—Continued.

- Petition for gates on a private road, 585.
- Petition to vacate road, 585.
- Report of viewers, 585.
- Order of court, 585.
- Petition to annul proceedings, 585.
- Report of viewers, 585.
- Petition to vacate a state road, 586.
- Petition for a review, 586.
- Petition for a road on a county line, 586.
- Report thereon, 586.
- Petition for a county bridge, 586.
- Report thereon, 586.
- Petition for a bridge on a county line, 586.
- Law of the road, 716.

ROBBERY.

- Definition of, 67.
- Punishment of robbers, 717.
- Decisions relative to robbery, 718.
- Examination of a person robbed, 718.
- Warrant for robbery, 719.
- Confession of a robber, 719.
- Commitment, 719.

ROUT. See Riot.

- Definition of, 67, 712.
- Punishment of, 712.

RULE.

- Definition of rule of court, 67.
- To answer interrogatories in attachment, 188.

SALE.

- Definition of, 67.
- Possession must accompany sale of chattels, 565, 721.
- Bill of sale, 565.
- Of the sale of real estate, 719.
- Of the change of property and delivery of chattels, 565, 720.
- Of warranty and fraud in the sale of chattels, 722.

SAMPLE.

- Penalty for sale of goods by sample, by agents of non-residents, 137-8.
- Agents to be licensed, 137-8.

SATISFACTION.

- Definition of, 67.
- Penalty for neglect to enter satisfaction, 111.

SCIRE FACIAS.

- Definition of, 73, 724.
- Appeal lies from judgment on scire facias, 724.
- Scire facias unnecessary on certificate for defendant, 307.
- Of scire facias to revive judgment, 488.
- When necessary to revive justice's judgment, 724.
- Form of, 724.

SEAL.

- What is a sufficient seal, 725.
- How proved, 725.
- When sealed instrument presumed to be paid, 725.
- Aldermanic seals, 725.

SEARCH-WARRANT.

- When and how it may be issued, 726.
- Proceedings on a search-warrant, 726.
- Decisions relative to search-warrants, 727.
- Form of search-warrant, 727.

SEDUCTION.

- Punishment for seduction, 728.
- Decisions relative to seduction, 728.

SERVANT.

- When master bound by the contract of his servant, 57.
- Penalty for marrying, without consent of master, 610.
- Different kinds of servants, 618.
- Of the relation of master and servant, 618.
- When master responsible for the acts of his servant, 618-19.

SET-OFF.

- Definition of, 67.
- When mutual demands may be set off, 307.
- Defendant may have execution on a certificate in his favor, 307.
- Between what parties allowed, 307.
- Subject-matter of set-off, 308.
- Set-off before a justice, 95, 308.
- When landlord may be compelled to defalcate, 88, 313.
- Summons to landlord to defalcate, 314.

SHIPS.

- Responsibilities of owners, 729.
- Who have a lien, 729.
- Landing foreign convicts indictable, 729.

SLANDER.

- Definition of, 67.
- Justices have no jurisdiction in, 766.
- Limitation of action for, 596.

SODOMY.

- Punishment of, 729.

SPECIAL BAIL. See Bail.**STAMPS.**

- Payment of stamp duties, 730.
- What instruments to be stamped, 730-7.
- What instruments to be exempt, 730-3.
- Penalty for counterfeiting, 730.
- Cancelling of, 731.
- Penalty for issuing unstamped instruments, 732.
- Schedule of stamp duties, 734.

STATUTES.

- Statutes in force before the revolution revived, 123.
- Where remedy is given by statute, nothing to be done agreeably to the common law, 24.
- Construction of statutes, 124.
- Repeal of statutes, 126-8.
- British statutes in force in Pennsylvania, 123.
- Decisions relative to English statutes, 123.
- Constitutionality of statutes, 129.

STAY OF EXECUTION.

- Time of stay, 105.
- When bail may be entered for stay, 106.
- From what time to be computed, 106.
- Bail for stay of execution, 106.
- Effect of special agreement to waive stay of execution, 96.

STOPPAGE IN TRANSITU.

- When it may be exercised, 68.

SUBPOENA.

- Definition of, 68.
- How issued and served, 743.

SUBSTITUTION.

- Letter of substitution, 578.

SUMMARY CONVICTION.

- Definition of, 68, 738.
- Conviction for intoxication, 334.
- profaneness, 694.
- of delinquent overseer of the poor, 688.
- When statutory form must be pursued, 740.
- Decisions relative to summary convictions, 740.

SUMMARY CONVICTION—Continued.

- Requisites of a summary conviction, 738.
- Of the information, 738.
- What it must contain, 738.
- Of the summons, 739.
- Of the appearance or non-appearance of the defendant, 739.
- Of the defence or confession, 739.
- Of the evidence, 739.
- Of the judgment, 740.
- Form of conviction, 741.
- Conviction of professional thieves, &c., in certain counties, 514-16.

SUMMONS.

- Against garnishee in domestic attachment, 172.
- What is a sufficient return to a summons, 90, 241, 743.
- Against constable, 266.
- Against corporation, 278.
- How served on corporation, 276.
- For a penalty, 325, 744.
- Administratrix against executors, 393.
- Surviving executor against administrators with the will annexed, 394.
- How summons to be issued and served, 89, 742.
- Summons to landlord to defalcate, 314.
- to third party claiming title, in landlord and tenant case, 534.
- in landlord and tenant case, for non-payment of rent, 544.
- for delinquent overseer of the poor, 688.
- Of the summons in case of summary conviction, 739.
- Of issuing a summons, 742.
- Of filling up the summons, 742.
- Of the service of a summons, 75, 742.
- Summons in debt, 744.
- in trover and conversion, 744.
- in trespass for damages, 744.

SUNDAY.

- Persons found tippling on Sunday may be bound for their good behavior, 745.
- Penalty for selling liquor on Sunday, 745.
- Note given on Sunday is void, 746.
- When arrest may be made upon Sunday, 745.
- Worldly employment prohibited, 745.
- Decisions relative to Sunday, 746.
- Of contracts made on Sunday, 746.
- Breach of the Sabbath, 747.

SUPERSEDEAS.

- Definition of, 68.
- When certiorari is a supersedeas, 241.
- Form of supersedeas to constable, 266.

SURETY OF THE PEACE.

- Definition of, 68, 748.
- Docket entry in case of, 332.
- Must be returned to court, 749.
- When demandable, 748-9.
- Warrant for threats, 749.
- Commitment, 749.

SURRENDER.

- Bail in criminal cases may surrender, 196, 782.
- Effect of, in such cases, 196, 782.

SWINE.

- Duties of justices in relation to swine running at large, 750.
- Swine going at large to be yoked, 750.
- Proceedings where swine are found at large, 750.
- How advertised, 750.
- Proceedings where no owner appears, 750.
- Information, 751.
- Appointment of appraisers, 751.
- Return of appraisers, 751.
- Form of publication, 751.

TAXES.

- On real estate cannot be apportioned, 290.

TELEGRAPHS.

- Punishment for unlawfully revealing dispatches, 752.
- for sending forged dispatches, 752.
- Judicial decisions and authorities, 752.

TENDER.

- Definition of, 68, 753.
- When pleaded, money must be paid into court, 753.
- After suit brought, 753.
- Suspends interest, 753.
- Must be unqualified, 753.

THEATRES.

- To leave passage ways unobstructed, 755.
- Means of ingress and egress, 755.
- Penalties for violation, 755.

THREATENING LETTERS.

- Punishment for sending, 755.

TIMBER.

- Duties of justices in actions for cutting timber trees, 756-7.
- Proceedings where title to lands will come in question, 756-7.
- Punishment for wilfully cutting timber on the lands of another, 756.

TIME.

- How computed, 758.

TOWNSHIPS. See *Counties and Townships.***TRADE MARKS.**

- Penalty for counterfeiting trade marks, 759.
- for selling goods so marked, 759.
- Trade marks of venders of mineral waters protected, 759-61.
- Penalties how recoverable, 760.
- Jurisdiction of justices to grant process of search, 760-1.
- Action, when maintainable, for using plaintiff's trade marks, 761.
- When restrained by injunction, 761-2.

TRANSCRIPT.

- Definition of, 69, 762.
- How filed, to bind real estate, 106.
- When prothonotary may issue execution, 107.
- Justice to give transcript on demand, 110.
- Refusal to be a misdemeanor in office, 110-11.
- What is a sufficient transcript, 762.
- Effect of, when filed in the common pleas, 762-3.
- Form of transcript, 763.

TREASON.

- Punishment of high treason, 764.
- of misprision of treason, 764.
- What acts amount to treason, 765.
- To be proved by two witnesses, 765.
- Trials for, 791.

TRESPASS.

- Definition of, 69.
- Docket entry in case of, 321.
- Execution on judgment in trespass, 321, 390.
- Jurisdiction of justices in, 765.
- Limitation of action of trespass, 596.
- Summons in trespass for damages, 744.
- Proceedings before justices in cases of trespass, 765.
- Parties may appeal, 766.
- When trespass is maintainable, 767.
- Decisions relative to trespass, 767.

TRIAL.

- Of civil causes before a justice, 93.

TROVER AND CONVERSION.

- Definition of, 69.
- What is a conversion, 57, 767.
- When it lies, 69.

TROVER AND CONVERSION—Continued.

- Docket entry, in case of, 320.
- Jurisdiction of justices in, 765.
- Limitation of action of trover, 596.
- Summons in trover and conversion, 744.
- Of damages in trover, 766.
- Decisions relative to trover and conversion, 768-9.

*Recoupment-768***UNLAWFUL ASSEMBLY. See Riot.**

- Definition of, 67, 69, 712.
- Punishment of, 712.

UNWHOLESOME PROVISIONS.

- Punishment for sale or exposing for sale of, 130.

USAGE. See Custom.**VAGRANTS.**

- Punishment of vagrants and disorderly persons, 770.
- Who shall be deemed vagrants, 770-1.
- Decisions relative to vagrants, 771-3.

VERDICT.

- Definition of, 69.
- Different kinds, 69.

VOCABULARY OF LAW TERMS, 53.**WAGER.**

- No action can be maintained on a wager, 773.
- On horse-races void, 774.
- Wagers on elections, 774.

WAGES.

- When to have preference in assignment, 166.

WARRANT.

- Definition of backing warrants, 55.
- Warrant for misprision of felony, 82.
 - for accessory before the fact, 82.
 - for adultery, 132.
 - for an affray, 136.
 - in apprentice case, against the master, 155.
 - against the apprentice, 156.
 - for arson, 161.
 - for assault and battery, 163.
 - for selling bread otherwise than by weight, 227.
 - for burglary, 236.
 - for refusing to serve as constable, 265.
 - against constable for neglect of duty, 266.
 - for an escape, 368.
 - for cutting a ferry rope, 415.
 - against the keeper of a ferry, 415.
 - against the master of a sail-boat, 416.
 - for firing woods, 419.
 - for damages for so doing, 420.
 - to freeholders to assess damages, 420.
 - for forgery, 428.
 - for bastardy, 432.
 - for concealing the death of a bastard child, 432.
 - for horse-stealing, 458.

When criminal warrant should issue, 497.

Requisites of criminal warrant, 497.

Justices to back warrants, in certain cases, 508.

Warrant to distrain for rent, 314.

- to deliver possession in landlord and tenant case, 533, 541.
- for removing landmarks, 605.
- for publishing a libel, 594.
- for malicious mischief, 605.
- for perjury, 676.
- for subornation of perjury, 676.
- for rape, 710.
- for riot, 715.
- for robbery, 719.

WARRANT—Continued.

- Search-warrant, 727.
- Warrant for threats, 749.
for debt, 775.
- When warrant may issue in civil cases, 775.
- Of the service of a civil warrant, 775.
- Bail on civil warrant, 775.
- Proceedings on civil warrant, 775-6.

WEAPONS. See Concealed Weapons.**WEIGHTS AND MEASURES.**

- Penalty for selling by false beams, scales, weights or measures, 776.
altering regulations of weights or measures, 776.
selling by short weight or measure, 777.
- Proceedings on certiorari, 777.
- Penalties how appropriated, 777.

WILL.

- Definition of, 70, 588.
- Who may make a will, 588.
- Different kinds of wills, 589.
- Requisites of wills, 589.
- Forms of wills, 589-91.
- Married woman may make a will, 614.

WITNESS.

- Definition of, 70.
- When competent, 56.
- When attachment may issue against witness, 190, 381.
- Witness refusing to testify may be committed, 190.
- Attorneys not entitled to fees as witnesses, 192.
- Attendance, how compelled, 381.
- Privileges of witnesses, 382. *... may be held in some cases 776*
- Of their examination, 382.
- Evidence of experts, 382.
- How witnesses to be sworn, 382.
- Costs of witnesses, 282.
- Mother of bastard may be a witness against putative father, 430.
- Witness against gamblers not to be liable to prosecution, 440.
- Purchaser of a lottery ticket may be a witness, 601.
- Persons entitled to reward may be a witness against horse-thief, 458.
- Deposition of absent witness, how taken, 97, 376.
- Two witnesses requisite to convict of perjury, 675.
- Punishment of absconding witnesses, 777. *see 776*

*The witnesses entitled to fees for attendance
given if not subpoenaed and sworn*

P. L. 2 July 8 1874

THE END.

for the Indian Justice comes where little or land
comes in question is forcible entry & detainers
and in partition fences

P Penalty to be collected as other
debts no arrest to be made
note C. 51

Summons against non residents -
must be short summons
Page 92 note 6

Summons served on agents of
non residents -
92

Set-offs must be made and
a copy sent to court
Prop action in
note

95-4 m. h.
+ 115-
claim against
95-4 m. h.
+ 115-
Digitized by Google

Professional High Maryland.

Rail Road construction to 515

515

515

517

Amherst

517

651

Depot construction 7 + 740



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